



[2018] UKFTT 172 (PC)

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

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF 2016/0761;2016/0250

BETWEEN:

**PAUL WILLIAM HUGH CARSON
EIRENE JANE CARSON**

Applicants

and

**PAOLO GIUSEPPE OLIVIER
ROSSANA PUGGIONI OLIVIER**

Respondents

**Property Address: Land adjoining 15 Beechwood Avenue, Bottisham, Cambridge and 1
Cedar Avenue, Bottisham, Cambridge**

Title numbers: CB1505528, CB2020635 and CB411727

ORDER

The Chief Land Registrar is ordered:

1. To give effect to the application by the Applicants dated 6 April 2016
2. To cancel the application by the Applicants dated 28 October 2016

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 21st day of February 2018





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Respondents

**Property Address: Land adjoining 15 Beechwood Avenue, Bottisham, Cambridge
CB25 9BE**

Title numbers: CB1505528 and CB202635

**Before: Judge McAllister
Bury St Edmunds Tribunal Centre
28th and 29th November 2017 and 1st December 2017**

**Representation: Mr Andrew Gore of Counsel instructed by Barr Ellison Solicitors
appeared for the Applicants; Mr Michael Jefferis of Counsel instructed by Woodfines
Solicitors appeared for the Respondents.**

DECISION

Introduction

1. The Applicants, Mr and Mrs Carson, and the Respondents, Mr Olivier and Mrs Puggioni, are neighbours. Mr and Mrs Carson are the registered owners of 15 Beechwood Avenue, Bottisham ('No 15') registered with title number CB150528. They purchased their property on 18 September 1992. Mr Olivier and Mrs Puggioni (whom I shall refer to as Mr and Mrs Olivier simply for ease of reference) are the registered owners of 1 Cedar Walk, Bottisham ('No 1') registered with title number CB202635. They purchased their property on 31 July 2007.
2. The issues between them relate first to the ownership of a small triangle ('the Triangle') lying between the properties at the northern end of the garden of No 15 and adjacent to the garage of No 1, and second as to the of the boundary between the properties south of the garage.
3. Attached to this judgment are three plans. Plan 1 shows the Triangle as drawn by Land Registry between points A and B. Plan 2 is the plan prepared by Martin Rickman BSc for Mr and Mrs Carson. The line D-E-F is the line contended for by Mr and Mrs Carson as the boundary between their property and No 1. Plan 3 is a plan prepared for Mr and Mrs Olivier by their architect in 2009 and shows the boundary claimed by them running from A to H. Applying that boundary to Plan 2, the line contended for by Mr and Mrs Olivier runs from B southwards to what is marked as 'concrete post'. The southern boundary of the garden of No 1 is in line with the marking 'Tree T14'. South of that boundary is the garden of 15 Cedar Walk. Point F on Plan 2, therefore, marks the intersection between No 15, 11 Beechwood Avenue and 15 Cedar Walk. There is no dispute between these neighbours as to point F.
4. No 15 lies to the west of No 1. Cedar Walk runs east to west and intersects with Beechwood Avenue to the west. Beechwood Avenue runs north to south. The common boundary, and the Triangle, is to the west of No 1 and runs north to south. The garden of No 1 is, very approximately, half the length of the garden of No 15. The length of the Triangle is a little under 6 metres.

5. There have been three applications to Land Registry by Mr and Mrs Carson. The first application, dated 6 April 2016, is an application for title by adverse possession of the Triangle. This application was made under the transitional provisions set out in paragraph 18 of Schedule 12 to the Land Registration Act 2002 ('the Act'). The application was supported by a statement of truth which stated that the Triangle forms part of the garden of No 1 and is enclosed on two sides by walls and cannot be accessed from No 15. Mr and Mrs Olivier disputed both these claims.
6. The second application, dated 28 October 2016, is an application to alter the register to remove the Triangle from the title plan of No 1. Title plans only show general boundaries. The application was to show a more accurate general boundary by including the Triangle within the title to No15. The basis of this application is that the Triangle has always formed part of the land conveyed with No 15. Mr and Mrs Oliver again objected to this application. Matters were made more complicated by the Land Registry mistakenly altering the title plan to No 1 by showing the Triangle as part of No 15. The mistake has been recognised by Land Registry.
7. The first application was referred to the Tribunal on 13 September 2016, and the second was referred on 28 February 2017. The Tribunal ordered that both applications should be heard together.
8. A third application was made by Mr and Mrs Carson on 19 October 2017. A copy of this was received by the Tribunal a few days before the hearing. The application is for a more accurate general boundary in respect of the remainder of the boundary between the properties, marked as points D-E- F on Plan 2.
9. Although the application was made very late in the day and not referred to the Tribunal by Land Registry in time for the hearing, the parties agreed that it would be in their interest to deal with both the Triangle and the remainder of the boundary at the same time, and the case proceeded on this basis. Both parties were able to deal with their respective cases. Mr Jefferis at the conclusion of the hearing submitted that the application was misguided. It should have been an application for a determined boundary and, given the small scale, and the principles applicable to general boundaries, the application should be rejected. I did

not however understand him to submit that I should not make findings of fact as to various points in dispute between the parties.

10. Following the hearing, the Tribunal received a letter from Land Registry stating that the third application had been cancelled on the grounds that, in so far as it was not a repetition of the prior applications, there did not appear to be a mistake. A letter was written to the solicitors acting for Mr and Mrs Carson dated 21 November 2017 which stated that the Land Registry was not satisfied that a mistake had been made in the preparation of the title plans and that any change to the boundary would not result in a change to the title plans, not being noticeable on the latest ordnance survey detail. I only received a copy of this letter very recently.
11. There is therefore no application before me regarding the remainder of the boundary and accordingly I cannot make any order in respect of this. In any event I agree with both Land Registry and Mr Jefferis that, given the tolerances involved in general boundaries, there would be no point, on the facts of this case, in ordering the Chief Land Registrar to replace one general boundary between points D and F (or, more accurately, D to the point marked T14 on Plan 2) with another general boundary, even if I were satisfied that it would be appropriate to do so. This does not prevent me making factual findings as to the position of the boundary.
12. I had the benefit of a site view the day before the hearing.
13. The issues which arise are the following:
 - a) Was the Triangle conveyed to the original purchasers of No 15 (Mr and Mrs Pollintine) or the original purchasers of No 1 (Mr and Mrs Gaydon)?
 - b) If the Triangle forms part of the paper title of No 1, have Mr and Mrs Carson and/or their predecessors in title acquired title thereto by adverse possession?
 - c) On the facts of the case, where is the boundary between points D and F?
14. For the reasons which appear below, my findings are as follows:
 - (i) the Triangle formed part of the paper title of No 1
 - (ii) title to the Triangle was extinguished by adverse possession by 1975 and has remained part of No 15 ever since

- (iii) the boundary between point D on Plan 2 southwards runs to E and thereafter follows the line of the posts and fence marked on the Plan. It does not extend westward to the concrete post (or the remains of the post) marked on Plan 2. The panels which were replaced in 2010/2011 were replaced in the same position as the earlier fence, and mark the boundary.

The first issue: does the Triangle form part of the paper title of No 15 or No 1?

History of the sales of No 15 and No 1

15. No 1 and No 15 are on what is known or was known as the Park Estate, Bottisham. Planning permission for the development of 34 houses (phase 2 of the development) was granted by Cambridgeshire County Council to the developers, Middleton and Phillips Ltd, on 17 December 1962.
16. By a conveyance dated 26 July 1963 ('the July 1963 Conveyance') No 1 (then known as Plot 15) was conveyed to Mr and Mrs Gaydon. By 1980 an extension had been made to the garage of No 1 to create a study. In 1980 Brian Lewis bought No 1. In due course No 1 was sold to Mr and Mrs Bond. By May 2005 the original extension to the garage had been demolished and a new single storey extension erected. At some point between 2005 and 2007 No 1 was sold to Mr and Mrs Hill who in turn sold the property to Mr and Mrs Olivier. A new extension was built by them in 2013. This extension consisted of adding a second storey to the existing extension. It did not change the footprint of that extension.
17. On 26 September 1963 ('the September 1963 Conveyance') No 15 (then known as Plot 14) was conveyed to Mr and Mrs Pollintine. Mrs Pollintine attended to give evidence.
18. In 1971 Mr and Mrs Pollintines sold No 15 to Mr and Mrs Gray. Mrs Gray made a witness statement but was not able to attend the hearing due to declining health. Mr and Mrs Gray sold No 15 to Mr and Mrs Steward, and on 18 September 1992 No 15 was sold to Mr and Mrs Carson who have lived there since that date.

Construction of the July 1963 and September 1963 Conveyances

19. The parcel clause in the July 1963 Conveyance describes the property by reference to the First Schedule. The First Schedule reads as follows: 'ALL THAT plot of land situate at Bottisham in the County of Cambridge as the same is for the purpose of identification only more particularly delineated on the plan attached hereto and thereon edged pink and known as Plot 15 on the Park Estate Bottisham aforesaid TOGETHER WITH the semi detached house and garage recently erected thereon on or some part thereof AND TOGETHER WITH the drive and pathway serving the said property coloured yellow on the said plan.'
20. In respect of No 15 the description is in the same terms, save that the Plot is referred to as Plot 14.
21. By paragraph 1 of the Second Schedules to the conveyances the purchasers covenanted: '*At all times hereafter to keep and maintain the posts fences walls or hedges forming the boundaries of the property which are marked 'T' within the boundary of the said plan in good repair and condition*'.
22. The same plan is used in both Conveyances. It was the developer's estate plan. It is stated to be not to scale. It shows the entirety of Phase 2 of the development, and shows in blue the amenity land. It also appears to state that it was reduced from the original plan.
23. The use of the expressions 'more particularly delineated' and 'for the purpose of identification only' have been described by Megarry J in the well known case of *Neilson v Poole* [1969] 20 P&CR 909 as 'mutually stultifying'. But this does not mean that the plan attached to a conveyance where those terms are used cannot be looked at. As was stated in *Wigginton & Milner v Winster Engineering* [1978] 1 WLR 1462, provided the plan does not conflict with the explicit description in the parcels, the fact that it is stated to be 'for identification only' does not exclude it from consideration in order to solve problems left undecided by the explicit descriptions in the parcels.
24. Megarry J in *Neilson v Poole* also made the point that: '*...in the construction of the parcels clause of a conveyance and the ascertainment of a boundary the court is under*

strong pressure to produce a decisive result. The prime function of a conveyance is to convey. As to any particular parcel of land, either the conveyance conveys it or it does not: the boundary between what is conveyed and what is not conveyed must therefore be proclaimed...'

25. The courts have long recognised the need to allow extrinsic evidence to be used as an aid in construing parcels in a conveyance in appropriate cases (see *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894, and *Liquat Ali v Robert Lane* [2006] EWCA Civ 1532). Such evidence may consist of relevant physical features of the land existing and known at the time of the conveyance, or the long acceptance of a specific boundary by a succession of parties on both sides of the boundary.
26. In *Pennock v Hodgson* [2010] EWCA Civ 873, in another case where the plan was for identification purposes only, Mummery LJ summarised the correct approach in these terms: '*Looking at the evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of the surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date.*'
27. It is common ground that the wall A-B-C was on the ground at the time of the two Conveyances, and that the fence was not yet erected. Mrs Pollantine's evidence is that the boundary fence was erected a week or so after she moved into No 15.
28. Mr Gore, for Mr and Mrs Carson, asks me to conclude that the reasonable purchaser, armed with the plan of No 1, would conclude that no part of the wall A-B-C formed part of his or her title, and that the side wall of the garage constituted the boundary. Mr Jefferis approaches the matter by saying that the plans make it absolutely clear that the Triangle forms part of No 1 and not No 15 (and that the wall B-C is plainly within No 1's title). The boundary is shown as a straight line from the wall A-B. He further points to the covenants to fence in the Conveyances which tend, he says, to confirm that the plans were intended to be relied upon to show the boundary of the land conveyed. This was accepted in evidence by Mr Carson who stated that he had not looked at the title or Conveyance plans, but simply believed that the wall A-B-C marked the boundary.

Conclusions on the paper title point

29. In my judgment, the plans to the Conveyances clearly show the Triangle forming part of the title of No 1. It is not shown as part of the title to No 15. It seems clear to me that the wall B-C was within the title to No 1. The line of the boundary starts at point B and runs southwards in a straight line. There is nothing to suggest that the line of the boundary started at point C. There is nothing to suggest that the north western wall of the garage should mark the boundary.
30. In my judgment this is a case where, in the absence of any more particular definition in the parcels clause, the plan prevails. There is no conflict between the verbal description and the plan. The covenant to maintain ‘ the posts fences and walls and hedges marked with a ‘T’ within the boundary on the said plan’ re-enforces, in my view, the conclusion that the Conveyancing plans were intended to be relied upon to show the boundaries of the land conveyed.
31. To argue that point C on the site plan should mark the northern point of the boundary would be to put the boundary at an angle would result in the boundary line not following a straight line, as shown on both Conveyancing plans.
32. The Triangle has been shown as part of No 1 since first registration of No in 1997 and of No 15 in 1992. This is not a determinative factor, but it is not irrelevant that the respective owners at the time, and their solicitors, accepted that the Triangle formed part of the paper title of No 1.

The second issue: the adverse possession claim

33. The Triangle is a defined area, bounded to the north by the wall B-C and to the west by the wall of the garage of No 1. On the eastern side (the hypotenuse) it is not marked by any fence or wall, and is therefore open to the garden of No 15, save that there is the remains of a trellis running from a little south of point D northwards, more or less parallel to the line C-D. The trellis is marked on Plan 2.

34. The main factual issues between the parties is whether it has been possible to gain access to the Triangle from the garden of No 1, as Mr and Mrs Olivier contend, or whether the Triangle has never been accessible from the garden of No 1, as Mr and Mrs Carson contend. A second issue is whether, as Mr and Mrs Olivier contend, a fence ran from point B to point D during their ownership effectively enclosing the Triangle within the curtilage of No 1.

Legal principles

35. Two elements are necessary to establish actual possession: a sufficient degree of physical custody and control ('actual possession') and an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess') (per Lord Browne-Wilkinson in *J.A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.)

36. The essential concept of actual possession is (as set out in *Powell v McFarlane* (1977) 38 P&CR 452 is '*...an appropriate degree of physical control... the question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.... Broadly what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to do so and no-one else has done so.*'

37. The essence of the intention to possess is the manifested intention to exercise control for the time being, excluding all others, so far as possible, for one's own benefit (see again *Pye v Graham* and *Powell v Macfarlane*.)

Evidence

38. I heard evidence from a number of witnesses, and I have considered a number of photographs, and a video. I have also taken into account the evidence of Mrs Gray, who was not able to attend due to ill health.

39. Mrs Pollantine and her husband purchased No 15 from the developers in September 1963, as mentioned above. They lived at the property until 1971. Mrs Pollantine's evidence was

that the Triangle was always part of, and open to, the garden of No 15, and there was no access to the Triangle from the garden of No 1. The fence which marked the boundary between the two properties extended a little way along the side elevation of the garage, but there was never a fence alongside the full length of the garage. This fence was erected shortly after she and her husband moved into No 15: the wall A-B-C was already there. The fence followed a straight line to the bottom of her garden. Mrs Pollantine planted rose bushes in the Triangle. These did not extend right up to the garage wall.

40. Mrs Pollantine produced a photograph taken in 1965. This clearly shows the wooden fence extending a little way north alongside the garage wall, and a mass of flowers and vegetation in the remainder of the Triangle.

41. In oral evidence Mrs Pollantine was clear that the fence was attached to the garage, and that it was not possible to gain access to the Triangle from the garden of No 1. She stated that the sketch plan prepared by Mr Carson was not quite accurate because the wooden fence extended a little way into the garage. She was not challenged on this point by Mr Jefferies. His case, however, is that it is clear from the photographs, having regard to the shadows and the height of the fence relative to the height of the garage wall, that there was a gap between the garage wall and the fence.

42. Mr and Mrs Pollantine sold No 15 to Mr and Mrs Gray. Mrs Gray's statement was that she lived at No 15 with her husband and family until 1984. Her evidence was that the Triangle was always part of the garden of No 15, and that no boundaries were changed during their ownership. Mrs Gray exhibited two photographs to her statement, both taken in the 1970s. One was taken in winter and one in summer. The first, taken in winter, clearly shows the Triangle forming part of the garden of No 15, and the bushes and vegetation growing there. The second shows the vegetation and bushes in full flower and growth. Neither picture shows the fence. Mrs Gray also attached a hand drawn sketch plan.

43. I also heard evidence from Philip Gray, Mrs Gray's son. He drew the sketch plan referred to above on his mother's instructions. He also lived at No 15 until 1984 when he was 14. He too stated that there was no fencing separating the garden from the Triangle. There was no gap between the fence and the wall of the garage. He recalls that the owners of No

1 had two cats who would walk along the top of the fence: they could not get into the garden of No 15 any other way. The Gray family also had two dogs, and the dogs too could not get into No 1. It was safe to leave them during the day in the knowledge that they could not leave the garden. He also stated that he would hide behind the bushes in the Triangle. He also confirmed that the boundary features did not change.

44. Thomas Green lived at No 5 Cedar Walk, and was a close friend of Philip Gray. His evidence dealt mainly with the boundary at the southern end of the garden of No 15, where it abutted no 15 Cedar Walk. However he also stated that the wooden fence stopped at the end of the new extension to No 1.

45. Mr and Mrs Steward owned No 15 from around 1985 to until 1992: they exchanged houses with Mr and Mrs Gray. Mr Steward gave evidence. He too stated that the Triangle always formed part of the garden of No 15. He produced a number of photographs and a DVD. The photographs were taken in the 1980s. They again show the Triangle forming part of the garden of No 15. One of the photographs shows him seated in the living room of No 15. It is possible to see the wooden fence and the wall of the extension of No 1 through a large window. This photograph, taken at Christmas 1989, shows a sliver of light between the end of the fence and the end of the wall. In evidence he stated that it was not possible to get from the garden of No 15 into his garden. The gap was minimal, and was the gap between the wooden pole supporting the last fence panel and the end of the garage.

46. The Triangle was full of well tended shrubs which stopped 9 inches to a foot short of the wall. This area was used for putting grass cuttings.

47. Mr and Mrs Carson's evidence was that by the time they moved into No 15, No 1 had been extended by adding a study to the rear of the garage. Mr and Mrs Bond then built a new ground floor extension, which meant that the original study extension was demolished. A section of the wooden fence was taken down, since the new extension was larger than the old one. In 2013 Mr and Mrs Oliver built a two storey side extension to No 1. This did not affect the position of the ground floor wall.

48. As for the Triangle, it was their evidence that this area has always been treated as part of their garden, and that it has never been possible – in their period of ownership – for anyone to gain access from No 15. They also produced photographs, taken in 1992-3, and again in 1997, which clearly show the Triangle forming part of their garden. The area has now become overgrown, since it has not been tended in the years during which the dispute has been ongoing.
49. In 2005, during the course of the works being undertaken by Mr and Mrs Bond, Mr and Mrs Carson agreed to the removal of large Laylan Cypress to the south east of point D on plan 2. There was no dispute as to the position of the boundary. Mr and Mrs Carson did not object to the further extension carried out by Mr and Mrs Olivier, and did not raise any issue as to the position of the scaffolding. Their evidence is that they wanted to help.
50. Mr and Mrs Oliver gave evidence, as did Michael and Ashley Pettitt, who carried out the building works to their extension. They could not, of course, give any evidence as to the use of the Triangle prior to 2007.
51. It is however Mr and Mrs Olivier's case that there has always been a gap between the fence and their garage wall through which, it is said, successive owners were able to access the Triangle. Their evidence is that they were able to walk, and did walk, into the Triangle on a number of occasions from 2007 to 2013, as did their architect, the local planning officer and a number of other people connected with the new extension. They did so from point J on Plan 3. The gap was at least 0.8 metres, and the Triangle was free from any vegetation. Reference was also made to conversations with Mr Bond, who confirmed that he could gain access from his garden to the outside wall of the extension. He did not attend to give evidence, and I give no weight to this.
52. Mrs Olivier stated that she and her children played in the Triangle, and never saw the Carsons. Importantly, she stated that there was a fence from point B downwards, effectively, as I understand it, incorporating the Triangle as part of No 15. Mr Oliver confirmed this. Mr and Mrs Olivier accept that it is no longer possible to access the Triangle from their garden because the fence was moved by Mr Carson. The Triangle has become overgrown. They also state that the fence previously there from point B

downwards has been removed and replaced with a trellis. They also stated that at all times they considered the Triangle to be theirs.

53. The evidence of the Pettitts was that they were employed in or around January 2013 to build a first floor extension to the garage and kitchen of No 15. The scaffolding was already in place around the perimeter of the garage and kitchen. The scaffolding was accessed from the driveway of No 1, via a ladder, over the wall. Ashley Pettitt remembers a fence between the scaffolding and the garden of No 15, which was a little lower than the working platform of the scaffolding, and it ran along the entirety of No 1's garden. The trees and branches from No 15 overhanging into No 1 made it working on the scaffolding difficult. Michael, Ashley's father, remembered that the fence was an old panel fence about 6 foot tall, and in a poor state. They had access all down the side of the garage and extension, even though the space was tight. He also stated that it was possible to get from the side into the garden of No 1, although the space was no more than a foot, so that it was a squeeze.
54. Finally, on this point, I should refer to the inspection carried out by the ordnance survey surveyor for Land Registry on 27 April 2016. The surveyor noted that the area tinted green (the Triangle) was in use as part of the private garden of an occupied by No 15. Adjacent to the building of No 1 was a mature planted border. Access to the Triangle was open to the garden of No 15 only. The trellis did not appear to be part of a former fence line. The mature trees within the planted border do not appear to form a straight feature/hedge in the area A-B (ie the northern and southern points of the Triangle).
55. Mr Gore submits that, having regard to the totality of the evidence, it is clear that from September 1963 the Triangle formed part of the garden of No 15, and that there was never a fence from B enclosing the Triangle was part of No 1. Moreover, if there was a gap between the end of the garage and/or kitchen extension and the fence, this was not wide enough to allow easy access to the Triangle.
56. On the evidence, he states that it is simply not credible that Mr and Mrs Oliver and their children played in the Triangle. If the Bonds had entered the Triangle, Mr and Mrs Carson would have objected. The reality is that the Triangle was always treated as part of the

garden of No 15. The various owners enjoyed exclusive possession of the Triangle and had the necessary intent to possess.

57. Mr Jefferis submits that very little weight should be given to the evidence of Mrs Pollantine due to the passage of time since she lived at No 15, and that the photograph she relied on clearly showed a gap between the wall and the fence. The argument is based on the relative heights of the fence and the wall. In the same way, the photograph produced by Mr Steward also shows a gap. He further submitted that I should accept the evidence of Mr and Mrs Oliver and of the builders. The gap was there, and moreover, there was a fence running south from point B.

58. The further point is taken that, as the Oliviers are in possession of at least part of the Triangle it follows that the register should not be altered unless either Mr and Mrs Olivier have by fraud or lack of proper care caused or substantially contributed to the mistake or it would be for any other reason unjust for the alteration not to be made (see paragraph 6(2) of Schedule 4 to the Act).

Conclusion on the adverse possession claim

59. The claim is brought under the transitional provisions set out in the Act. Title will be extinguished if Mr and Mrs Carson can establish 12 years adverse possession at any point since 1963.

60. In my judgment, title was extinguished by 1975. I found Mrs Pollatine to be an impressive and honest witness whose memory for detail was sharp. I fully accept her evidence. The Triangle was treated as part of the garden of No 15. It was planted with flowers and bushes. There was nothing to mark out the Triangle from the rest of the garden. I do not accept that there was any appreciable gap, between the end of the fence and garage wall at that time, or at any time thereafter. Such a gap as there was not large enough to allow access. It is visible in the photograph of Mr Steward in December 1989, but it is plainly very small.

61. More importantly, the fact that an area of land is not completely fenced off on all sides does not prevent a successful claim for adverse possession being made. The relevant test

is to consider whether, in all the circumstances, and having regard to the nature of the land and the way in which such land is commonly used or enjoyed, the land is possessed in the way an occupying owner would possess it.

62. In this case, it seems to me unarguable that the Triangle formed part of, and was treated as part of, the garden of No 15 since Mr and Mrs Pollantine's purchase. There is no evidence to the contrary relating to any time before 2007. I fully accept the evidence of the various witnesses called on behalf of Mr and Mrs Carson, all of whom struck me as honest and conscientious. This evidence is supported by the many photographs. A small, but telling detail, is the evidence of Philip Gray regarding the dogs owned by his family. Whatever gap there was at that time was not sufficient to allow the dogs to escape.
63. The Triangle is a small area. It was planted with a variety of shrubs and flowers. Again, it seems to me irrelevant that there may have been a small gap between the shrubs and the wall of the garage.
64. The various owners of No 15 also, in my judgment, had the clear intention to possess the Triangle. There is no evidence of any dispute with any of the owners of No 1. As stated above, I attach no weight to the evidence given as to the conversations between Mrs Oliver and Mr Bond.
65. As for the evidence of Mr and Mrs Oliver, I do not accept that they considered the Triangle part of their land (at least not until 2015) or that they used it as part of their garden, or that their children played there. I do not accept that there was ever a fence parallel to or along the side of the garage, thus placing all or part of the Triangle within what appeared to be the land belonging to Mr and Mrs Oliver. I also note that in their Statement of Case they say that the fence ran between points A, B, I and H (on Plan 3 and H to I, but not between B and I because there was an oak tree there (the tree was in fact a cypress tree)). Such a fence would have made it difficult for the scaffolding to be erected when the second storey extension was built.
66. It is clear from the correspondence between Mr and Mrs Olivier's surveyor and Mr and Mrs Carson at the early stages of the dispute, however, that no claim was being made to

the Triangle. There was an issue as to whether a connection could be made between a new gutter and the rainwater downpipe without encroaching on Mr and Mrs Carsons' land. Their position changed in August 2015 when a second surveyor, Alan Langley, was instructed. The surveyor looked at the title plan of their property and concluded the western boundary extended from the west side corner of the section of wall at the front of their house (point B on Plan 2) down to an existing concrete post which is approximately 870mm on the other side of the fence. In his opinion, this post indicated the rear corner of their land.

67. It may have been just possible to squeeze through the fence, or to push it back sufficiently to allow access down the side of the extension, and this may have occurred when the further works were being done in 2013. It might have been easier to do this (for the architect or city planner) than climbing over the front wall with a ladder. But the key point is that the Oliviers' title to the Triangle had been extinguished, in my judgment, by 1975. The limited acts made by and on behalf of Mr and Mrs Oliver, if any, at the time of the extension works in 2013 had no effect on the title acquired by adverse possession by Mr and Mrs Carson's predecessors in title.

68. I fully accept the evidence of Mr and Mrs Carson regarding the Triangle. It seems to me inconceivable that they would not have noticed Mr and Mrs Olivier or their children in the Triangle.

69. I should also add that, if limited access was gained to the side of the extension by Mr and Mrs Olivier and others, these acts do not result in the Oliviers being in possession of the Triangle or any part of it for the purposes of paragraph 6 of Schedule 4 to the Act. It follows therefore that the alteration sought by Mr and Mrs Carson must be made under paragraph 6(3) unless there are exceptional circumstances which justify not making the alteration. In my judgment there are no such circumstances. Some of the difficulties which might be caused by the wall of the garage and the extension being the boundary can be made by applying for the appropriate access order under the Access to Neighbouring Land Act 1992.

The third issue: the position of the remaining boundary

70. The boundary in dispute runs south of the line of the back of Mr and Olivier's garage (marked D on Plan 2). Mr and Mrs Carson rely on a plan prepared in September 2017 by Martin Rickman BSc MRICS FRGS (Plan 2). Plan 2 marks in darker blue the line contended for down to the end of the Olivier's house (as extended). This starts at point C, runs along the wall of the garage, then follows the line of the further extension (veering slightly at the point where the additional extension meets the original extension). Part of this area is the Triangle, and has been dealt with above. The legend states that this boundary line is 'contended for on physical features'.
71. Point E marks the end of the Olivier's house. The line southwards is in lighter blue. This is 'contended for off physical features'. It is a straight line down to Tree 14 and thereafter kinks slightly westwards point F. Between point T14 and E the line drawn is slightly to the east of the fence and posts.
72. Mr and Mrs Olivier's case is that the boundary follows the line shown on their architect's plan dated October 2009 (Plan 3), and, relevantly, follows the line next to point J (the end of the house: on this plan there is a gap between the end of the house and the boundary) down to H. It is their case that the fence, as currently positioned, runs to point G. The boundary does not touch any part of the wall to the garage or the extension. A low green fence then, it was said, ran across so as to close off the boundary with 15 Cedar Avenue. The concrete post, shown on Plan 2, marked the end of the boundary.
73. I note however, that in April 2013 their surveyor wrote to Mr and Mrs Carson stating: *'the timber panelled fence between the two properties follows a straight line albeit it has been varied by trees and shrubs which have pushed the fence out of alignment. The planting generally conforms to the straight line boundary shown on the Land Registry plan...'* (plants and trees all on No 15's side). Mr and Mrs Carson responded by saying that the fence had not been pushed out of alignment and that it had been replaced, at their expense, in agreement with Mr and Mrs Olivier. Mr Norman repeated that the fence had been pushed into the garden of No 1 by the trees and shrubs. The use of the concrete post as a boundary marker was first raised, as stated above, when a second surveyor was instructed in August 2015.

74. The difference between the two lines contended for is 0.75m at point D, 0.4m where the extension turns at an angle (as can be seen on Plan 2) and thereafter approximately 1 metre from E down to the end of the boundary. On the ground, this would mean that most of the trees marked on Plan 2 would be in the garden of No 1.
75. Mr and Mrs Olivier make two specific points about the southern end of the boundary. The first is that the boundary runs to the concrete post. This post is approximately 870mm on the other side of the fence. The second is that, until Mr Carson moved the line of their back garden fence in 2010/2011, the fence stood on top of a little raised bank at the edge of their garden. The rectangle shown on Plan 3, they say, is a shed which was removed recently. Both these points are disputed by Mr and Mrs Carson.
76. In support of their case relating to the raised bank Mr and Mrs Olivier rely on a photograph taken from the garden of No (I believe when Mr and Mrs Bond lived there), showing the fence on top of a mound of earth. It may be that there was also a raised bank in the garden of No 1 The photograph is not clear enough to show No 15. Reliance is also placed on a sketch plan attached to Mrs Gray's statement, which shows, or appears to show, a raised bank in the garden of No 15.
77. As to the second point, I accept the evidence of Philip Gray that the raised bank was on No 15's side of the boundary: the brushed line is intended to show the hedging. The plan also shows a greenhouse, and a washing line post (the concrete post). The concrete post is clearly within the garden of No 15. The boundary on the sketch plan runs in a straight line southwards from the end of the garage of No 1.
78. Mr Steward's evidence on the raised bank was clear. The earth bank was in the garden of No 15. The timber fence running south from point D met the return of the wall and the boundary was marked thereafter by hedge and thick shrubs. The earth bank was retained on his property by the low brick wall. The wall began at the end of the timber fence panelling and projected the width of the shrub border (about 3 feet). The wall then turned to run parallel with Cedar Walk until reaching the fence marking the boundary with 11 Cedar Walk.

79. Philip Gray stated the hedge behind the raised bank was the sort of hedge a farmer would plant: this formed the corner between No 15 and 15 Cedar Walk. The earth mound had been created and planted by his mother. He was also clear that the concrete post was in the garden of No 15, and that his father laid concrete behind the garage for a greenhouse which he built. He produced a photograph showing the car port/garage and the edge of the washing line. In another photograph it is possible to see the raised bank behind a table and chair. Mrs Gray also stated that the raised flowerbed was part of No 15's garden. Thomas Green also stated that the raised bank at the corner of the garden of No 15 was within that garden.
80. Mrs Pollantine, in giving her evidence, stated that the raised earth area was not there in her time, just a hedge. The concrete post was used for a washing line. The fence ran in a straight line from the end of the garage.
81. Mr and Mrs Carson also gave evidence as to the position of the boundaries in 1992. In 2005 part of the fencing was removed to allow for the removal of the cypress tree. The fence was re-instated in the same position, save that it did not extend as far because the Bond's extension was larger than the one it replaced. A short wooden post showing where the original fence was can be seen in one of the photographs taken by the surveyor who carried out the site inspection for Land Registry. This post was put in 2005 and has been there since. Mr and Mrs Olivier claim that this post was placed there by Mr Carson in or about 2013 and that it was placed there in connection with the trellis. This was also disputed by Mr Carson. It was also their evidence that they never moved the fence into another position. In 1998 Mr Carson erected a shed in the corner of his garden nearest to 11 Beechwood Avenue. To do this he altered the position of the low retaining wall but did not change the boundary. The shed has been recently removed.
82. In 2010/2011 two fence panels were removed by the Carsons and the Oliviers. It is the Carsons' case that they were replaced in the same position. Mr and Mrs Olivier's case is that the fence was moved some way into their garden, and that the gap between their kitchen wall and fence was closed for the first time. It is also their evidence that they were aware of the mistake at the time, but were intimidated by Mr and Mrs Carson. This is denied by the Carsons.

83. I accept the evidence of Mr and Mrs Carson on this point. I found the evidence of Mrs Olivier at times very difficult to follow. The dispute which followed between the Carsons and the Oliviers does not assist in establishing the true line of the boundary and I will not rehearse the evidence as to this.

84. Mr Gore submits that the totality of the evidence, oral and photographic, supports the contention that the boundary follows the line of the Oliviers' extension (D to E) and thereafter follows the lighter blue line on Plan 2. Essentially the boundary between E and the northern end of the retaining wall was a straight line. There is no evidence to support the Oliviers' case that the fence at any time ran to the remains of the concrete post. The earth bank was always part of No 15.

85. Mr Jefferis submits that Plan 3 accurately shows the boundary. The fence stood on top of the raised bank or earth mound until it was moved by Mr Carson in 2010/2011. The Oliviers did not agree the position of the new panels. The remains of the concrete post, and the sawn off wooden post referred to above (as shown in the photographs from Land Registry) mark the true boundary. Mr Jefferis was critical of the witnesses' recollection, not least because the sketch plan drawn by Mr Carson is not entirely accurate (the same point was made in respect of the Triangle).

Conclusions on the third issue

86. The starting point, in my judgment, is the evidence from all the various witnesses called on behalf of Mr and Mrs Carson regarding the position of the boundary fence. This fence was erected shortly after Mr and Mrs Pollantine moved into No 15. It clearly marked the boundary and was treated as such by the various respective owners. To the extent that it differed (if it did) from the line shown on the Conveyancing plans, it nonetheless marked the boundary if only because any land on 'the wrong side' of the fence would have been acquired by adverse possession.

87. I am satisfied, having heard the evidence, that the raised earth area, now supported by a small retaining wall, has always been in the garden of No 15. At this point the boundary was marked by a hedge. Again, I am satisfied that the fence never ran to the concrete post

marked on Plan 2. I do not accept that the witnesses called for Mr and Mrs Carson were mistaken, or confused by Mr Carson's plan. Their evidence was clear and consistent.

88. I also find that the fence panels which were replaced in 2010 were replaced in the same position. I do not accept that Mr and Mrs Carson moved them further into the Oliviers' garden. Some movement may have occurred due to the pressure from the shrubs and trees, and it may be that part of one of the panels was cut to accommodate the growth of a hawthorn tree, but this does not materially alter the boundary line. Purely on a practical level it is hard to see how the fence could have been moved so as to place trees and shrubs in the garden of No 15.

89. The effect of the line contended for by Mr and Mrs Olivier would be to place most of the trees on Mr and Mrs Oliviers' land, and two of the trees on the boundary. It would move the boundary a metre or so into the garden of No 15.

90. In view of all the evidence, and in particular the evidence regarding the earth mound, and the position of the boundary where it intersects with 15 Cedar Walk and 11 Beechwood Avenue, and the evidence regarding the fence running to the eastern edge of the retaining wall, the fence along E-F is not, as claimed by Mr and Mrs Olivier, on the wrong alignment. The best indicator of the boundary is the position of the fence and posts, shown on Plan 2.



Costs

91. I invited the parties to make their submissions in writing within the next 14 days.

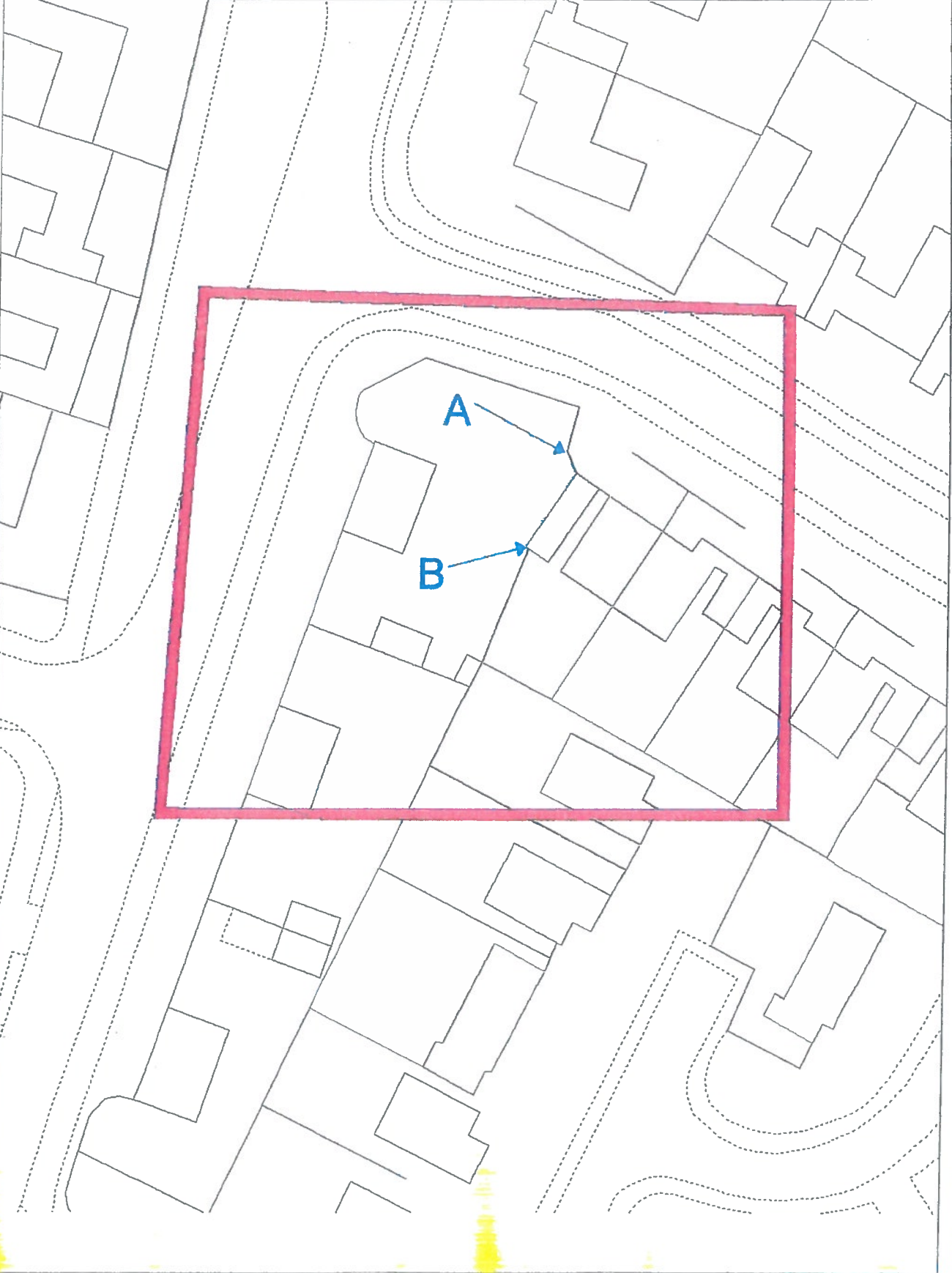
BY ORDER OF THE TRIBUNAL

Ann McAllister
Dated this 21st day of February 2018



	TITLE NUMBER CB411727	
	SURVEY PLAN - GRID REF:554872.6, 260518.2 LR REF:MB6484F0113	

ORDNANCE SURVEY MAP REFERENCE: TL5460NE SCALE: 1:500



KEY

M RICKMAN SURVEY
 Boundary Line Contended for
 on physical features
 Boundary Line Contended for
 off physical features



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CARSON BOUNDARY LINE
15 BEECHWOOD AVENUE
AND 1 CEDAR WALK
BOTTISHAM

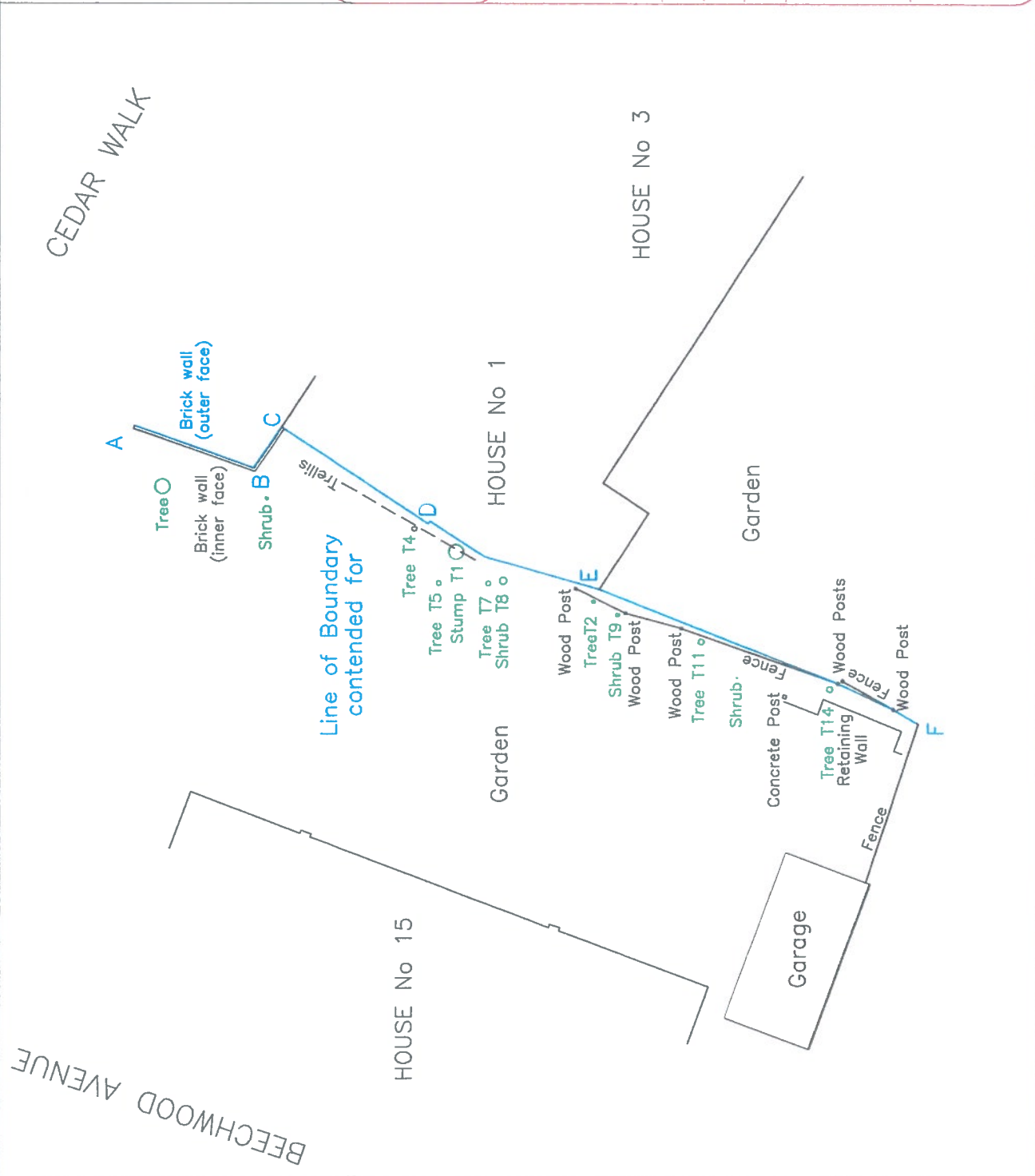
Job No 1708 Date Sept 2017

Drawn By M.C.R. Checked MCR

Scale 1:200 Sheet 1 of 1

Client

A4 DRAWING SIZE



Plan 3



	scale	1:200 @ A3	project Prop Two Storey Side Extension to 1 Cedar Walk, BOTTISHAM Cambridgeshire for Mr. & Mrs. Puggioni	a E
	date	OCT 2009		
	drawn	LWK	draw no.	ECS / BOTT / 2009-06 / 5
ALL DIMENSIONS TO BE CHECKED ON SITE.				

