[2019] UKFTT 0162 (PC)

PROPERTY CHAMBER
FIRST–TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO. 2017/0832

BETWEEN

(1) ADRIAN PAUL WOODHEAD
(2) JENNIFER AIMEE WOODHEAD

Applicants

and

SHAUN CHARLES WITT

Respondent

Property addresses: 82 Heatherstone Avenue, Dibden Purlieu, Southampton SO45 4JZ
Title number: HP21988
84 Heatherstone Avenue, Dibden Purlieu, Southampton SO45 4JZ
Title number: HP21377

Before: Judge Daniel Gatty

Sitting at: 10 Alfred Place, London WC1
On: 14 December 2018 and 18 January 2019

ORDER

IT IS ORDERED THAT:

1. The Chief Land Registrar is directed to give effect to the Applicants' application dated 7 March 2017 for a determined boundary as if the Respondent's objection thereto had not been made.

2. Any application for costs should be made in writing accompanied by a schedule of costs and evidence of the disbursements claimed and served on the Tribunal and the other party by 4.30 pm on 12 March 2019.

3. Any response to an application for costs should be served on the Tribunal and the other party by 4.30 pm on 2 April 2019.

4. Any reply to a response to an application for costs should be served on the Tribunal and the other party by 4.30 pm on 16 April 2019.

JUDGE DANIEL GATTY

Dated this 12th day of February 2019

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On: 14 December 2018 and 18 January 2019

Applicant Representation:	Tahina Akther of counsel, instructed by Scott Bailey, Solicitors
Respondent Representation:	Simon Williams of counsel instructed by Clive Sutton, Solicitors

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DECISION

Cases referred to:
Lowe v William Davis Ltd [2018] 4 WLR 113
Pennock v Hodgson [2010] EWCA Civ 873
Ali v Lane [2006] EWCA Civ 1532
Neilson v Poole (1969) 20 P & CR 909

1. This case concerns an application dated 7 March 2017 to HM Land Registry made by the Applicants, Mr Adrian Paul Woodhead and Mrs Jennifer Aimee Woodhead, for a determined boundary between numbers 82 Heatherstone Avenue, Dibden Purlieu, Southampton SO45 4JZ, title number HP21988 ("No. 82") and 84 Heatherstone Avenue, Dibden Purlieu, Southampton SO45 4JZ, title number HP21377 ("No. 84"). Mr and Mrs Woodhead own No. 82. No. 84 is owned by the Respondent, Mr Shaun Charles Witt, who opposes the application. They are semi-detached houses with No. 84 on the left and No. 82 on the right when looking at them from the highway.

2. The plan attached to the application, prepared by Kim Moreton MRICS, shows a straight line running between points A at the front of the properties and point D at their rears, passing through the middle of the shared chimney breast of the two properties ("the Chimney Breast") and points B and C which are shown on the front and rear walls of the building. The application asks for the boundary to be determined as the straight line A-B-C-D.

3. It is common ground that the boundary does pass through the middle of the chimney breast and Mr Witt and his expert, Mr Carl Calvert FRICS, do not take any position on the location of point A which is at the end of the front wall of No. 84. Indeed Mr Calvert did not map the boundary line between the front gardens of the properties because that has not been disputed on the ground. The issue between the parties is as to the position of the line running from the middle of the Chimney Breast to the rear of the properties, i.e. whether points C and D on the application plan are correctly shown. It has to be observed that the difference between the parties as to the location of that line are slight and it is in many ways regrettable that this dispute reached a final hearing before the Tribunal.

4. The hearing was listed for one day on 14 December 2018. Although the evidence was completed on that day, closing submissions were not reached and instead were heard on

18 January 2019. I made a site visit on 13 December 2018. At the hearing, the Woodheads were represented by Ms Tahina Akther of counsel and Mr Witt by Mr Simon Williams of counsel. I am grateful to them both for their assistance.

The factual background

5. The properties are part of an estate built by George Wimpey & Co. Ltd in the early 1960s. The bundle includes a copy of the transfer dated 22 February 1961 of No. 82 from George Wimpey & Co. Ltd to Anthony Moore Sheath, the first owner of that property. The plan to that transfer shows the boundary between No. 82 and No. 84 running in a straight line from front to back through what appears to be the middle of the two adjoining buildings. In fact, it was not the 1961 transfer of No. 82 ("the 1961 Transfer") which established the boundary between Nos. 82 and 84 because George Wimpey & Co. Ltd sold No. 84 first, on 16 December 1960 to Frank and Irene Sayers. It would have been the 1960 transfer of No. 84 ("the 1960 Transfer") which established the legal boundary between No. 82 and No. 84 by separating No. 84 from what was then George Wimpey & Co. Ltd's retained land, including No. 82.

6. I was not provided with a copy of the 1960 Transfer but will proceed on the basis that it was very likely to have been materially in the same terms as the 1961 Transfer and also to have included a transfer plan showing the boundary between No. 82 and No. 84 running in a straight line from front to back through what appears to be the middle of the two adjoining buildings. Neither party demurred at the hearing when I proposed dealing with the absence of a copy of the 1960 Transfer in that way. I therefore find as a fact that the 1960 Transfer was in materially the same terms as the 1961 Transfer and that its transfer plan was a mirror of the transfer plan to the 1961 Transfer.

7. By cl. 1 the 1961 Transfer describes the property being sold as "the land shown and coloured red and Numbered 129 on the accompanying plan being part of the land comprised in the title about referred to Together with the dwelling house and premises erected thereon or on some part thereof and known as Forest Firs ([illegible] No. 129) Heatherstone Avenue Hythe in the County of Hants". I find on the balance of probabilities that cl. 1 of the 1960 Transfer would have been in the same terms save as to the plot number which would have been 130.

8. The only other provision in the 1961 Transfer which is potentially material to the location of the boundary is the buyer's covenant at para. 3 of the schedule "At all times hereafter to maintain and keep in repair the fence on the sides marked "T" within the boundary on the same plan". On the transfer plan, all the properties are shown with T marks indicating responsibility for the right-hand fence in the rear garden (right-hand from the point of view of someone looking towards the rear). Accordingly it is No. 84 that is responsible for maintenance of the fence along the disputed boundary as the 1960 Transfer had, I find, a covenant in the same terms.

9. On 22 April 1996 Mr Woodhead and his then wife (who sadly died in December 1997) bought No. 82. At that time it had a rear conservatory which Mr Woodhead says was made up of a brick wall on the left hand side (nearest No. 84) and a wooden frame on the right hand side and on the rear (i.e. facing into the rear garden). Mr Woodhead estimates that this dated from the 1970s. In mid-1998 Mr Woodhead had the conservatory replaced with a brick built extension. His evidence was that the new extension incorporated the brick wall that he says was already a flank wall of the conservatory; his evidence on that was challenged on behalf of Mr Witt.

10. Mr Witt purchased No. 84 on 9 February 1996. At that date it had already been extended and so had the layout that it does now. The right hand side flank wall of the rear extension to No. 84 is adjacent to the left hand side flank wall of the rear extension to No. 82. One of the points of controversy was exactly where the two extensions met. A vertical mortar joint is visible which Mr Witt maintains is the point of meeting and which Mr and Mrs Woodhead maintain is probably the point where the rear wall of the extension built in 1998 meets what they maintain was an existing flank wall of the conservatory made of brick. The mortar joint is about 7 cm on the No. 82 side of the line A-B-C-D on the application plan according to Mr Moreton, although he did not record its exact location.

11. It is common ground that the original boundary fence between the rear gardens of No. 82, probably erected by the developer, was a chain link fence running between concrete posts. The rear most of those posts ("the Back Post") is still standing and Mr Moreton's point D is located in the middle of it. Mr Calvert also located the line of the boundary with reference to the Back Post but his plan puts the boundary along its No. 82 facing flank.

12. Until 2011 the chain link fence was still in place between the back of the gardens and a cherry tree about three-fifths of the way between the rear of the gardens and the extensions. Mr Witt's evidence was that there was a straining wire running through the middle of the concrete posts and the wire mesh was on the No. 82 side of the posts. He was not seriously challenged about that. Between the cherry tree and the extensions (or rather No. 84's extension and No. 82's conservatory initially) was a wooden fence. The cherry tree fell down and has been removed but a mature ash tree now stands very close it its location.

13. As the date of my site view, and for some time before, the Back Post was the only one standing. Some concrete was visible further up the garden which Mr Witt said was the base of other posts, and which he said he followed when erecting the present fence except at the location of the tree. However, neither surveyor mapped the location of the other concrete and so I am unable to base any conclusion upon it.

14. The parties' dispute seems to have begun properly in about 2014. Before then they were on neighbourly terms. In 2014 Mr Witt erected part of a fence between the rear gardens which the Woodheads considered encroached into their garden. The fence was not completed then but was completed in 2015. Mr Witt instructed Clive Sutton of his present solicitors early in 2015. Mr Sutton wrote a letter to Mr and Mrs Woodhead on 10 February 2015 and the parties have been at loggerheads ever since (for the avoidance of doubt, I am not attributing the blame for that to Mr Sutton's letter - I am not concerned with blame).

15. The fence erected, or rather finished, in or after 2015 is visibly not completely straight but follows a line more or less along the boundary to within a matter of inches. The hearing was about the inches.

The Issues

16. As the argument between the parties developed, it became apparent that there are two issues:

    (1) Where the boundary line is as a matter of the construction of the 1960 Transfer;

    (2) If the boundary is along the line A-B-C-D as a matter of construction of the 1960 Transfer, whether a boundary agreement has relocated it a little further into what

would initially have been part of No. 82, to the location of the present fence, as Mr Williams contended on behalf of Mr Witt.

The law

17. The law was not much, or at all, in dispute between the parties.

18. By default registered title plans show general boundaries, i.e. the approximate location of legal boundaries (s. 60(1),(2) of the Land Registration Act 2002).

19. It is possible to apply for the determination of the exact line of a boundary pursuant to s. 60(3) of the 2002 Act and Part 10 of the Land Registration Rules 2003. That, of course, is the application made by Mr and Mrs Woodhead.

20. If such an application is to succeed, the applicant must show that the application plan depicts the exact line of the boundary on a plan that complies with the requirements in the relevant Land Registry practice guide. It is not disputed here that if the application plan depicts the correct line, it complies with the relevant Land Registry practice guide.

21. In the light of Morgan J's decision in *Lowe v William Davis Ltd* [2018] 4 WLR 113, it is appropriate for a First-tier Tribunal Judge hearing an application for a determined boundary to make findings as to where the legal boundary is located as part of the exercise of deciding whether it is exactly represented on the application plan. The Tribunal has power to (1) direct the registrar to complete the application (2) direct the registrar to complete the application but with a variation to reflect the Tribunal's findings as to the location of the boundary line, (3) direct the cancellation of the application, (4) direct the cancellation of the application but make findings as to where the boundary is, to whatever degree of accuracy is possible on the evidence (such findings will give rise to an issue estoppel if they are necessary to the Tribunal's decision to direct cancellation).

22. In identifying the legal boundary, the Tribunal must first determine, if possible, where the original conveyance separating out the parcels of land located it, as a matter of construction of that conveyance. It may then be appropriate on the particular facts to

consider whether the boundary has been relocated since the date of the original conveyance as a result of adverse possession or a boundary agreement, or otherwise.

23. In construing the original conveyance, the court or Tribunal must consider the operative clause, the plan to the conveyance and any other clauses in the conveyance that shed light on the intentions of the parties. One is seeking to ascertain, not the subjective intentions of the parties, but the meaning which the conveyance would be understood to bear by a reasonable observer with knowledge of the factual background information available to the parties at the date of the conveyance. In the now well-known words of Mummery LJ in *Pennock v Hodgson* [2010] EWCA Civ 873, at paragraph 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 that date."

24. It is permissible to have regard to conduct subsequent to the date of the original conveyance but only if it is probative of the intentions of the parties to the original conveyance; se *Ali v Lane* [2006] EWCA Civ 1532.

25. Neighbouring landowners can reach a boundary agreement which fixes the location of a disputed or unclear boundary and binds successors-in-title. See *Neilson v Poole* (1969) 20 P & CR 909. Usually such an agreement will not be treated as disposing of land and so will not need to comply with s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and can be informal in form.

Discussion

<u>The original boundary line</u>

26. It is apparent from the 1961 Transfer, and hence would have been apparent from the 1960 Transfer, that the original boundary between No. 82 and No. 84 was intended to be a straight line from the front to the back of the plots running through the party wall between the houses. There was no dispute about that. What the parties disagreed about

was whether the line drawn between points C and D on the application plan was along that line.

27. It is possible to see into the rear garden of No. 82 from the carriageway because of the locations of windows in the house. That allowed Mr Moreton, the Woodheads' expert, to plot the line A-B-C-D by, in effect, taking a line from the end of the front boundary wall of No. 84 to the middle of the Back Post via the middle of the chimney breast between the houses. He said in cross-examination that he took a line from the measured centre of the chimney breast parallel to the internal face of the party wall within the original part of No. 82 and extended it in CAD to find that it coincided with the centre of the Back Post (point D) and the end of the front wall of No. 84 (point A). His line, therefore, was based on three datum points although his report notes that he recorded a total of 184 points when surveying the site.

28. Mr Calvert, the Defendant's expert, took a different approach. He did not measure from the front of the properties so he had two principle datum points. One of them was the Back Post where, as noted above, he measured from the edge facing No. 82. The other was also the middle of the chimney breast.

29. The Back Post is about 8 cm wide according to Mr Calvert and so the difference between Mr Calvert's end point and point D is about 4 cm. If both surveyors were measuring from the same point within the chimney breast, the difference between their two lines at the point where they met the rear walls of the No. 82 extension would be less than about 4 cm, as a matter of geometry. It was apparent, however, that the difference between point C and the point where Mr Calvert considers the boundary meets the rear wall of the No. 82 extension is rather more than 4 cm. Mr Moreton places the mortar joint about 7 cm within No. 82. Mr Calvert's latest report places it 12 cm within No. 84 (and hence puts some of the Woodheads' extension within No. 84). So the difference between the points where they consider the boundary line crosses the rear wall of No. 82's extension is of the order of 19 cm. The exact difference between them is not important. What is important is that it is more, not less, than half the width of the Back

Post. That difference can only be explained by Mr Calvert having plotted the middle of the chimney breast differently from Mr Moreton, either horizontally or vertically.

30. It also has the consequence, as Mr Calvert accepted in questioning by me, that if his depiction of the boundary line were extended to the front of the properties, it would not meet point A, the end of the front wall of No. 84, but would terminate 7 to 9 inches from Point A on the No. 82 side. So if point A is in the right place, and that was not challenged as Mr Calvert had not considered the boundary at the front of the properties, it would follow on Mr Calvert's evidence that the boundary line is stepped, not straight from front to back as shown on the 1961 Transfer plan.

31. Mr Calvert commented when giving the evidence that he had no reason to doubt Mr Moreton's surveying capacity. Nor did I to the extent that it is possible to make an assessment of that capacity from Mr Moreton's reports and oral evidence. It was submitted that I should be circumspect about Mr Moreton's application plan because he was not able to explain why some of the detail shown towards the rear of the garden in his original plan prepared in 2015 was different from the application plan, which is dated 2017 and which is based on the 2015 plan. I reject that submission. I formed the view that Mr Moreton had simply forgotten a visit that he made in 2017 before adapting the original plan into the application plan. Both experts were, in my judgment, doing their best to assist me by giving their honestly held opinion based on the information that they had gathered and the measurements they had made. I do not consider that Mr Moreton's memory failure in that respect throws any light on the reliability of his surveying method.

32. As a general proposition, I consider that Mr Moreton's approach in taking a line between three datum points, points A and D and the middle of the chimney breast, and cross-checking that his line is parallel to the internal face of the party wall within the main part of No. 82 is less vulnerable to error than Mr Calvert's in measuring between only two points and not ascertaining whether his boundary line is parallel with the party wall within the main house.

33. However, Mr Calvert did not only rely on his initial survey measurements (which are accurate to 25 mm rather the 10mm required by determined boundary plans and to which Mr Moreton states his plan is accurate). There are planning drawings available for the

extension to No. 84 which shows it was to have a cavity wall and shows its intended dimension. Mr Calvert has drilled into the side wall of the No. 84 extension and established that there is a cavity after the initial layer of brick. His measurement of the width of the No. 84 extension is to within 2.5 cm of the proposed width shown on the planning drawings. This, in his view, supported his conclusion that the mortar joint was between the outer brick layer of the No. 84 extension and a new brick wall built as part of the No. 82 extension, corroborating his view that the boundary runs through, or rather to the No. 82 side, of the mortar joint. He also took into account the soffits at the rear of the properties.

34. Mr Woodhead's evidence was that the mortar joint was between the existing brick flank wall of the conservatory and the new rear wall, rather than being between the outer walls of the two extensions. He was challenged on that with reference to the planning drawing for the No. 82 extension but was adamant. I do not consider that the planning drawing is of much assistance either way. It shows a brick flank wall for the extension on the No. 84 side but begs the question whether that brick wall already existed as part of the conservatory.

35. I did not form the view that any of the witnesses were giving dishonest evidence. They were all doing their best to assist me with their honest recollections, in my judgment. I would expect Mr Woodhead to be able to remember whether there was already a brick flank wall as part of his conservatory which could be incorporated into his extension and accept his evidence that there was one. Mr Witt was unable to say one way or the other from personal knowledge. It follows from that conclusion that the mortar joint is not necessarily between the outer walls of the two extensions and that the cavity that Mr Calvert drilled into may have been between the flank walls of the two extensions rather than between inner and outer layers of brick in the walls of the No. 84 extension.

36. There is no way to be certain about that without carrying out destructive investigations, since there is no evidence as to how closely either set of builders followed the planning drawings. In any event, I do not find the way in which extensions were built many years after the original conveyance of much assistance in interpreting that conveyance. It is not known whether either set of builders accurately set out the respective extensions with respect to the exact boundary line between the two properties as it was established

in 1960. For the same reason I cannot put much weight on the location of soffits which may well not be original.

37. For those reasons I prefer Mr Moreton's evidence to Mr Calvert's. There remains the question, however, whether Mr Moreton was right to show Point D in the middle of the Back Post. The fencing obligation lay on the owner of No. 84. Should I infer from that obligation that the fence posts were all within No. 84 and the boundary is on the No. 82 facing flank of the Back Post, not in the middle, especially when Mr Witt's evidence which I accept, was that the chain link was fixed to that flank?

38. If this were a case in which the original purchaser was expected to erect the fence, there would be much to be said for assuming that he placed all of the posts on his own land. In the case of a housing development such as this, however, where the fence would have been erected by the developer, there is much less reason to conclude that the fence posts were erected on one side of the boundary. It is more likely, in my judgment, that the developer would have marked out the plot boundaries and then erected the fence posts straddling the boundaries and in line with the party wall of the houses. Mr Moreton's evidence is that a line drawn from the measured centre of the chimney breast parallel to the internal face of the party wall coincides with the middle of the Back Post, which supports that view. Furthermore, if points A and the mid-point of the chimney as plotted by Mr Moreton are on the boundary, as I find that they are, but point D ought to be on the No. 82 face of the Back Post there would be a step in the boundary which is not in accordance with the transfer plan which shows one straight line.

39. While the 1960 Transfer has to be construed with reference to what could have been seen on the ground in December 1960, which probably included the chain link fence with the chain link on the No. 82 side, I do not consider that a reasonable observer would have concluded that the boundary was stepped by half the width of the posts and not straight. I consider that the reasonable observer armed with the 1960 Conveyance would

probably have concluded that the boundary followed the straining wire through the middle of the posts, not the chain link on one face of them.

40. I therefore hold that line A-B-C-D on the application plan is the exact line of the boundary as it was established in 1960.

Boundary agreement

41. Mr Williams invited me, were I to find that line A-B-C-D represented the original boundary, to hold that the boundary between the rear gardens had moved over the years by an informal boundary agreement.

42. Mr Williams put his case in two ways. First he relied on the fencing that was in place when the parties came to their properties in 1996 and that subsequently was erected by Mr Witt. He points to Mr Witt's evidence that when erecting fencing Mr Witt followed the remains of the original fence posts. He points to the absence of any dispute before the cherry tree collapsed in about 2011 requiring fencing to be replaced. He submits that if the pre or post 2011 fencing diverged from the paper boundary line, to what can only be a negligible extent, I can infer an agreement that the fencing represented the boundary.

43. Alternatively, Mr Williams submits that a boundary agreement can be read out of a letter dated 19 February 2016 from the Woodheads' then solicitors, Irwin Mitchell, to Clive Sutton, the material parts of which read:

"Our clients refute your client's version of events regarding the boundary wall between the two properties. Decades ago, two extensions were constructed to the rear of both properties with both extensions continuing the two original lines of brick. One line belonged to no. 82 and one to no. 84. When our client converted the rear conservatory of no. 82 to brick around 1999, it was clear that the wall, which your client is claiming to own, was within their title and an integral part of the conservatory. Three predecessors (two of no. 82 and one of no. 84) in title have confirmed this to be the case, as does our clients' survey report as do the original concrete post markers. Indeed, section 38(1) of the Law of Property Act 1925 provides that in the case of a wall separating two houses, the law presumes (in the absence of contrary evidence) that the boundary line runs through the middle of the wall and that each party own half of the wall subject to easements of user and support in favour of the other adjoining owner.

In essence, we do not propose to waste further costs discussing the location of the relevant boundary until your client provides expert evidence in support of his position.

Our clients wish for your client to finish the fence in the middle of the wall, where the old fence still remains. In May 2014, your client spray painted our clients' patio slabs and explained that this was where the new concrete posts would go, making clear his

intention to move the fence over to our clients' side of the wall whilst also damaging their property in the process.

The Patty Wall etc. Act 1996 ('the Act') is fraught with enforcement difficulties and is an area of law out of which many neighbour disputes arise. As such, our clients do not wish to rely on the Act simply because your client is making unfounded assertions that our clients' historic extension was built into his wall.

In light of this, our clients request that your client completes the fence so that it falls directly in the middle of the wall, where the old fence still remains. Our clients will allow the fence to deviate, as it does on the survey plan, to come around the tree situated on the boundary, but nothing more. On constructing the last part of the fence, our clients also wish for your client to place the concrete posts in his garden, rather than theirs.

Our clients also respectfully request a statement, signed by your client, declaring that there is no issue as to ownership of our clients' extension wall. If your client makes no issue over wall, this should not be a problem, and would give our clients peace of mind.

If your client cannot do this, we are instructed that our clients will proceed to erect their own fence on the correct boundary, recompensing your client reasonably for any damage done to his partially completed fence in the process."

44. I acknowledge that boundary agreements can be reached informally or even inferred from conduct but it is nonetheless necessary for there to be evidence establishing on the balance of probabilities that the owners of the respective plots expressly or impliedly agreed that the boundary was or was to be along a particular line or particular feature. I do not consider that the evidence before me about the location of fencing prior to 2011 allows me to conclude that either these parties or their respective predecessors in title reached any agreement to move the paper boundary to any particular line or to identify the boundary as being along any particular line. The evidence of the line of the fencing which no longer exists is not sufficient for me to reach any firm conclusion about its location. More importantly, there was no particular dispute before about 2011 so there was no reason for the parties to address their mind to the line of boundary and reach an agreement about it - no reason for the parties to consider whether the fencing was exactly along the boundary and reach an express or implied agreement that if it was not, the boundary should henceforth be along the line of the fence.

45. It is conceivable that if the fencing was to one side of the boundary or the other for 12 years before the coming into force of the Land Registration Act 2002 in October 2003 then title to the land encroached upon could have been obtained by adverse possession. That, of course, does not require an agreement - indeed would be incompatible with an agreement. However, quite rightly Mr Williams did not seek to rely on adverse

possession as the evidence neither proves factual possession of any particular area of land nor an intention to possess it dating back to 1991.

46. So, I do not consider that a boundary agreement prior to 2011 is established. It is clear that the parties have not been in agreement about the line of the boundary since then.

47. The letter dated 19 February 2016 does not amount to a boundary agreement, in my judgment. It is part of a negotiation in which the line of boundary far from being agreed was expressly not agreed between the parties. The letter contained a proposal for a line of *fencing* that the Woodheads could live with but falls far short of amounting to an agreement as to where the *boundary* was or should be. If agreement had been reached, over time that line of fencing might have become the boundary line, by a boundary agreement or an application for adverse possession, but it would be stretching the concept of an informal boundary agreement much too far to treat that letter as constituting a boundary agreement. What is more, the response to that letter from Mr Sutton was not to agree to Irwin Mitchell's terms. If Irwin Mitchell's letter were to be capable of amounting to an offer of a boundary agreement, contrary to my view, it was not an offer that was accepted.

48. I therefore find that there has been no boundary agreement reached between these parties or their predecessors-in-title and that the boundary today is along the line that was established in December 1960, namely the line A-B-C-D on the application plan.

49. I should add that it is possible - I cannot reach a conclusion on the evidence - that the footprint of either the extension of No. 84 or the conservatory and subsequent extension of No. 82 marginally crosses that line. If so, the boundary might have shifted as a result of adverse possession for the length of the extension to the outer edge of whichever one it is that crosses line A-B-C-D, if either of them do. However I make no finding about that as I am unable to find on a balance of probabilities that the boundary has been relocated in that way and to what extent.

50. I do not consider that I am prevented from directing that the application be given effect to as between points B and C by the mere possibility that for the length of one extension or the other the boundary may have moved by dint of adverse possession. The Tribunal bases its findings on what has been proved by the evidence before it to be more probable than not, not on mere possibilities. That is not to say, if one party or the other were

determined to prove by evidence derived from destructive investigations that their extension crosses that line, that the party in question ought in my view to be prevented by this decision from making a further application as to the location of the boundary in the area between B and C for the length of the extension. I do not intend by this decision to preclude either party from doing so and, while it is not for me to decide, I would hope that a future court or tribunal would take that into account should the other party seek to raise a res judicata or issue estoppel in response to such an application. However, I fervently hope that no such application will be made. It would achieve nothing at all in the real world and would be a gross waste of the parties' and of public money. It would not, in any event, affect the boundary between the parties' rear gardens, the main subject of this dispute, which is between C and D on the application plan whether or not there has been a minor change in the boundary for some of the distance between points B and C.

Decision

51. For the reasons that I have sought to explain above, I will direct that the Chief Land Registrar gives effect to Mr and Mrs Woodhead's application for a determined boundary along line A-B-C-D on the application plan

52. The usual rule in this jurisdiction is that costs follow the event: the loser pays the winner's costs since referral to the Tribunal. However, that is not the invariable rule. By para. 9.1 (b) of the Practice Directions, Property Chamber, First-Tier Tribunal, Land Registration I can make a different or no order as to costs. Mr Witt has been the loser in these proceedings but I have not yet heard any submissions on costs, which I propose to decide with reference to written submissions. So, if either party wishes to apply for costs they should make a reasoned application in writing, including a schedule of costs within 28 days. Such an application should be served on the other party who will then have 21 days to respond to the application by way of written submissions sent to the Tribunal, copying any submissions to the applying party or parties. Any response to such submissions should be provided to the Tribunal and the other party or parties within 14 days of receipt of the submissions.

JUDGE DANIEL GATTY

Dated: 12th February 2019