[2018] UKFTT 577 (PC)

REF/2017/0113

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Dean Peter Amesbury and Rachel Louise Amesbury

APPLICANTS

and

Gordon Murdoch and Sandra Murdoch

RESPONDENTS

Property Address: 73 and 75 Coombe Valley Road, Preston, Weymouth, DT3 6NL
Title Number: DT148185

ORDER

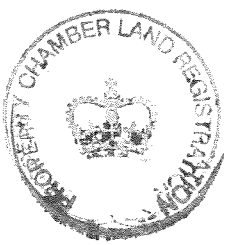
IT IS ORDERED as follows:

The Chief Land Registrar is to cancel the original application dated 27 May 2016 for a determined boundary.

Dated this 29 August 2018

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL



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Title Number: DT148185

Before Judge Elizabeth Cooke sitting as a judge of the County Court and as a Tribunal Judge
Sitting at Alfred Place, London WC1 E 7LR
On 20 – 22 February 2018
and
on 9 July 2018

DECISION

KEYWORDS: determined boundary – conveyance plan – boundary feautures

Cases referred to:

Alan Wibberley Building Ltd v Insley [1999] 1 WLR 894
Ali v Lane [2006] EWCA Civ 1532
Cameron v Boggiano [2012] EWCA Civ 157
Chadwick & Others v Abbotswood Properties Ltd & Others [2004] EWHC 1059 (Ch)
Murdoch v Amesbury [2016] UKUT 3 TCC
Pennock v Hodgson [2010] EWCA Civ 873

1. This is my decision about the position of the boundary between numbers 73 and 75 Coombe Valley Road, Weymouth. The paragraphs that follow are both
    a. the reasons for my direction to the Chief Land Registrar following the reference to the First-tier Tribunal of an application for a determined boundary pursuant to section 60 of the Land Registration Act 2002 ("the LRA 2002"), and
    b. my judgment in an action in the county court where both the Claimants, Mr and Mrs Amesbury, and the Defendants Mr and Mrs Murdoch seek a declaration as to the position of the boundary between their respective properties.
2. I explain more about how these two matters came before me, sitting as a judge both of the First-tier Tribunal and of the county court, in paragraph 10 below.
3. I visited the parties' properties on 19 February 2018, and I am grateful to Mr Amesbury and to Mr and Mrs Murdoch for showing me the boundary. The hearing took place in Alfred Place on 20 – 22 February 2018; the Claimants were represented by Mr Nathaniel Duckworth of counsel and the Defendants by Mr Martin Horne of counsel, and I am grateful to them both for their helpful arguments.
4. I heard evidence from Mr Amesbury for the Claimants, and from the Defendants Mr and Mrs Murdoch, who all gave evidence honestly and to the best of their knowledge of the relevant facts. I also heard expert evidence from surveyors – Mr Gary Vaughan MC Inst CES, Member of the Academy of Experts for the Claimants and Mr Carl Calvert MSc, MA, PgDLaw, FRICS, CITP, MBCS, FRIN, MBCartoS for the Defendants – both of whom gave their evidence with considerable expertise and conscientious independence.
5. In the paragraphs that follow I set out
    i. The procedural history of this matter
    ii. The properties and the boundary
    iii. The law
    iv. The evidence for the boundary: the deeds, the land, and the evidence of the parties
    v. The expert evidence
    vi. Conclusions.

(i) The procedural history of this matter

6. The Claimants bought their property, 75 Coombe Valley Road, in 2010; title to number 75 has been registered since 1987. The Defendants bought number 73 in 1971; title was registered on 17 October 2011. Both titles are registered with general boundaries, which means that the red line on the title plan does not show exactly where the boundary lies.
7. In 2011 the Defendants applied to HM Land Registry for a determined boundary between numbers 73 and 75. A determined boundary is an exact line determined pursuant to rules made under section 60 of the LRA 2002. That application met with objection from the Claimants in this matter, Mr and Mrs Amesbury, and was referred to the Land Registration Division of the First-tier Tribunal ("the LRD") pursuant to section 73 of the LRA 2002. The reference was heard in May 2013; on 20 August 2013 the judge of the LRD directed the registrar to cancel the application because the plan that accompanied it did not meet Land Registry's requirements, and also made findings about the position of the boundary.
8. That decision was appealed, and was overturned by the Upper Tribunal on 4 January 2016.[1] It was held that the LRD's findings about the boundary had been made without jurisdiction. The judge of the Upper Tribunal also discussed the position of the boundary, but did so only in deference to the parties' having argued the matter before him. He observed at his paragraph 84 that the matter of the boundary was not properly before the Upper Tribunal and that "my comments are in my view neither determinative of the issue nor binding upon the parties". That appeal brought to an end the 2011 reference to the LRD.
9. In May 2016 the Claimants made an application to HM Land Registry for a determined boundary; the Defendants objected and the matter was again referred to the LRD.
10. On receipt of the reference the LRD made a direction under section 110 of the LRA 2002 that the Claimants should commence an action in the county court, and that they do so in the Central London County Court so that a judge of the LRD could hear both the county court action and the tribunal reference pursuant to the judicial deployment project operated by that court and the LRD. In the county court the Claimants seek a

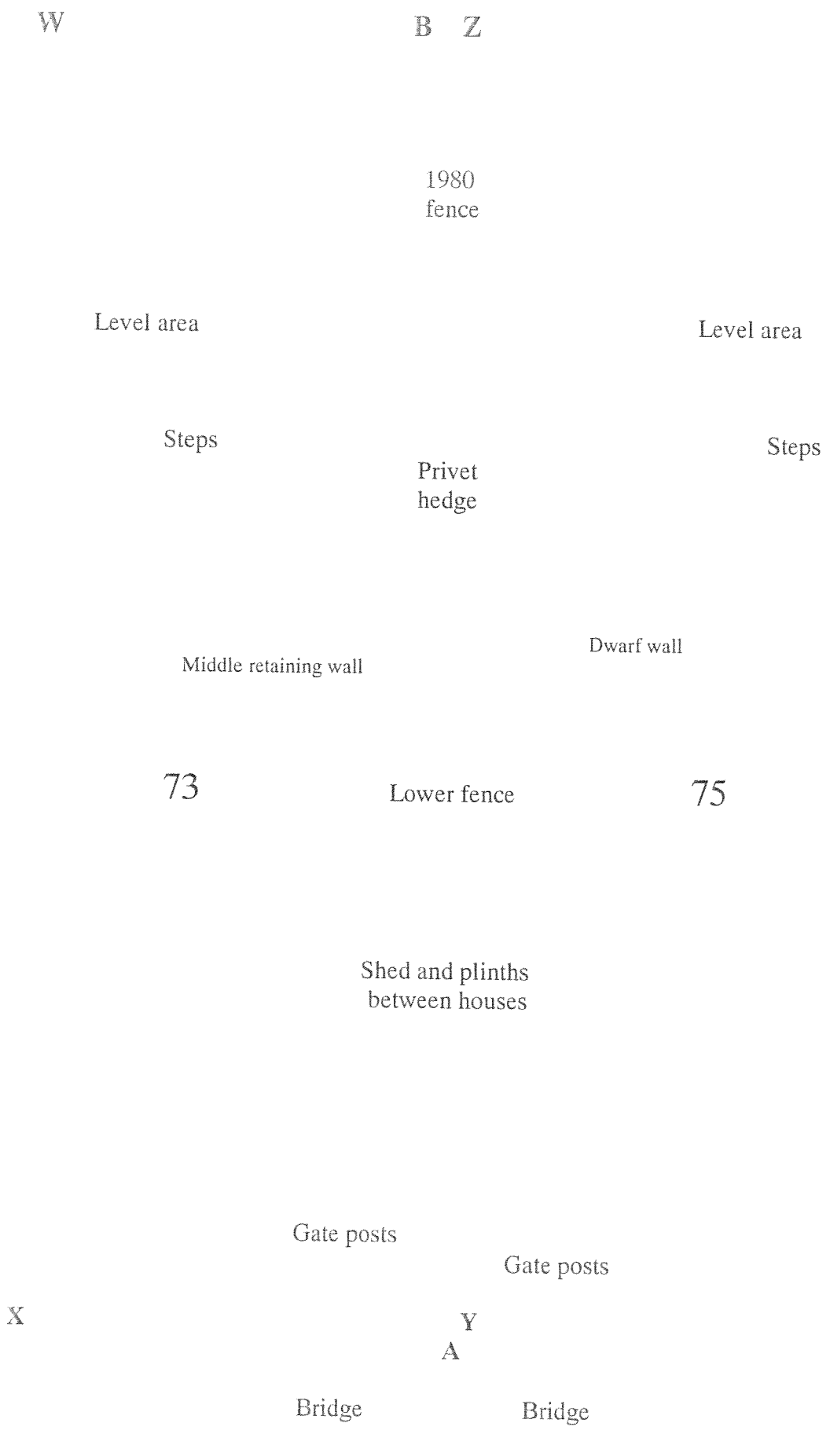
[1] *Murdoch v Amesbury* [2016] UKUT 3 TCC.

declaration as to the position of the boundary between numbers 73 and 75 Coombe Valley Road and the Defendants have counterclaimed for a like declaration.

11. I conducted a Costs and Case Management Conference on 17 July 2017. I made it clear to the parties at that hearing that neither the decision of the LRD in 2013 nor the appeal decision of the Upper Tribunal of 2016 created any issue estoppel about the boundary. The former was found to have been made without jurisdiction, and the latter was said by the judge not to be determinative of the matter and indeed could not have been, on the judge's own reasoning. Accordingly the current reference and county court action fall to be decided from scratch, without reference to the previous decisions.
12. The two actions are in any event very different from the earlier proceedings. There is no pleading of adverse possession, and the determined boundary contended for is different from that contended for in the earlier reference. I have not made reference to the findings made about the boundary in the earlier decisions, nor heard argument about them; nor have I considered any of the plans or expert evidence adduced in the LRD in the first reference, although some of these appeared in the trial bundle this time. I start afresh.

(ii) The properties and the boundary

13. I now set the scene by describing the land that is the subject of these proceedings.
14. Coombe Valley Road runs roughly north to south along a valley. The 1958 Ordnance Survey map shows the area as a marsh, with a road or track at the bottom of the valley.
15. Land in the valley was sold in single plots for housing in 1960. On each side of the road there is a stream in a ditch, and the properties that line the road are reached by crossing a concrete bridge. When those bridges were built is a matter of conjecture, but the houses could not have been built without there being vehicular access to each plot, so it is likely that each bridge pre-dates the house to which it gives access.
16. Numbers 73 and 75 are on the west side of the valley, with their eastern frontages to the road. Their land slopes up the valley, first gradually and then very steeply; their western fences keep livestock out of their gardens from the adjoining farmland. Number 75 is to the north of 73.
17. The sketch that follows shows the physical features that can now be seen in the vicinity of the boundary. It is not drawn to scale and it does not form part of my reasoning; it is included simply for illustration.


W
B
Z
1980
fence
Level area
Level area
Steps
Steps
Privet
hedge
Dwarf wall
Middle retaining wall
73
Lower fence
75
Shed and plinths
between houses
Gate posts
Gate posts
X
Y
A
Bridge
Bridge

18. If one walks westwards from the road along the disputed boundary one encounters first the concrete bridges. They are not symmetrical and their edges are not straight. Then there are the brick gate posts of numbers 73 and 75. It is not known when they were built. There is a gap between them. Between the front gardens of the two houses are plants and shrubs. Between the two houses are two brick piers which used to support number 75's oil tank, and a small disintegrating shed also attached to number 75. Behind the houses the two gardens are separated first by a fence (which I call "the lower fence"), then by a privet hedge, and then by a post and wire fence in the far western section.
19. From a gardener's point of view these are challenging gardens. Nothing can be done without terracing as the land slopes all the way. Further west is a small wall to which I refer as "the middle retaining wall", which runs north-south, turns north, and joins up with what the parties have described as the dwarf wall, a drystone wall running across number 75's garden. There are steps and a path in each garden up to the final level area, and then a much steeper section which is not cultivated on either side. The Defendants have installed a ladder and a climbing rope along the fence; at the site visit I made my way up on the number 73 side to inspect the post at the north-west corner and found it a hair-raising experience because of the steep gradient.
20. It is not in dispute that the fence in that top, steep section was installed by the Defendants in 1980, and I refer to it as "the 1980 fence."
21. The Claimants say the boundary runs from the westernmost post of that fence, their point B, in a straight line to a point A roughly half-way between the two bridges at the front.
22. The Defendants say that the 1980 fence was about a foot to the south of the boundary.
23. They agree that the boundary is a straight line, but they say that it runs from an aluminium bar a few inches to the north of point B, to a point just to the south of the south face of number 75's gate post. The Defendants have marked points A, B C and D on their boundaries, anti-clockwise from the south-west; to avoid the confusion that flows from the presence of two As and two Bs referring to different points on the same plan I have re-named those points W, X, Y and Z; so the Defendants' contended boundary line runs from Y to Z on my sketch.
24. The line contended for by the Claimants runs just to the south of the brick piers and the shed between the two houses, so that those structures are not trespassing, and to

the south (by a greater margin) of the lower fence, but of course coincides with the 1980 fence. The Defendants' line intersects the brick piers and the shed between the houses, and is partially in line with the lower fence (only partially because the lower fence is not straight).

25. It will be seen that the land that is in dispute is a matter of inches wide from north to south. It has neither value nor usefulness.

(iii) The law

26. In both the tribunal reference and the county court action I have to make my decision in the light of well-established law about the position of boundaries.

27. In *Ali v Lane* [2006] EWCA Civ 1532 at 36 Carnwath LJ said:

> "In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended."

28. In *Pennock v Hodgson* [2010] EWCA Civ 873 the Court of Appeal set out a little more detail, referring to the opinion of Lord Hoffmann in *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894:

> "9. The following points can be distilled as pronouncements at the highest judicial level :-
>
> (1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land, in this case the conveyance to the defendant being first in time.
>
> (2) An attached plan stated to be "for the purposes of identification" does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land.
>
> (3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.
>
> (4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other

relevant evidence that may lead the court to reject the plan as evidence of the boundary.

...

12. Looking at 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 its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction."

29. As Mummery LJ put it in *Cameron v Boggiano* [2012] EWCA Civ 157 (citing with approval the words of Lewison J in *Chadwick & Others v Abbotswood Properties Ltd & Others* [2004] EWHC 1059 (Ch) at paragraph 44), where the conveyance does not provide the answer, the court has to consider what the reasonable layman looking at the land on the date of the conveyance with the plan in his hand would think he was buying.
30. In this case the conveyance that created the boundary is ambiguous (see below) by reason of the use of the words "or thereabouts" and because the plan does not identify the line exactly (because of its small scale and because the words of the conveyance prevail). It is not possible to divine from the conveyance exactly where the boundary is. I can therefore look at the physical features on the ground in order to discern the intentions of the parties to the deed that created the boundary – and only insofar as they are probative of those intentions.

(iii) The evidence for the boundary: the deeds and the land

31. Bearing those principles in mind I turn now to the evidence for the boundary provided by the conveyance that created it and by the physical features on the ground. I make reference also to the evidence of the parties, but I remind myself that none of the parties has any knowledge of the intentions of the people who created the boundary. Nevertheless their evidence has some relevance, as will be seen, because of what it reveals about the physical features on the ground.

The number 73 conveyance

32. On the west side of the road, where numbers 73 and 75 are situated, the plots appear to have been sold in succession from south to north. By a conveyance dated 9 November 1959 the executors of the will of Henry Diment sold the plot for number 71 to Mr and Mrs Cottrell. The parcels clause described the eastern frontage as being "50 ft or thereabouts" and the western boundary as "36 ft or thereabouts".
33. Number 73 was sold on 29 June 1960, by the same vendors, to Mr Brian Pressly; the vendors retained land to the north, and therefore this is the deed that created the boundary now in dispute and to which I refer as the number 73 conveyance. The parcels clause describes the land as

> "ALL THAT piece of land situate on the West side of and having a frontage of Fifty feet or thereabouts to Coombe Valley Road ...which ... is for the purpose of identification only more particularly delineated on the plan drawn hereon and thereon coloured pink"

34. Those words give a measurement only for the eastern boundary. The plan shows 14 plots on the west side of the road. It is drawn to a small scale; the western boundaries of the plots are labelled with measurements; the plan shows the western boundary to number 73 as "36 feet". It is well-established that where a property is said to be "for the purpose of identification only more particularly delineated" on the plan, those words being contradictory (since "for the purpose of identification only" means that the words of the conveyance prevail, whereas "more particularly delineated" means that the plan prevails), the words of the conveyance prevail.
35. Accordingly, the conveyance states that the eastern boundary of number 73 is 50 feet long "or thereabouts" and the plan says the western boundary is 36 feet long.
36. What do the words "fifty feet or thereabouts" mean? A real line on the ground, drawn from a point to a point, has a precise measurement; a determined boundary shows the "exact" line of the boundary and this conveyance does not purport to do so. What did the parties to the conveyance intend by their words? I take the view that the words "or thereabouts" were an acknowledgement that the boundary created on the ground might not be perfectly measured, and that the fence put up to mark it (see below) might not lie precisely 50 feet away from the boundary between numbers 71 and 73; I find that the parties to the number 73 conveyance intended the eastern and western boundaries to be as near to 50 feet long and 36 feet long respectively as could be achieved.
37. Two days later, on 1 July 1960, the plot for number 75 was sold to Mr Philip Webb. The parcels clause conveys:

"ALL THAT piece of land situated on the West side of and having a frontage of fifty feet or thereabouts to Coombe Valley Road Preston Weymouth in the County of Dorset with a depth therefrom of two hundred and fifty feet or thereabouts and a width at the rear of thirty six feet or thereabouts which said piece of land is for the purpose of identification only delineated on the plan annexed hereto and thereon edged red."

38. So the conveyancer tried a bit harder in this instance; there is a measurement for the rear boundary at the west as well as for the front, and the side boundary – the one now in dispute – has a measurement. All the measurements are of a "thereabouts" nature, and the description of the plan makes it clear that the words of the parcels clause prevail. The conveyance of number 75 had no effect upon the boundary that is currently in dispute, as that one had already been created by the number 73 conveyance.
39. Accordingly, the land on either side of the boundary now in dispute remained in the ownership of the parties who created it only for two days; after that, only Mr Pressly (of number 73) remained of the original parties.

The fencing covenants

40. All three conveyances contained fencing covenants which obliged the purchaser to fence his southern and western boundary.
41. There is a line of concrete posts along the south side of number 73's garden, some of which are embedded in the concrete path on the south side of the house and therefore are likely to be a very early feature. It is the Defendants' case that these are the posts installed by the owners of number 73 in compliance with their fencing covenant along the boundary. No-one can give evidence about that. In the light of their being set in the concrete path I find that these are the original fence posts.
42. Accordingly these posts mark the boundary between number 73 and 71, and when installed they would have been the line from which the other boundaries of number 73 would have been measured. Importantly, the expert witnesses for both parties agree that the point from which the western boundary of number 73 is to be measured is the south-west corner of the post at the western end of this line; this is point W on the Defendants' plan. In the light of that agreement I find that that is the point from which the "36 feet or thereabouts" is to be measured, so as to determine the western end point of the disputed boundary.

43. Moreover both experts agree that the front boundary of number 73 is to be measured along a line produced from the original position of the easternmost post in the fence, although they disagree as to whether that post stands today in its original position; I revert to this below.

44. The number 73 conveyance did not oblige anyone to fence the boundary that is now in dispute, but the number 75 conveyance obliged Mr Webb to do so. He was not a party to the conveyance that created the boundary but his neighbour, Mr Pressly, who owned number 73 until August 1965, was. Any fencing put up by Mr Webb is not direct evidence of the intentions of those who created the boundary, but it may be indirect evidence in the sense that if he got it wrong, or at least if he went too far south, Mr Pressly would have protested.

45. That is as much assistance as can be gleaned from the 1973 conveyance which created the boundary.

The land and the evidence of the parties

46. I turn now to the physical features to be found along the boundary. I look at what is there now, and at the evidence provided by the parties as to what was there in earlier years. To that end I proceed east to west along the boundary.

The bridges and the gateposts

47. As I said at paragraph 15, it is likely – and I therefore find as a fact – that the concrete bridges were built before the houses. It is not known and cannot be known whether they pre-dated the number 73 conveyance.

48. It is not known when the brick gateposts were built but they can be seen in an aerial photograph dated 1968. They do not line up along a north-south line, number 73's posts being further to the west than number 75's.

The front gardens

49. Further historical photographs show, and it is not in dispute, that at one stage there was a hurdle fence between the front gardens of the two properties. The Defendants remember it, and photographs show it as being rather dilapidated; Mr Murdoch in cross-examination expressed annoyance that Mr Webb did not fence the front garden boundary properly. It is not known when the hurdle fence was put up and there is no sign of it today.

50. One of the photographs – a colour one taken by the Defendants - appears to show some wooden posts along the southern side of the hurdle fence. No written evidence was given about these posts. In cross-examination Mr Murdoch said that at one stage

there was a wire fence between them, and that he recalled the neighbour's daughter jumping over that fence to get into their garden.

51. Until 2012 there were four angle irons between the two gardens. Mr and Mrs Murdoch say they remember these being put in by Mr Webb in 1986 to replace the collapsing hurdles. They also say that they took them out in 2012.

52. There are two concrete post sockets between the two front gardens, near the houses. Again, Mr and Mrs Murdoch say they recall Mr Webb putting these in in 1986; Mrs Murdoch, at least, saw one of them being installed.

53. Even if – which is not known – the hurdle fence was put up by Mr Webb when he first met his fencing obligations after purchase, it is not now known where it was. I accept the Defendants' evidence that Mr Webb installed the fence post sockets and the angle irons in the 1980s. Their position is therefore of no assistance in deciding where the boundary lies because they are late features, installed long after the parties who had created the boundary had moved on, and are of no evidential value in divining the intentions of those parties.

The space between the two houses

54. The space between the two houses is rather neglected. It contains brick plinths which used to support an oil tank, and a decrepit shed. The Defendants have produced the replies to preliminary enquiries given to their solicitor when they purchased their property from Mr Voute, which include the following statement:

> "The owner of 75 Coombe Valley Road has constructed an oil storage tank, with the consent of the Vendor, and in its existing position it protrudes a few inches into this property. The Vendor has no objection and has not experienced any difficulty as a result."

55. The owner of number 75 at that date (in 1971) was still Mr Webb, who did not sell until May 1987. It is a central tenet of the Defendants' case that the piers and the shed encroach and have always done so. It is not now possible to determine whether that is the case, because we have only the hearsay evidence from Mr Voute, who may have been mistaken about the tank and said nothing about the plinths or the shed, and in any event was not one of the parties who created the boundary.

The fence post between the houses

56. There is a fence post between the two houses. The Defendants say (in paragraph 37(5) of their defence) that this post was installed by one of their tenants during the 1990s. No-one is in a position to contradict this and I accept their evidence; that post

therefore is of no assistance as evidence of the intentions of those who created the boundary.

The lower fence

57. The Defendants remember the fence that stood between the two gardens when they moved in. They say, and I accept, that that was the fence built by Mr Webb. They say that he replaced some panels in the 1980s, and have produced a photograph taken when they had cleared but not planted their garden on that level, just before they went to America in 1980, showing some new panels in the fence and some old. They say, and I accept, that he put in the easternmost panel, between the two houses, on a double post so that it was set further south and touched the edge of the shed; the double post is still there and the fence is skewed to the south at that point.

58. The Defendants say that the lower fence was eventually replaced by Mr and Mrs Tanner who bought from Mr Webb, but they say that it remains in the same position as the lower fence built by Mr Webb; however, I regard that as an expression of opinion and I do not accept it as evidence of fact. It is likely, and I find as a fact, that the lower fence stands in approximately the same position as the one originally put up by Mr Webb, save for the southern panel which is skewed because of the double post. That is the best that can be said, since the replacement of the fence is likely to have led to some discrepancies with the original line. Accordingly the lower fence cannot be said to be a feature that marks the boundary.

The middle retaining wall and the return

59. I refer to the short section of the middle retaining wall that turns west-east as "the return" of that wall. The Claimants say that it is logical that the return should mark the boundary, because the junction of the middle retaining wall and the different stone-work of the dwarf wall is at the end of the western end of the return.

60. It is not known when the middle retaining wall or the dwarf wall were built. They form part of the garden architecture of both properties, whose gardens slope so steeply that they cannot be cultivated without terracing. It is likely, and therefore I find as a fact, that they were built later than the date at which Mr Webb complied with his fencing covenant. That being the case, the return cannot have marked the boundary; it would have had to be constructed to the south of the fence that marked the boundary.

61. Accordingly the return of the middle retaining wall cannot be regarded as part of the boundary and cannot give me any information as to the intentions of those who created the boundary.

The privet hedge

62. It is not known when the privet hedge was planted. The Claimants' line runs along the centre of the hedge whereas the Defendants' line runs along its northern edge (paragraph 34(3) of their Defence).
63. A photograph taken by the Defendants 1983 appears to show wires extending from the lower fence – not the current one, at that date, but the one put up by Mr Webb – into the privet hedge and possibly a post sticking up from the middle of the privet hedge. I cannot attach any significance to these features in the absence of information about them.
64. Too little is known about the privet hedge for it to amount to any evidence about the position of the boundary.

The 1980 fence and the top of the garden

65. The very steep section at the top of the garden of number 73 was fenced by Mr Murdoch in 1980. A photograph of his fence when it was new shows his concrete posts, and the unmown grass to the north of the 1980 fence. Also to the north one can see in the picture two thin dark posts. It is not possible to see whether they are wooden or metal. They appear to be fence posts and Mr Murdoch says they are the posts of the fence installed by Mr Webb to mark the boundary when he bought number 75; I refer to this section of fencing, on the steepest part of the garden, as "Mr Webb's fence". Mr Murdoch says that he positioned his fence about the length of a wellington boot to the south of Mr Webb's fence.
66. The Defendants say that when they put up this fence they did not wish to get into further dispute with Mr Webb – there was already dispute about the shed and the plinths between the houses. So they built their fence on their side of Mr Webb's fence.
67. Mr Murdoch's evidence is unchallenged and indeed there is no-one who could challenge it. I find as a fact that Mr Webb's fence, put up in compliance with his covenant to fence the boundary, lay about a foot to the north of the 1980 fence. I accept Mr Murdoch's evidence that the 1980 fence was not intended to lie on the boundary and did not do so.
68. In that 1980 photograph there can be seen a cluster of posts to the right (north) of the westernmost post of the 1980 fence. A couple of those posts are darker and one is lighter. One or more of them – the photograph is not clear – leans away from the post marking the end of the 1980 fence and is closer to that post at ground level.

69. Today, about 20 cm to the north of the post at the Claimants' point B is an aluminium bar. The expert witnesses say it is a pole not a post because it appears not to be fixed in the ground; this was not apparent until recently when the vegetation was cleared around its base. Mr Amesbury says, and I accept, that he cleared vegetation away from the fence but did not do anything to the aluminium bar. It is the Defendants' case that the aluminium bar is the northernmost post of Mr Webb's fence and that it marks the western end of the disputed boundary.

70. Neither expert can date the bar – but neither claims to be qualified to do so. It is not in dispute that it is not particularly corroded, and I note that aluminium does not corrode very much. Mr Murdoch did not recall seeing it when he put the 1980 fence up.

71. I find as a fact that even if the aluminium bar was present in 1960 it is unlikely, today, to be in the same position that it occupied at that date. There is insufficient evidence to make any finding that it is an original feature; but if it is it is likely to have moved. I say that because it is not fixed in the ground, and because it is attached to the concrete post at point B by barbed wire. The Defendants say they did not attach it, and that they never used barbed wire. It may have been so fixed by the farmer, whose land lies to the west and whose interest is in having a stockproof fence on that boundary. So even if the aluminium bar is an original boundary feature it has certainly been tampered with and is unlikely to remain in the place it occupied in 1960. If it happens today to be at or near the western end of the boundary that is a coincidence; it cannot be regarded as a feature whose position enables that end point to be precisely determined..

72. I have said very little about the evidence given by Mr Amesbury for the Claimants. They bought their property in 2010 and have no knowledge of it at any earlier date. Mr Amesbury's evidence and the Claimants' Statement of Case includes many expressions of opinion and statements of what would be the logical or most likely position for the boundary. Those views are expressions of opinion and I cannot accept them as evidence of fact. The Claimants' views and inferences from the physical situation cannot assist me in determining the intentions of those who created the boundary.

(iv) The expert evidence

Mr Vaughan's evidence for the Claimants

73. Mr Vaughan drew the plan that accompanies the Claimants' application to HM Land Registry for a determined boundary, and that stands as their contended boundary in the

county court proceedings – I refer to it as the Claimants' DB plan. He was instructed in 2012 after Mr and Mrs Murdoch made their determined boundary application, and it was in 2012 that he carried out the survey that forms the basis of his report in these proceedings written in 2017.

74. When Mr Vaughan drew what is now the Claimants' DB plan, he was acting on the instructions of Mr Amesbury, who says that his instructions were to draw a boundary from the westernmost post of the 1980 fence to a point halfway between the two bridges.

75. Mr Vaughan does not now recall drawing that plan. Moreover, he is now instructed as an expert with a duty to assist the court, and so takes a different approach; he does not support the Claimants' plan as a depiction of the boundary.

76. Mr Vaughan's report, dated 6 November 2017 with a short addendum dated 15 February 2018, begins by describing the physical features on the ground. He comments on the Ordnance Survey map in use in 1960; he describes and comments upon the 1960 conveyances of numbers 73 and 75, and on the registered title plans of the properties, while noting that their significance is a matter of law. He describes historical photographs shown to him. He describes three "processes which can be used when attempting to reconstruct a legal boundary" (his paragraph 5.1.7), namely an overlay exercise, comparing the conveyance plan with features on the ground; a dimensional analysis using the measurements in a deed; and an "anecdotal analysis" using a "best fit" method (which I explain below) "by reference to surviving anecdotal features and the presumption of continuity". Obviously none of these methods coincides with the legal test which I have described above (paragraphs 26 to 30).

77. He rejects the overlay exercise as pointless in this case because of the likely inaccuracy of the deed plan (his paragraph 5.2.10).

78. The basis of dimensional analysis is said to be that "where dimensions on title deeds produce good correlation with physical features, the dimension can be taken as a corroboration of the physical feature used in the measurement" (his paragraph 5.3.1), whereas "where dimensions on title deeds produce poor correlation with physical features it remains my opinion that nothing definitive has been established one way or the other".

79. In this case there is indeed a very poor correlation between physical features on the ground (none except perhaps the bridges can be said to have been in existence in

1960) and the very small-scale plan on the number 73 conveyance, and accordingly I have not found this method to be of any assistance.

80. Mr Vaughan records the outcome of his dimensional analysis on his plan D3, which places the western end of the boundary two inches to the north of the fence post at B and the eastern end at his Pin 1, which he has placed in the ground; it is between the two bridges and is very close to point A.

81. Mr Vaughan regards it as crucial to take measurements on the ground with a tape measure as a 1960s surveyor would have done, in the absence of computer and GPS technology at that date. He notes that the dimensions on the 1960 conveyances are likely to have included a margin of error. He therefore regards as a virtue the inaccuracy of the tape measure compared with modern methods using computer analysis and GPS. That seems to me to be a misconception; I have made a finding that the parties to the number 73 conveyance intended the boundaries to be as close as possible to the measurements given on the plan, and therefore to use a deliberately inaccurate method is not helpful.

82. Mr Vaughan's report does not specify the points from which he measured at the southern ends of the western and eastern boundaries. He explained in cross-examination that he used a point L1 which is a notional point at the south-west corner of number 73; his dimensional analysis of course preceded his agreement with Mr Calvert as to the south-west post to be used (paragraph 42 above). Accordingly the line on plan D3 does not depict the boundary and is of no further assistance to me.

83. In any event Mr Vaughan prefers the line generated on his plan D4, using his preferred method: the "anecdotal evidence analysis", using features such as walls and fences to generate a line of "best fit", also known as a "line of least squares".

84. The anecdotal evidence analysis takes a line between a number of features that, in the surveyor's view, mark the boundary; a computer programme is used to generate a line such that the sum of the squares of the displacement of those features from the line is as small a number as possible. The squares are used because displacements on one side of the line are positive and on the other are negative.

85. The premise of this method, as Mr Vaughan explains it, is the "presumption of continuity" on the basis that "each time a wall or fence is renewed, a legitimate attempt is made to retain the previous alignment and position". It is that presumption that enables current physical features to be used.

86. I pause to note that this is problematic for two reasons. First, legitimate attempts are often inaccurate and therefore this method cannot assist when what is in dispute is a matter of inches. Second, in many cases, there is evidence that a legitimate attempt was not made; in this case, for example, it is the Defendants' evidence that Mr Webb deliberately skewed the fence panel between the houses.
87. Mr Vaughan's line is drawn using 14 features. They are not listed in his report but are revealed in his answers to written questions addressed to him by the Defendants. They include the fence post sockets visible between the houses, the sockets of angle irons seen in 2012 and since removed (see my paragraph 51), the end of a panel of Mr Webb's fence, posts in the 1980 fence and the concrete post at point B but not the buildings themselves nor the shed or plinths between the houses. He has not used the aluminium bar (which he mentions at his 3.4.7 but does not regard as being particularly old because it shows little sign of corrosion).
88. The line generated by this exercise is seen on Mr Vaughan's plan D4, as revised by him later once vegetation was cleared so that it was possible for him to measure from the base of the post at point B. Like the line on plan D3, the line on plan D4 differs from the Claimants' DB plan in that the western end of the boundary is placed very slightly to the north of the fence post at the Claimants' point B. Mr Vaughan says in his report (5.5.4) that the line on plan D3 falls a maximum of 15mm north of the line on plan D4.
89. I am not assisted by the line on plan D4 nor by the methodology used to generate it. The line is drawn using a mixture of old and new features, but gives no priority to older features. It assumes what it sets out to prove namely that certain features mark or are near the boundary. It is not explained, for example, why Mr Vaughan uses the fence post at the Claimants' point B rather than the aluminium bar to the north which the Defendants' contend for. Plan D4 is drawn without regard to the law, whereas I must determine the boundary in accordance with the law.
90. Accordingly Mr Vaughan's statement at his paragraph 5.4.1 that "the examination of anecdotal evidence offers by far the most precise methodology for the determination of a legal boundary" is incorrect, excellent as this method would no doubt have been if he had been instructed by both pairs of neighbours to produce a boundary that was as close as possible to some agreed features.
91. I have to say a little more about Mr Vaughan's views about the fence post at the Claimants' point B, being the corner post of the 1980 fence put up by Mr Murdoch.

Both Mr Vaughan's plans D3 and D4 place the end of the boundary just a little to the north of that post. The text of his report however refers at paragraph 5.4.17 to "the presumption that the corner post was set at a location determined by the true position of the legal boundary", which he says was established by reference to the leaning timber post seen in the crucial 1980 photograph. That view is contradicted by Mr Murdoch's evidence, which I accept, that he put the post in a position that did not mark the boundary. Mr Vaughan's view is generated by a presumption which is not known to the law, and without knowledge of the facts; insofar as Mr Vaughan's report, rather than his plans and his evidence at the hearing, supports the Claimants' case that the post at point B marks the boundary, I reject it.

92. That concludes my summary of Mr Vaughan's report.

Mr Calvert's report for the Defendants

93. Mr Calvert's report is dated July 2017. He begins (his paragraph 6) by making it clear that he is competent only to report on physical features and the physical boundary, not the legal one. He describes the documents he has read, the properties, the conveyancing documents, the physical features along the boundary, and the Ordnance Survey and Land Registry plans. He explains that he has made his measurements with the assistance of the panoply of modern, GPS-based, computer assisted technology. Like Mr Vaughan he mentions the aluminium bar and says that while it is "clearly of some antiquity" it is not possible to say how old it is.

94. Mr Calvert then (his paragraph 117) observes that the Defendants' boundary plan was drawn by him when he was not yet appointed as an expert witness. He therefore now comments on it in that capacity – his position is therefore similar to that of Mr Vaughan. He supports the Defendants' plan. He says that the rear boundary of number 73, measured to the southern corner of the aluminium bar, is 36 feet (his paragraph 123) and that the Defendants' point Y at the front is 50 feet away from the south-east corner of the post at their point X (see my paragraphs 100 and following, below) and 0.094m from the south-east corner of the brick gate-post of number 75.

95. Mr Calvert goes on to analyse the Claimants' line and to express disagreement with their choice of point A, because it is on the eastern side of the ditch, which he regards as outside the property; and because it is claimed that point A lies between the two bridges, yet the bridges have curved edges so that it is difficult to say where a half-way point lies). He criticises the Claimants' point B because, as he measures it, it

produces a rear measurement of 15 feet 7 inches for the western boundary of number 73.

The expert witnesses' later work

96. In the weeks before the hearing the two expert witnesses made a joint inspection of the land. They generated a further joint report showing what they agreed and disagreed about. This report relates in part to matters of measurement and observation; it records extensive discussion about a joint "best fit analysis" which they undertook, using some features which Mr Calvert preferred, and which he thought might be of interest but he does not say that the line thus generated is the line of the boundary. Indeed, Mr Calvert says that this method "acts like a butter knife spreading agreements and disagreements across the calculation as butter on toast and leaving no lumps". I am inclined to agree, at least where the method purports to be used to reveal a legal boundary. I do not regard the joint "best fit" plan as taking matters any further forward because of the inadequacies of this method described above.

97. What does emerge usefully from the experts' joint work is one point of agreement and one point of disagreement.

98. First, it will be recalled that I observed above (paragraph 42) that the experts agree that the southern end of the western boundary of number 73 is to be measured from the south-west corner of the westernmost post of the line of concrete posts just referred to. This is the Defendants' point W. Specifically it is to be measured from the south-west corner of that post. I accept that agreement and I make use of it below in my declaration of the position of the disputed boundary.

99. Second, both experts also measured the eastern boundary. They agree that the southern boundary is marked by the line of posts set in the path beside number 73 (my paragraph 41 above), and they used string to take a straight line along the posts at the eastern end. They agree that the easternmost post is 66mm out of alignment with the three or four posts to its west. Mr Vaughan says it has moved, because of the tree next to it, and so he has extrapolated a line from the rest of the posts.

100. Accordingly Mr Vaughan measures the western boundary of number 73 (which the number 73 conveyance said was to be "50 feet or thereabouts") from the extrapolated line, whereas Mr Calvert measures it from the post 66mm to the north.

101. Moreover, the two experts have discussed whether their line should run to the east or the west of the ditch. They disagree; and it is no part of my task to determine

where that boundary lies. There is no such application to HM Land Registry, and if there were the highway authority would have to be a party.

102. Accordingly Mr Vaughan has taken two measurements, one on each side of the ditch; one ends at Pin 1, referred to in paragraph 80 above, and the other at Pin 2 which is on the western side of the ditch, although he takes the view that the correct line is on the east bank of the stream. Both pins are about (but not exactly) halfway between the two bridges and about (but not exactly) halfway between the two pairs of gateposts.

103. Mr Calvert, by contrast, says the westernmost post of the southern boundary has not moved and was originally out of alignment, so that it should be used as the extremity of this boundary; he has measured 50 feet due north from that post and reached a point 0.094m south of one of the corners of the brick gate-post of number 75. This accords with his view that the eastern boundary of number 73 lies on the western side of the stream.

104. I am persuaded by Mr Vaughan's opinion on this point. It seems to me improbable that the post, which I have found to be an original boundary feature, was not placed in a straight line with its fellows. Why it has moved is not known and there is no need for me to make a finding of fact on that point, although I note that the tree is a possible cause as is the nearby telegraph pole. It also seems to me more likely that the boundary lay roughly halfway between the two bridges, which is achieved by Mr Vaughan's measurement and not by Mr Calvert's, and roughly halfway between the two gate-posts, than that it was closer to number 75's as Mr Calvert's measurement has it. The gateposts were probably not in existence at the date of the number 73 conveyance, but it is more likely than not that Mr Webb and his neighbour would have built their gateposts more or less equidistant from the boundary.

105. Accordingly in making my declaration of the position of the boundary that is in dispute I have used the line extrapolated from the other fence posts along the southern boundary to number 73, rather than the final fence post 66mm north of that line. I use a line on the western side of the ditch because it is not known how far east the parties' ownership extends but it is not in dispute that number 73's land extends at least as far east as the western side of the ditch.

(vi) Conclusions: my declaration, and my direction to the registrar

106. I revert to the test laid down by the Court of Appeal in *Pennock v Hodgson* [2010] EWCA Civ 873, and I consider what the reasonable lay person, looking at the

land with the plan in their hand on 29 June 1960 with the plan in his hand, have concluded about the position of the boundary?

107. There was remarkably little to see at that date; probably the fence on the southern boundary of number 73 was present, perhaps the concrete bridges were present, and probably there was nothing else. There were no boundary features along the line of the disputed boundary, and so the reasonable lay person had nothing to provide a clue about the boundary except the southern fence and the measurements in the conveyance.

108. First, therefore, he would have concluded that at its western end the boundary lay 36 feet – or as near to 36 feet as could be achieved - to the north of the then existing fence on the south boundary of number 73. That was not at point B, which is not 36 feet from the southern fence and is known to be a modern feature that was not intended to be on the boundary line.

109. I have said that I accept the expert witnesses' view that that 36 feet is to be measured from the south-western corner of the westernmost post of that fence, which remains in place today.

110. Accordingly I declare that at its western end the disputed boundary runs from a point (marked "Point Z" on the plan attached, whose origin I explain at paragraph 114 below) 36 feet from the south-western corner of the westernmost post of the fence on the southern boundary of number 73

111. Second, the layman with the plan in his hand on 29 June 1960 would have concluded that at its eastern end the boundary was 50 feet to the north of the line now marked by the fence on the south boundary of number 73. I have found that the fence was not there at that date, but the fence is the best evidence we have of the line where the parties to the conveyance thought that boundary lay. I have found that the easternmost post of that fence was in line with the other posts when it was put up. The reasonable person would have expected, from his inspection, that the northern (now disputed) boundary lay between the two bridges, and had he then measured from the line now marked by the fence (as extrapolated) he would have found that it did so.

112. Accordingly I declare that the disputed boundary passes through a point (marked "Point 50ft from Judge's Point X" on the plan) 50 feet away from a point on the extrapolated line of the southern fence, that point being 66mm south of the south-east corner of the easternmost fence post, and the 50 feet being measured along the top of the western bank of the ditch

113. The extrapolated line I have used is the one drawn on Mr Vaughan's plans, because that is the best that can be achieved in the circumstances.

114. That is as precise as can be achieved in words. The parties have signed a plan to accompany the county court declaration, to indicate their agreement that the line marked on that plan is the boundary that I have declared.

115. I emphasise that I make no decision as to where the eastern boundary of number 73 lies, nor therefore the eastern terminus of the disputed boundary. If I did so my decision would not bind the highway authority; but in any event I have heard no evidence as to where it lies and there is no application for me to do so. It remains a general boundary on the title plan. As it happens it is possible to say where the western end of the disputed boundary is and I have done so, but at its eastern end I can give only a point through which the boundary passes.

116. That is my declaration in the county court action. It will be noted that the line does not coincide with that contended for by either party. Whether that line intersects the shed and the plinths between the houses I do not know; those items are not original features and it will be for the parties to decide what to do about them.

117. Inevitably my direction to the registrar in the reference to the LRD is to cancel the determined boundary application because the Claimants' DB does not depict the correct line.

118. That is all I need to say about the determined boundary. Because I have made a declaration in the county court there is no need for me to consider whether the LRD has jurisdiction to make any further direction to the registrar about a determined boundary; if either party wants a determined boundary in accordance with section 60 of the LRA 2002 in the future they will be able to make an application for the boundary to be determined by the registrar in accordance with the declaration I make, and any objection to that line will be groundless.

119. This decision was sent out to the parties in draft on 6 April 2018 so that counsel could comment on typographical matters in the usual way, and also for the parties to agree the form of the order in the County Court. The latter proved impossible and I heard the parties about the form of the order on 9 July 2018, and it after that hearing the parties provided the plan referred to in paragraph 114 above.

120. I have given the parties permission to make written submissions on costs.

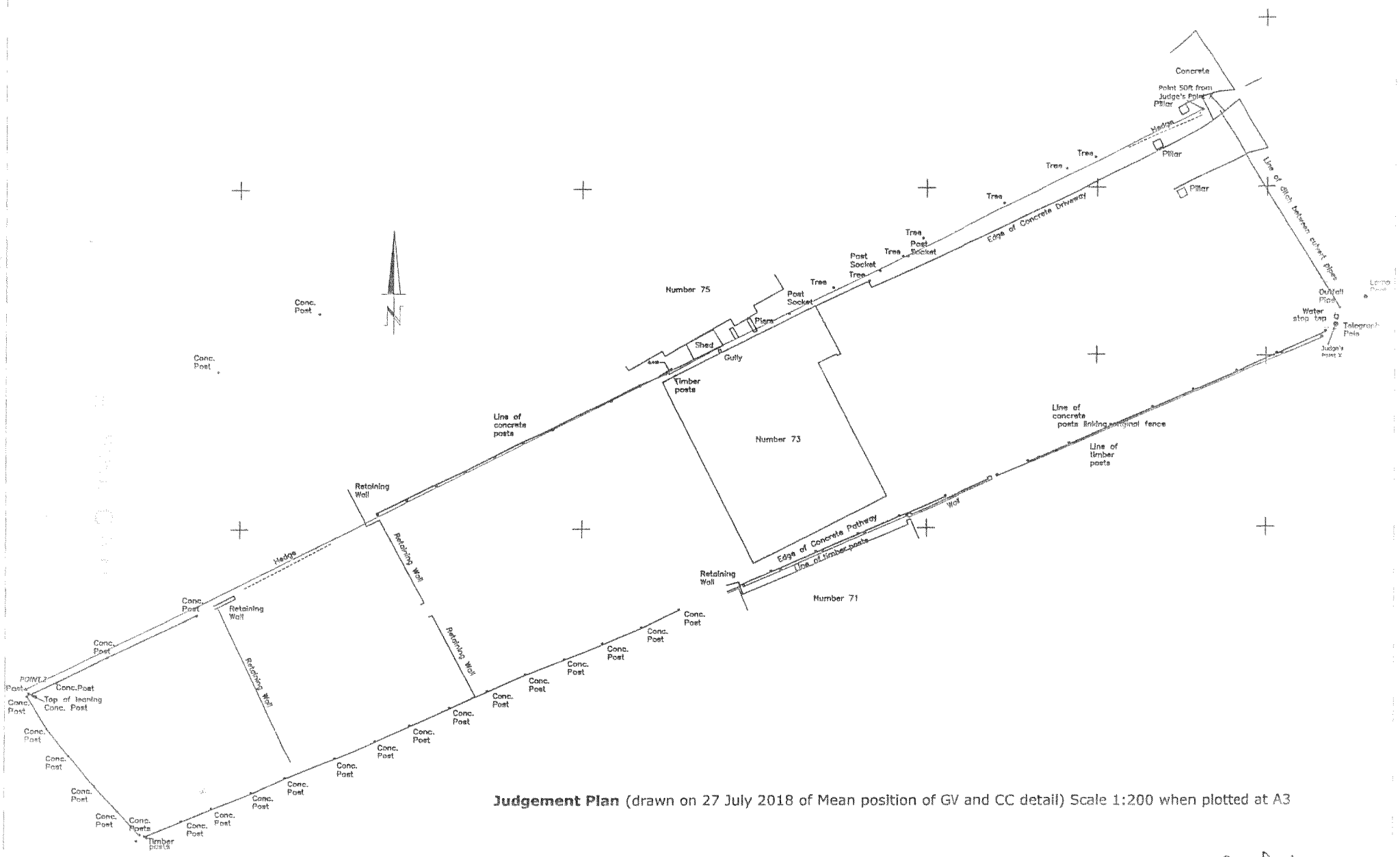
DATED THIS 29 August 2018

Elizabeth Cooke

By order of the Tribunal

And

In the Central London County Court



Judgement Plan (drawn on 27 July 2018 of Mean position of GV and CC detail) Scale 1:200 when plotted at A3