

[2019] UKFTT 0585 (PC)

REF/2017/0398
REF/2017/0401

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

Before Tribunal Judge Timothy Cowen
Sitting in Canterbury

BETWEEN

(1) DAVID MARK OWEN &
ALISON JAYNE OWEN

Applicants
in REF/2017/0398

(2) IAN STEWART CRONK &
SUSAN LORRAINE CRONK

Applicants
in REF/2017/0401

- and -

(1) WAVERLEY COURT (FREEHOLD) LIMITED
(2) WAVERLEY COURT (FREEHOLDERS) LIMITED Respondents
(3) GRANVILLE JAMES JOHN &
MARJORIE JOHN

Respondents
in REF/2017/0401

Property Addresses:

REF/2017/0398: 12 Bushby Avenue, Rustington, West Sussex BN16 2BZ
Title Number: WSX158089

REF/2017/0401: 10 Bushby Avenue, Rustington, West Sussex BN16 2BZ
Title Number: WSX63883

SUBSTANTIVE ORDER

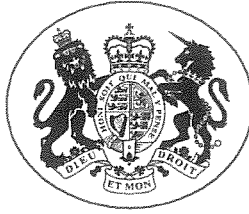
IT IS ORDERED THAT:

1. The Chief Land Registrar is directed to reject both of the Applicants' applications for determined boundaries.
2. The Respondents shall file at the Tribunal and serve on the Applicants by 4 pm on Friday 20 September 2019 a schedule of the costs they have incurred.
3. If the Applicants wish to make any submissions in relation to what costs order should be made and in what amount, then they should file at the Tribunal and serve on the other party, any such submissions by 27 September 2019.

Dated this day of 27th day of August 2019

Timothy Cowen

BY ORDER OF THE TRIBUNAL



[2019] UKFTT 0585 (PC)

REF/2017/0398
REF/2017/0401

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

Before Tribunal Judge Timothy Cowen
Sitting in Canterbury

BETWEEN

(1) DAVID MARK OWEN &
ALISON JAYNE OWEN

Applicants
in REF/2017/0398

(2) IAN STEWART CRONK &
SUSAN LORRAINE CRONK

Applicants
in REF/2017/0401

- and -

(1) WAVERLEY COURT (FREEHOLD) LIMITED
(2) WAVERLEY COURT (FREEHOLDERS) LIMITED Respondents
(3) GRANVILLE JAMES JOHN &
MARJORIE JOHN

Respondents
in REF/2017/0401

Property Addresses:

REF/2017/0398: 12 Bushby Avenue, Rustington, West Sussex BN16 2BZ
Title Number: WSX158089

REF/2017/0401: 10 Bushby Avenue, Rustington, West Sussex BN16 2BZ
Title Number: WSX63883

SUBSTANTIVE DECISION

Introduction

1. These references from HM Land Registry (“HMLR”) are both applications under section 60 of the Land Registration Act 2002 to determine the exact line of a boundary.
2. 10 Bushby Avenue (“No. 10”) is owned and occupied by Mr & Mrs Cronk. 12 Bushby Avenue (“No. 12”) is next door and is owned and occupied by Mr & Mrs Owen. They are all the Applicants.
3. On the other side of No. 10 is 8 Bushby Avenue (“No. 8” - registered under title number WSX328387) which is owned and occupied by Mr & Mrs John, who are Respondents to the application made by Mr & Mrs Cronk.
4. Those three properties are detached houses on the same side of the road, all with rear gardens. Running behind the rear gardens is a piece of roadway known as “Land on the South side of 8 Bushby Avenue” (“the Rear Roadway” - registered under title number WSX382842). Waverley Court (Freehold) Limited (“WC Freehold Ltd”) is the registered proprietor of the Rear Roadway and is a Respondent to both applications. At the date of the applications, Mr & Mrs John were the sole directors of WC Freehold Ltd and were authorised by that company to be its representatives in these proceedings.
5. Waverley Court (Freeholders) Limited (“WC Freeholders Ltd”) is the owner of some of the land affected by these applications after the land was transferred to it during the course of these proceedings. It has been added as a Respondent as a result. I am satisfied that WC Freeholders Ltd has been duly notified and that it has elected not to take any part in these proceedings .
6. There is also a very small piece of land in a separate title which is affected by this applications because it is in the vicinity of the point where the southern boundaries of No. 10 and No. 12 meet each other and the Rear Roadway. That small piece of land is registered under title number WSX328715 and is bona vacantia. The Crown has not objected to either of these applications and is not therefore a party to these proceedings.
7. I visited the site before the hearing in the presence of all the parties. All those who were present had the opportunity to point out features upon which they wanted to rely.
8. The legal framework within which I must consider both of these applications is the same and is as follows. Section 60(1) of the Land Registration Act 2002 provides that

the boundary of registered land as shown on the register is a general boundary unless determined under section 60. In other words, the default position for all registered land is that the register does not show the exact line of the boundary (section 60(2)). The rest of section 60 provides for there to be a mechanism to enable the exact line of a boundary to be determined.

9. The mechanism itself is set out in rules 117-122 of the Land Registration Rules 2003.
10. Rule 118 provides for the application to be made to the registrar in form DB and for the form to be accompanied by prescribed material namely:
 - “(a) a plan, or a plan and a verbal description, identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map, and
 - (b) evidence to establish the exact line of the boundary.”
11. There is provision in rule 119 for the application to be served on all interested parties and for any objections to be raised, unless there is agreement and rule 120 provides for how HM Land Registry is to record any completed application on the register.
12. In both cases before me, the Respondents have objected, but this is not a case in which the Respondents offer their own rival version of where the true boundary lies. The Respondents take a very straightforward position: they simply deny that the Applicants have proved that the boundaries in question are in the positions specified in the applications. In essence, the Respondents do no more than to put the Applicants to proof. It is a position which the Respondents are perfectly entitled to take.
13. There is agreement about the boundary between the Applicants in 0398 on the one hand and the Applicants in 0401 on the other hand in the sense that each of them agrees the others’ application. This has an impact on the location of the boundary between No. 10 and No. 12 to the extent that its position to the east/west is agreed between them. It does not, however, mean that the forward or rear position of that boundary is determined by agreement, because the location of that boundary in that direction affects the Respondents, especially to the rear.

14. There are no applications before me to alter the register under Schedule 4 of the Land Registration Act 2002. Nor is there any claim for adverse possession of which I am aware. The task here is simply to decide whether I can determine the disputed boundaries on the evidence available.
15. HM Land Registry is satisfied that the plans in this case satisfy the requirements of the 2013 Rules. I agree. The principle question therefore in both of these applications is whether there is “evidence to establish the exact line of the boundary” and if so whether that evidence shows the boundary to be in the position claimed by the Applicants in each case or in some other position.
16. As a guide to the sort of evidence which might be submitted, paragraph 4.2 of Land Registry Practice Guide 40 “Boundary agreements and determined boundaries” Supplement 4 states as follows: “The evidence lodged to satisfy the registrar that the exact line of the boundary is in the position shown might include plans or provisions within pre-registration deeds, statutory declarations, statements of truth or other signed statements. Where an applicant is relying on an expert’s report, a copy of that report should be lodged...”. I cite this passage as a starting point for the sort of evidence which is useful. It is not an exhaustive list and in any event the Land Registry Practice Guide is not binding on me in any sense. It is also worth pointing out that the plan required under rule 118(a) of the 2003 Rules (see above) is not itself evidence, because it is the basis of the Applicants’ claim. The “plans” referred to as potential evidence are usually historic plans.
17. I should say that the two sets of Applicants have clearly been working together all along. Their applications were made on the same day and their application plans and expert reports are prepared by the same surveyor. There is nothing wrong with that, but it explains why many of the same issues arise in both cases and why it was sensible to hear them together. Nevertheless, they are distinct and separate applications and I will consider each application in turn.

REF/2017/0398 – Boundary of No. 12 (WSX158089) – Mr & Mrs Owen

18. The application was made on 14 July 2016 on the basis of a site plan which identifies the proposed determined boundary around the entirety of No. 12 as being a four-side

shape formed by straight lines drawn between the following points shown on the application plan:

- a) I to H – the front boundary – Length: 45’11”
- b) H to G – the eastern boundary with No. 14 – Length: 139’11”
- c) G to F1 – the rear boundary – Length: 46’6”
- d) F1 back to I – the western boundary with No. 12 – Length: 136’7”

19. The points themselves are defined by the Applicants as follows:

- a) Point F1 : a notional point where the western OS boundary line of No.12 would meet the south western corner of the southern boundary fence of No. 12
- b) Point G: the point where two fences meet at the southern boundary of No. 12 and the north-south dividing boundary between No. 12 and No. 14 and meets the existing physical boundary to the east marked by the existing fence line.
- c) Point H: The meeting point of the north/south boundary line and the east/west boundary line between No. 12 and No. 14 as shown on the OS map
- d) Point I: The meeting point of the north/south boundary line and the east/west boundary line between No. 10 and No. 12 as shown on the OS map

20. In the rest of this decision, I shall use these labels (and later on the ones used in the No. 10 application – REF/2017/0401) to refer to the approximate location of the corners of the plots for convenience and consistency. By doing so, I am not thereby accepting that the precise location of those points as marked on the application accords with the precise location of the legal boundary. They are simply convenient labels to discuss the respective corners of the plots.

21. The primary question (as in the other application) is whether there is sufficient evidence that those points (and the lines formed between them) form the true boundary on the balance of probabilities. The Respondent, WC (Freehold) Ltd says that there is not.

22. The site plan which is also the application plan together with a survey report was prepared by Robert McLean, a land surveyor of Archidata Limited. Mr McLean did not attend to give oral evidence at the Tribunal. The application plan he produced is dated 24 June 2016.
23. Mr McLean's report says that he was engaged to carry out a topographical land survey of No. 10 and No. 12 and "co-ordinate this onto the same Ordnance Survey datum as used in OS extract plans commonly used for conveyancing purposes and to then overlay the survey results over the latest OS extract plan to compare any differences found." He provides evidence of how he measured the precise location of the topographical features existing at the time of his visit in April 2016. For some reason his report was not written until 1 June 2017. In any event, the accuracy of this topographical survey was not challenged by the Respondents and I accept the truth of that part of Mr McLean's evidence. Mr McLean also sets out in his report his observation that there are slight discrepancies between his detailed site survey and the OS maps which are to a 1:1250 scale. I accept that there are such discrepancies, as one would expect.
24. What is not clear is the provenance of the labels "F1", "G", "H" and "I" and the blue "determined boundary line" drawn between those points on the plan prepared by Mr McLean in June 2016. His June 2017 report does not mention these points or the "determined boundary line". The report does say that he was "provided with detail from the title deeds of the Properties together with Land Registry data including information relating to adjoining properties...", but he does not discuss in the report what, if any, use he made of those documents or what, if any, conclusions he drew from them.
25. Another way of putting the same point is this. Mr McLean has marked and measured certain physical features on the land. He has chosen to show only four possible boundary measurements¹. He does not explain in his report why he chose to measure from those points, rather than from any others. The most likely explanation is that the Applicants told him to measure from those points. He does not show alternative ways of measuring the boundary so as to be able to demonstrate that any one possible

¹ there is one other measurement marked on his plan, which is a distance of 12'9" from the brick wall of "The Studio (Warehouse)" to an indeterminate point along the western boundary of No. 12, but he does not refer to or explain this measurement in his report.

boundary line is better or more accurate than any other. For example, the thickness of a wall can make a difference of a few inches; the width of a tree trunk can make a significant difference; and the position of a fence, fence posts and other possible markers can also make important differences overall. Mr Mclean does not explain why he did not even consider the concrete post which is embedded in the sycamore tree, nor did he seem to have measured the distance from that post to any other permanent feature, nor did he mark it on his plan.

26. I find that Mr Mclean's report and plan are reliable as accurate representations of what they show, but they are highly selective with no explanation for the process of selection. The inevitable conclusion is that it is a plan and report produced as a result of Mr McLean having been instructed where to plot the boundary by the Applicants. The plan and report are therefore of limited value in the process of working out where the legal boundary is.

27. Another feature of Mr Mclean's report is its focus on Ordnance survey data. It is important at this point to make some important distinctions:

a) The topographical features plotted to a high degree of accuracy by Mr McLean simply show what physical objects are on the land at the date of his survey. They may be used as pieces of evidence to determine the boundary, but they are not necessarily on the boundary as a matter of law.

b) The lines shown on the OS map are also not the exact line of the boundary. They also show only the physical features which were present on the date when the data for that map was collected. In addition, as correctly observed by Mr McLean, the OS plan is much less accurate than a topographical site survey and usually less up to date. It is also important to keep in mind that the 1:1250 OS map is the basis for the general boundary which is already registered at HM Land Registry and marked on a plan which bears the following words (in common with all modern filed plans of general boundaries): "This plan shows the general position, not the exact line of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground". In other words, the OS plan used by HM Land Registry comes with a prominent warning that it should

not be used for the purposes of working out where the precise boundary lies. So, any evidence based on mapping the OS map line is of very little, if any, value when considering a determined boundary application.

- c) The exact line of the legal boundary is a notional line, which may or may not be represented or marked by physical features currently on the ground. It is ideally derived from the root of the Applicants' original title. Usually this means the definition of the parcel of land in the document which first separated the Applicants' title from neighbouring titles. In the absence of such information, the legal boundary line can sometimes be ascertained from various legal presumptions (such as hedge-and-ditch) and reference can be made to physical features which are known to be or to be in the location of the original boundary structures of features.

28. The gap in Mr McLean's evidence is that the four defined points and the blue "determined boundary line" are not only physical features, but are being represented as points and lines which define the legal boundary. But there is no evidence from Mr McLean as to how he chose those particular points and lines. Of course, Mr McLean is not a lawyer, and it is not up to him to determine the legal boundary, but I raise the issue, because it seems to be his plan which forms the basis of the Applicants' case without sufficient explanation. It was not possible to ask him about this because he did not attend the hearing.
29. As a matter of law, the starting point for determining the boundary is the conveyance which originally defined the plot in question. I have seen a copy of a conveyance dated 30 October 1936 in which Rustington Sea Estates Limited conveyed to Ethel Ellen Brittan the following plot:

ALL THAT piece or parcel of land situate on the south side of Bushby Avenue Rustington in the County of Sussex and having a frontage thereto and a width throughout of forty five feet or thereabouts and a depth therefrom on the west side of one hundred and thirty eight feet or thereabouts on the west side and on the east side one hundred and forty feet or thereabouts as the same is more particularly delineated and coloured pink on the plan drawn hereon..."

30. The plot is therefore defined by its measurements and by reference to the plan drawn on the deed. The plan on the 1936 conveyance has the following seven measurements marked on it (and shown here in comparison with the measurements on the application plan):

	Line	Measurement shown on 1936 Deed	Measurement shown on 2016 application plan	Difference
1	I to H – north (front) boundary	45'0"	45'11"	11"
2	H to G – east boundary	140'0"	139'0"	12"
3	G to F1 – south (rear) boundary	No separate measurement marked on plan, but the deed refers to the "width throughout" as being 45'0".	46'6"	18"
4	F1 to I – west boundary	136'7"	138'0"	17"
5	F1 to eastern edge of Broadmark Lane along the rear of the Bushby Avenue properties	350'0"	No measurement shown	--
6	Frontage of No. 14	75'0"	No measurement shown	--
7	Gap between frontage of No. 12 and frontage of No. 14	6'0"	No measurement shown	--

31. I make the following observations on this data:

- a) It is notable that the application plan and Mr Mclean's report do not address at all the last three of the seven measurements listed which are all shown on the 1936 deed plan. Those measurements may have been of some assistance in plotting the exact line of the boundary for the purposes of the present application.
- b) Of the four boundary lines, the discrepancy between the 1936 deed plan measurements and the 2016 application plan measurements are not large. However, I note that the discrepancy is between 11" and 18". This is a significant difference because, as discussed in more detail below, there was a dispute in 2006 between the Applicants and the then owners of the Rear Roadway when the Applicants removed a fence and a wall along the southern boundary and replaced them with a fence. The dispute concerned an allegation that the new fence was 15" away from where it should have been. This 15" is

within the discrepancy of 11” to 18” shown above. So even if I accept for example that points I and H shown on the application plan are the true corner points of the front boundary, I cannot be satisfied on the balance of probabilities that the rear corners should be 139’0” or 140’0” or 136’7” or 138’0” away from those corners. The points F1 and G happen to coincide with the location of the fence which was in situ in 2016, but I also know that the previous fence and wall combination was removed from that area in 2006 with a dispute over 15”. I also have no clear evidence as to whether the true boundary was marked by the original location of the pre-2006 wall or the pre-2006 fence or some other line.

- c) The rough coincidence between the measurements by Mr Mclean and the measurements shown on the 1936 deed plan should also be considered in the following light. The measurements of the box coloured pink on the 1936 deed plan provide for an area of land which could be placed in any of a number of different possible locations. The 1936 deed plan itself provides for some reference points for how to place the box accurately on the ground (such as the distance across the rear to Broadmark Lane and the distance to and across the frontage of No. 14), but the application plan and Mr Mclean’s report does not address those. For that reason, it would have been useful for Mr Mclean and/or the Applicants to provide some alternative ways of showing where the boundary could be drawn (as part of their evidence) so that I could see what all the options might be and the consequences of those options. Their submissions and evidence could then have been used to explain why I should find that the points and lines shown on their application plan are the true boundary by reference to the alternatives. As the matter stands, however, I am left only to decide whether the boundary should be determined along the line shown on the application plan or not and I have no evidence to help me decide whether any other possible arrangement should be rejected or preferred.
32. The evidence of the Applicants themselves is that they have been occupying No. 12 since 1990, which is when No. 12 was first registered.
33. They claim in their amended statement of case that “there have been no changes to the boundaries to the property since the date of the original conveyance of 30th November

1936.” Taken literally, that statement is uncontroversial as it appears to be saying that the legal boundary has not changed since that date. That would be correct in the absence of any deeds of conveyance or claims of adverse possession or boundary agreements which altered the legal line of the boundary. It may be, however, that the statement is intended to say that there have been no changes to the **location** of the boundary **structures** since 1936. That would be a much more difficult statement to prove and it would also have considerable consequences if true, because it would mean that the line of the boundary is identifiable with the line of the current boundary structures (assuming that the boundary structures in 1936 coincided with the legal boundary at that time).

34. The Respondent has also produced a report dated 18 March 2018 from an expert surveyor, John Witherden, who also did not attend the hearing to give oral evidence. Mr Witherden’s report essentially analyses the application plans against the requirements of HMLR Practice Guidance 40 (see above) and gives the opinion that they are deficient. His particular criticism is that the points of reference are not **permanent** reference points as required by HM Land Registry requirements.

No. 12: the Southern boundary (F1-G)

35. There is a factual dispute between the Applicants and the Respondent about the location of the southern boundary fence of No. 12 (in the area of the line G to F1). This is the most controversial part of the boundary because it is where the Applicants’ land meets the Respondent’s land. The Respondent says that the fence position has changed. The Applicants say that the line of the fence is the same as it was when they moved in on 31 May 1990 and “for many years prior”.
36. The Applicants say that the line of the existing fence continues eastwards along the southern boundaries of “all properties along Bushby Avenue to the east” and that the point where the eastern boundary meets the southern boundary (point G) is demarcated by a 6’ concrete fence post which was in position prior to 1990.
37. The Applicants further claim that the westernmost point of their southern boundary (point F1) is demarcated by a sycamore tree. There is a concrete post embedded in the sycamore tree which the Respondent relies upon. The Applicants assert that this concrete post is of no significance to the boundary.

38. The Applicants' account of the history of the southern boundary is that, in 1990 when they arrived, it was demarcated by a low-level 2' high brick wall with a fence inside the wall. In 2005/2006, the Applicants replaced the fence and removed the wall. The new fence was placed "just inside the original line of the original demarcating wall to avoid the foundations of the wall". The fence could not meet the sycamore tree, because of its size and shape and so it doglegs around the tree.
39. It is clear, therefore that there were two boundary type structures along the southern boundary when the Applicants arrived in 1990: a wall and a fence, which were parallel to each other. The Applicants assert that it was the wall which lay along the boundary line, but without any evidence for the source of that belief. It is also clear that both of the two structures which were in place in 1990 are no longer there and that they have been replaced, over time, with a single fence which seems not to lie along the exact line of each of the previous two structures.
40. Included in the Applicants' evidence was correspondence dating back to 2006 between the Applicants and Bunkers, who were solicitors for the then owner of the Respondent's land. Bunkers wrote on 31 July 2006 stating that "the new fence erected by you is in a different position to the original boundary fence and, as a result, you have encroached upon our client's land". A later letter dated 18 September 2006 expresses that the difference between the position of the old fence and the new fence was 15 inches taken from the original concrete posts along the grass verge. Those posts were no longer in place when I visited the site, but I have seen photographs of them
41. The Applicants replied on 1 August 2006 as follows: "The boundary to our land is, and always has been clear and evidence both on the ground and at HM Land Registry. The previous fence was inside the boundary of the land as clearly identified by the line of fence posts, the previous brick wall foundations and the title map...". The Applicants' reply is notable in that it does not expressly deny that the new fence is in a different position to the original fence.
42. The letter goes on to address the sycamore tree: "...please also confirm what steps what steps your client will be taking to maintain the sycamore tree on the land he alleges to own. This tree is self evidently encroaching on our land...However it is the responsibility of the owner of that land to maintain that tree and to address the current

trespass.” This position, that the sycamore tree is within the Respondent’s title, is apparently different from the position now taken by the Applicants. It also indicates that the sycamore tree (as one would expect) has grown and changed its overall position over time. Upon visiting the site, it was obvious that this is a large tree with a wide trunk and it is not easy to see which part (if any) of the tree can be identified as the precise location of point F1. There is also no particular reason why the concrete post embedded in the tree (which is a point relied upon by the Respondent) should be rejected as an option. I note that Bunkers’ later letter of 18 September 2006 asserts that the true boundary marker for point F1 is that concrete fence post which was “behind the sycamore tree ... together with a roll of wire fencing”.

43. There is no reply from the Applicants to the Bunkers letter of 18 September 2006.
44. The Applicants have produced a number of HM Land Registry filed plans of different dates of the land to the south of No. 12. They all appear to show a straight line boundary running along the rear of No.s 8, 10 and 12. I do not derive any assistance from these as they are all general boundary lines and it is not unusual for fence lines along a section of a street which in reality deviate by several feet to be shown as straight lines on filed plans.
45. I also do not derive any assistance from a number of planning documents produced by the parties, since the planning authority as a matter of law is not concerned with the location of the legal boundary.

No. 12: the Northern boundary (I-H)

46. The Applicants’ case in relation to the front/northern boundary (line I to H) is that it should follow the line of a wall which divides the Applicants’ front garden from the grass verge of the road. The Respondents deny that the front wall is an original feature. As far as I can see, the Applicants have no evidence that the front boundary is marked by that wall, rather than the edge of the verge or some other line. There is also no evidence about where on the wall the boundary line is said to lie. The wall has width, copings, footings and pillars. The line of the boundary could pass through any of those or none.

No. 12: the side boundaries (F1-I and G-H)

47. The western and eastern boundary lines are, according to the Applicants, demarcated by the line of the existing fences. The west/east orientation of these lines does not seem to be as controversial, but of course the northern and southern ends of these boundaries are affected by the rest of the disputed evidence. I also note that the west/east “determined boundary lines” drawn in blue on the application plan does not follow exactly the line of the fences marked by a green line.

No. 12: Conclusion

48. The evidence of the Applicants does take the matter much further. The problems I identified above, in relation to the plans and measurements, remain. On the Applicants’ own evidence, two of the physical features in the location of the southern boundary (fence and wall) were removed in 2006 and replaced by a single fence. There was a dispute over the location of that fence which, as far as I can see, was never resolved. There is a concrete post with wire attached embedded in a sycamore tree, which the Applicants reject as a significant piece of evidence without any adequate explanation. There were concrete fence posts along a verge to the rear of No. 12. The location of the west and east boundaries depend on the location of the corners and on the angle at which any given line should depart from those corner points. I note from the application plan itself that the blue “determined boundary line” on the west and east sides deviates from the green lines of the existing fences. The Applicants’ case on the north boundary is based on an unsupported contention that the boundary runs along one of the faces of a driveway wall of indeterminate age. It is simply not possible for me to say on the balance of probabilities that the boundary is along the lines shown on the application plan to the accuracy required in order to be able to determine the **exact** line of the boundary. I have also considered whether I should make a finding that some other line constitutes the boundary (in accordance with my jurisdiction as considered in *Bean v Katz* [2016] UKUT 168 (TCC) and *Lowe v William Davis Ltd* [2018] UKUT 206 (TCC), [2018] 4 WLR 113), but the paucity of evidence of the location of alternative points, discussed above, means that it is not possible for me to do that either in this case. I therefore have no choice but simply to reject the application for a determined boundary of No. 12. As a result, the register will continue to show the boundary as a general boundary under section 60 of the 2002 Act.

REF/2017/0401 – Boundary of No. 10 (WSX63883) – Mr & Mrs Cronk

49. As stated above, many of the same issues relate to this application as to the No. 12 application. I do not propose to repeat them all here. Where there are statements of principle and analysis in connection with the application above, then it should be taken that I have relied upon that same approach when considering this No. 10 application, where relevant.
50. The application was also made on 14 July 2016 on the basis of a site plan which identifies the proposed determined boundary around the entirety of No. 10 as being a four-side shape formed by straight lines drawn between the following points shown on the application plan:
- a) A to I – the front boundary (where I is the same as point I in the No. 12 application) – Length: 55’10”
 - b) I to F1 – the eastern boundary with No. 12 (where F1 is the same as point F1 in the No.12 application and so the whole of this line is the same as the line proposed in the other application for the No. 12 western boundary. – Length: 136’7”
 - c) F1 to C – the rear boundary – Length: 56’10”
 - d) C back to A – the western boundary with No. 8 – Length: 134’10”
51. Unlike the No. 12 application plan, the No. 10 application plan has no measurements marked on it for any of these points or the lines between them. The line measurements shown above are taken from a separate table which also seems to have been created by Mr Mclean. The only measurements marked on the plan itself are (i) the same 12’9” measurement across the Rear Roadway as appears in the No. 12 application plan and (ii) a measurement of 3” apparently showing the width of the blue line which forms the “determined boundary line”. This last measurement is very odd, because in this case the blue “determined boundary line” at the rear does not seem to coincide with any particular physical feature, so it is not clear what is supposed to be 3” thick. It cannot be the legal boundary itself, because a legal boundary does not have any thickness at all. It can only be a reference to the 3” which is the thinnest depth of the wedge-shaped piece of land conveyed in a 1955 conveyance discussed below, but it is difficult to see how that assists to locate the exact line of the boundary in 2019.

52. The points themselves are defined by the Applicants as follows:
- a) Point F1 : a notional point where the western OS boundary line of No.12 would meet the south western corner of the southern boundary fence of No. 12 (as defined in the No. 12 application above)
 - b) Point C: the original SW boundary of original plot (per 1937 conveyance).
 - c) Point A: Corner of brick wall dividing No. 8 and No. 10
 - d) Point I: The meeting point of the north/south boundary line and the east/west OS boundary lines between No. 10 and No. 12 (as defined in the No. 12 application above)
53. It is notable that of these four points, only one of them (point A) is defined solely by reference to the location of any physical features. All of the other three are defined by reference either to lines on the OS map or lines on a 1937 plan. This makes it very difficult to fix any of them by reference to any existing physical structures and therefore very difficult to apply any evidence to the facts on the ground.
54. The primary question (as in the other application) is whether there is sufficient evidence that those points (and the lines formed between them) form the true boundary on the balance of probabilities. The Respondents say that there is not.
55. The site plan for No 10 which is also the application plan together with a survey report was prepared by Mr McLean. The application plan for No. 10 is dated 24 June 2016 and his report is dated 1 June 2017.
56. Mr McLean's report on No. 10. As with the McLean report on No. 12, I accept the accuracy of his topographical measurements of existing physical features. His report on No. 10 also suffers from the same disadvantage that it contains no justification for the selection of any of the points A, C, I or F1 or the blue "determined boundary line" marked on the application plan. This has all of the problems I have identified above in relation to the No. 12 application, which I shall not repeat here. I must therefore come to the same conclusion in relation to the plan and the evidence of Mr McLean as I have done in the No. 12 application above.

57. I therefore turn to the question whether there is any other evidence in support of the determined boundary line sought by the Applicants in this No. 10 application. As in the other application above, the starting point for determining the boundary is the conveyance which originally defined the plot in question. The earliest conveyance I have seen in relation to No. 10 is dated 17 June 1937 in which Rustington Sea Estates Limited conveyed to Frances Emma Smith the following plot:

ALL THAT piece or parcel of land situate on the south side of Bushby Avenue Rustington in the County of Sussex and having a frontage thereto and a width throughout of forty five feet or thereabouts and a depth therefrom on the west side of one hundred and thirty five feet six inches or thereabouts and on the east side of one hundred and thirty six feet six inches or thereabouts as the same is more particularly delineated and coloured pink in the plan drawn hereon...”

58. The plot is therefore defined by its measurements and by reference to the plan drawn on the deed. The plan on the 1937 conveyance has the following five measurements marked on it:

	Line	Measurement shown on 1937 Deed
1	A to I – north (front) boundary	45’0”
2	I to F1 – east boundary	136’6”
3	F1 to C – south (rear) boundary	No separate measurement marked on plan, but the deed refers to the “width throughout” as being 45’0”.
4	C to A – west boundary	135’6”
5	C to eastern edge of Broadmark Lane along the rear of the Bushby Avenue properties	305’0”

59. On 14 September 1944, by conveyance Frances Emma Smith conveyed No. 10 to Alice Mary Barton. That conveyance is not available, but it is noted on a conveyance of land by Ms Barton to Mr Britton Oldham Marston of 28 July 1955. On 3 December 1945, Rustington Sea Estates Limited conveyed an additional piece of land to Ms Barton. It consisted of the sale of roughly what is now No. 8, a plot 50’ wide and 137’0” deep to the west of No. 10. On 26 August 1960, Ms Barton transferred the westernmost 40’ wide plot of that 50’ plot. As a result of this 26 August 1960 conveyance, the width of

No 10 had increased by 10' in a westerly direction, meaning that the width of No. 10 throughout was thereafter 55'0" instead of 45'0".

The Wedge

60. By inference from the wording of later conveyances, it appears that the conveyance of 3 December 1945 to Ms Barton included a wedge-shaped piece of land at the back of No. 8 ("the Green Wedge"). The 1955 conveyance is of a longer wedge-shaped piece of land running along the back of No. 10 and along part of the back of No. 8, which includes the Green Wedge probably sold in 3 December 1945. The entire wedge is 3" at its narrowest easternmost point at point C and widens to a width of 2'2" at its widest westernmost point within the rear of No. 8. Clause 1 of the 1955 deed is a conveyance of the part of Green Wedge to Mr Marston (shown green on the 1955 plan) and clause 2 of the deed is a conveyance, confirmation and release of the part of the wedged shaped plot which lies at the back of No. 10 ("the Pink Wedge") to Mr Marston (shown pink on the 1955 plan). It is probable that the Pink Wedge at the rear of No. 10 was occupied by Ms Barton without any proof of title and so she conveyed it simply as the person in possession since 14 September 1944.
61. The plan attached to the 1955 deed contains measurements for the boundaries of No. 10 showing the frontage as 45'0" (as in the 1937 deed), but showing both of the western and eastern boundaries as being 137'0" long. It is not clear where the additional 6" on one side and 18" on the other side have come from. The addition of the Pink Wedge does not easily explain the increase of the eastern boundary of No. 10 from 136'6" to 137'0" because the Pink Wedge at that point is only 3" wide. In any event, it seems that after the 1955 conveyance, the boundaries of No. 10 probably reverted to their original 1937 size (give or take 3").
62. On 18 February 1960, Mr Marston conveyed the Pink Wedge and the Green Wedge to Harold Allen Trickett. On 17 August of the same year, Mr Trickett conveyed them both to C&N Building Developments (Sussex) Limited. On 24 March 1961, that company conveyed them both to Alan Charles Miller. And on 29 March 1965, Mr Miller conveyed them both to Michael Harvey de Silva.
63. The Applicants plead (para 34(r) of their Amended Statement of Case) that their proposed determined boundary line along the southern boundary incorporates within

No. 10 land which had been conveyed away by the 1955 deed, but which had never been reflected in the register. This was an unusual submission. They seemed to be arguing that even though the land was conveyed away from their title by the 1955 deed, they still claim ownership to the Pink Wedge because of the state of the register. It is, of course, true as a matter of law that the register effectively creates title by virtue of section 58 of the Land Registration Act 2002, so that if a transaction or part thereof is not registered then it is as if that transaction never took place. However, the register of No. 10 (WSX63883) shows that the land was first registered in 1982. Under the ordinary operation of the law and land registry practice, first registration of the title in 1982 would have incorporated any changes to the extent of the boundaries up to that date. They would not need to be listed. There is therefore no need for the 1955 deed to have been mentioned in register, unless it contained a charge which needed recording in the register. It did not. The first registration of No. 10 in 19892 was with a general boundary which would, in my judgment, have included any changes to the southern boundary made by any deeds prior to 1982. The Applicants argument that they can now incorporate within their determined boundary land which was conveyed away in 1955 is simply flawed. I note that the southern boundary claimed in the determined boundary application is based on this flawed argument, although paragraph 61 of Susan Lorraine Cronk's witness statement seems to cast some doubt on whether that is the basis of the Applicants' case at all.

64. The remainder of the Applicants' evidence in relation to the southern boundary is considered as follows.

No. 10: the Southern boundary (F1-C)

65. The blue "determined boundary line" shown on the application plan for the southern boundary of No. 10 does not appear to follow the line of any existing physical structure. One end of it, point F1, is in the vicinity of the sycamore tree discussed above. The other end of it, point C, is defined by the Applicants as "the original SW boundary of original plot (per 1937 conveyance)". That latter definition is of no assistance to prove the location of that part of the boundary for two reasons:
- a) The south west point of the boundary of No 10 in 2019 cannot be in the same location as the south west point of the boundary in 1937, because 10'0" more land was added to the west of the original No. 10 by virtue of the conveyances

of 1945 and 1960 as set out above and as pleaded by the Applicants themselves.

- b) In any event, despite (a) above, the definition of a point on the ground in 2019 cannot be ascertained by reference solely to a 1937 conveyance. While it may be legally correct that the boundary in 2019 is related to the location of a point defined by a 1937 conveyance, that does not help to locate the same point on the ground without some reasoning as to how that 1937 plan is mapped onto the 2019 physical ground. As discussed above, that exercise can be done by a number of different methods: measuring from an agreed or fixed point by reference to measurements, measuring from a fixed physical structure or landmark. None of these things have been done or explained in this application. It is simply asserted that point C as marked on the 2016 application plan is the original 1937 SW boundary, without any evidence to support that assertion.

66. The Applicants' evidence is that from the date when they started to occupy No 10 in 1991, there was a fence "along the southern part of the Applicant's property" (para 34(o) of the Amended Statement of Case) and that to the south of that fence line was a row of concrete posts. The fence line, according to the Applicants' evidence (para 19 of the witness statement of Susan Lorraine Cronk) accords with the ordnance survey line.
67. The Applicants' evidence is that the Respondents removed first the concrete posts and then the fence in about May 2015. Thereafter, the Respondent erected a small wall to the north of the removed fence. That wall remains in position. The Applicants state a belief that the concrete posts "reflected the minimum line of the southern boundary of the Applicant's property..." (para 34(p)). The Applicants go on to plead as follows (para 34(q)):

"Notwithstanding that the southern boundary of the Applicant' Property has previously been indicated by those concrete posts and/or the line of the wooden fence removed by the Respondent, the Applicant has established since owning the Applicant's Property that the actual southern boundary of the Applicant's Property defined in the registered title and related conveyances

extends southwards as set out in the details of the Application for the determined boundary.”.

68. That paragraph goes to the heart of the Applicants’ claim about the location of the southern boundary of No. 10. In it, the Applicant is saying that the line which they claim for the determined boundary lies further south than any previous boundary structure for which they have evidence – further south than the fence and further south than the concrete posts. They are also saying that the line marked on the application plan (which is the only “details of the Application for the determined boundary”) is this line which is further south than the concrete posts and the fence line.
69. This is then contradicted in paragraphs 39 to 41 of the Applicants’ amended statement of case which seem to say that the concrete posts mark the line of the southern boundary.
70. This confusion is compounded with the fact, which I have already observed above, that Mr McLean marks a blue “determined boundary line” on his application plan for No. 10 without reference to where the concrete posts or fence are alleged to have been and without any verbal explanation as to how point C and the line from C to F1 were chosen by him. I have also already remarked that the definition of point C by reference to the south west boundary shown on a 1937 deed plan is both impossible to relate to the physical ground (on the current evidence) and also legally wrong for the reasons I have set out above.
71. The Applicants also rely on the fact that the Respondents at one point in 2009 asserted that the concrete posts marked the southern boundary of No. 10 and that the Respondents have now resiled from that. Apart from the observations I have made above in relation to that, this feature of the evidence is of even less relevance in this application because the Applicants appear to be claiming in this application that the concrete posts were not the exact line of the boundary, but were the “minimum line of the southern boundary”. Needless to say, an application to determine the **exact** line of a boundary cannot be founded on a claim as to the “minimum” extent of a boundary.
72. Taking all this together, the evidence for the location of point C on the ground is jumbled and contradictory and reliant solely on flawed evidence for all the reasons I have stated. I have also dealt above at length with the problem associated with

determining point F1. Since the southern boundary of No. 10 is defined by a line drawn on the application plan from C to F1, there is no legal or evidential basis on which I can determine the southern boundary in accordance with the line sought in the application. I have also considered whether there is any evidence from which I can determine any other line as the exact line of the southern boundary. It is not clear to me on the evidence whether the southern boundary was ever marked by either the concrete posts or the pre-2015 fence. Even if I could choose between those potential markers, no evidence exists on the ground to show where they were, so it is not possible to fix them on a plan for the purposes of a section 60 determined boundary, in any event.

73. It is also instructive that when I asked the Applicants how they proposed to resolve all these contradictions, they said at the hearing: “There is potentially more than one correct boundary. The best estimate is the one plotted.” It is, I hope, clear as a matter of law, that this Tribunal on an application under section 60 of the 2002 Act cannot determine the exact line of a boundary based solely on a best estimate out of a number of possible options. In any event, I have decided that the line claimed by the Applicants in their application is not the “best estimate” for reasons set out in detail above.

No. 10: the Northern boundary (I-A)

74. The Applicants’ case in relation to the front/northern boundary (line I to A) is that it should follow the line of the walls on the northern boundaries of the adjacent properties on the south side of Bushby Avenue including No. 8 and No. 12. This is the line of the wall which divides the Applicants’ front garden from the grass verge of the road and is the same line as is discussed in relation to the northern boundary in the No. 12 application above. The Respondents deny, as there, that the front wall is an original feature. My analysis here is the same as it is above in relation to the northern boundary: the Applicants present the line of these walls as if they are the boundary, without any reason given for choosing that line and without any indication of where on the wall the line might lie by reference to its two faces, its footings, its copings and its pillars.

No. 10: the side boundaries (F1-I and A-C)

75. The western and eastern boundary lines are, according to the Applicants, demarcated by the line of the existing fences. The eastern boundary is shared with the No, 10 applicants and is therefore not controversial, but its northern and southern ends are dependent on evidence of the location of the two points: I and F1. I have already noted

above that the line F1 to I shown on the application plans deviates from the line of the fence as shown on the application plans.

76. The western boundary is disputed by the Respondents as it divides between No. 10 and No. 8, which is owned by Mr & Mrs John, Respondents. There was a fence along the western boundary until 2011 when it was replaced by the Respondents with a wall. The Applicants claim that the original fence represented the western boundary of No. 10 and that the eastern face of the new wall lies along the line of the original fence and therefore now marks the boundary line. The Respondents say that the wall they erected was within the boundary. I was invited to look at photographs to decide this dispute. It was possible to see that there was a gap between the post-2011 wall and the edge of the driveway of No. 10. The photographic evidence therefore appears to support the Respondents' case on this specific issue, but that does not help me to decide the exact line of the legal boundary, especially since the location of points A and C are not possible to determine in any event.

No. 10: Conclusion

77. It seems that the application to determine the boundary of No. 10 stems from a dispute which arose when the Respondents (a) removed a fence which the Applicants say was inside their boundary and (b) erected a wall which the Respondents say is also inside the Applicants' land. I do not know whether there are any proceedings in any other jurisdiction seeking damages or an injunction or any other form of relief in relation to these alleged acts of trespass. If there were, then it may be that such claims could be resolved without having to determined the exact line of the entire boundary (as this application does). For example, paragraph 40 of Susan Lorraine Cronk's witness statement states that:

“...even if that [boundary line sought in the application] were not the correct boundary marker the wall erected by the respondents is inside the line of the previous fence line...”

That is the kind of evidence which could be capable of supporting a claim for trespass (subject to be tested), but not a determined boundary application.

78. Unfortunately for the Applicants, this application which they have chosen to make (a) requires a more extensive and precise level of evidence to succeed and (b) does not give them any relief in relation to any alleged trespass. It therefore seems that I am unable to

assist with resolving the underlying dispute between the parties in relation to No. 10. Even though my jurisdiction is widened somewhat by the decisions in *Bean v Katz* and *Lowe v William Hill Ltd* (both cited above), I cannot see that I have any jurisdiction to decide whether any given act of construction or destruction was a trespass in a case in which I have been unable to determine on the balance of probabilities the exact line of the boundary.

79. For all the reasons stated above, I have reached the conclusion that the No. 10 application should also be dismissed. It is simply not possible for me to say on the balance of probabilities that the boundary is along the lines shown on the application plan to the accuracy required in order to be able to determine the **exact** line of the boundary. And I cannot find that the boundary is in any other exact position for reasons I have set out above. I therefore have no choice but simply to reject the application for a determined boundary of No. 10. As a result, the register will continue to show the boundary as a general boundary under section 60 of the 2002 Act.

Other matters

80. I should add for the sake of completeness that I have not considered the possibility of adverse possession. Although it is mentioned in the Respondents' case and there are a number of reference to fences or walls having been in place for various periods of time, there were no applications made expressly on the grounds that a piece of land not included in a paper title was added by adverse possession. There was no clear evidence that any particular boundary-type feature was in a specific position without being replaced or moved for the requisite period of time. I also heard no evidence directed to the questions of factual possession and intention to possess. I have therefore confined my decision to the question raised in the determined boundary application, namely the exact line of the boundary of the paper title to the subject properties.
81. One final observation is as follows. Both sets of Applicants have adduced evidence and made submissions about the Respondents' case in an attempt to show that (a) the Respondents have not provided evidence to support their position and (b) that the Respondent, Mr John, has contradicted his own legal position in previous correspondence. These submissions are of little or no value in this case because the Respondents' primary position is simply to put the Applicants to proof on their case and because the parties' current or previous statements about their belief of where the legal boundary usually have no weight as evidence of the location of the legal boundary.

Conclusion

82. I therefore direct the Chief Land Registrar to reject both of the Applicants' applications for determined boundaries.

Costs

83. I have decided on a preliminary basis that costs should follow the event in accordance with paragraph 9 of the Practice Direction made under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"). This means that I am minded to make an order that the Applicants should pay any allowable costs incurred by the Respondents since the date when this matter was referred to the Tribunal. I intend to carry out a summary assessment of the Respondents' costs on the standard basis. To that end, I have ordered the Respondents to file at the Tribunal and serve on the Applicants by 4 pm on Friday 20 September 2019 a schedule of the costs they have incurred.
84. If the Applicants wish to make any submissions in relation to what costs order should be made and in what amount, then they should file at the Tribunal and serve on the other party, any such submissions by 27 September 2019.
85. I intend to make a paper determination of costs thereafter based on any material filed by the parties.

Dated this day of 27th day of August 2019

Timothy Cowen

BY ORDER OF THE TRIBUNAL

