Neutral Citation Number: [2016] EWHC 3267 (Ch)

Case No: B30BM368

IN THE COUNTY COURT AT BIRMINGHAM
CHANCERY BUSINESS

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham B15 3ST

Date: 16/12/2016

Before :

MR JUSTICE NEWEY
(sitting as a Judge of the County Court)

- -

Between :

(1)	**PAUL FRASER HARRISON**	**Claimants**
(2)	**THERESA JANET HARRISON**	
	- and -	
	JUSTIN JOHN BRADING	**Defendant**

- -
- -

Mr Anthony Verduyn (instructed by **Broomfields Solicitors LLP**) for the **Claimants**
Mr Matthew Haynes (instructed by **Moore & Tibbits**) for the **Defendant**

Hearing dates: 6-9 December 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Newey :

1. This case concerns the boundary between two properties near Ilmington in Warwickshire. One of them, Cathole House, is owned by the claimants, Professor Paul Harrison and his wife, Dr Theresa Harrison. The other, which is now known as Cathole Manor Farm, belongs to the defendant, Mr Justin Brading.

2. The properties were formerly parts of a single farm called Cathole Farm. Mr Brading and his family live in the old farmhouse there. The Harrisons' home, which adjoins the old farmhouse, was built in the early 1970s when the whole farm was in the ownership of a Mr Dick Taylor. In about 1972, Mr Dick Taylor moved into Cathole House, while his son Peter and his family continued to live in the old farmhouse.

3. Mr Dick Taylor sold the old farmhouse (now Cathole Manor Farm) to a Mr Anthony Browne in 1989. The property conveyed is specified in the first schedule to the conveyance, which was dated 8 September 1989, as the land "the approximate location whereof is shown by red edging on Plan number 1 annexed hereto and which is more particularly shown edged in red on Plan number 2 annexed hereto". Plan 2 depicts a squarish area estimated at 0.33 of an acre which is surrounded by land retained by Mr Dick Taylor. Dimensions are given in feet along much of the border. For present purposes, it is the southern and eastern sections that principally matter. The southern edge is shown as including lengths of 10 feet and 58 feet. The eastern edge is made up of distances given as 11 feet, 39 feet and 84 feet.

4. There are four inward-facing "T" marks on Plan 2. These are mentioned in clause 2(2) of the conveyance. This provides for the purchaser "to maintain the fences or walls shown by inward facing 'T' marks on plan number 2 annexed hereto (with the exception of the 84 foot length on the eastern boundary of the Property) in good and stockproof condition". It is also noteworthy that the second schedule to the conveyance grants the purchaser a right to use a septic tank in the field to the south of Cathole House and to enter the retained land at "the point marked 'C' on Plan number 1" to carry out repairs to the septic tank and pipes serving it. Point C is shown immediately to the east of the land being conveyed.

5. By the time of the sale to Mr Browne, there was a fence on some of the southern side of Cathole Manor Farm between its garden and that of Cathole House. Mr Peter Taylor (whom I shall simply call "Mr Taylor") explained in evidence that he put up a fence to delineate the old farmhouse's garden even before Cathole House was constructed. When, he said (and I accept) his father went to live at Cathole House, his father moved the fence northwards because he wanted a larger garden.

6. Nowadays, fencing runs diagonally to the south-east from a wall on the southern side of Cathole Manor Farm for a little way (slightly less than 10 feet) and then roughly east-south-east for a greater distance (though not as much as 58 feet). The overwhelming likelihood, as it seems to me, is that the fencing stands in the position of that put up by Mr Dick Taylor in the 1970s. No one testified to the fence having been moved and I find it hard to see how such a move could have occurred since the sale to Mr Browne.

7. There was some debate as to whether the fence was formerly longer than it now is. In particular, it was suggested that Mr Brading removed the "eastern half" of the fence in

2010 or 2011. However, the evidence does not appear to me to sustain this allegation, which Mr Brading denied. A fence post shown in a photograph from that period was said to come from the fence, but it differs from posts in the extant fence.

8. There are conifer trees to the south of the fence. A relatively defined line of trees can be made out next to the fence and there is further, less organised planting south of this line. Mr Taylor thought (and I find) that the conifers would have been planted by or on the instructions of his father.

9. On the eastern side of the plot sold to Mr Browne, the land fell away somewhat. Mr Taylor remembered that there was a tumbledown stone wall there when his father owned Cathole Manor Farm. He explained that he constructed a stile to allow his children to play on the land to the east. There, there were to be found a field and, north of it, an orchard, neither of which was, at any rate in large part, sold to Mr Browne by Mr Dick Taylor. The stile was to the south of a pole that is still used to supply electricity to Cathole Manor Farm and Cathole House.

10. Field turned to orchard a little to the north of the electricity pole. Just inside the orchard, next to the tumbledown wall, there was a meter that remains there now. Nearby, there was a track running southwards through the orchard. Mr Taylor's recollection was that the track was made of cinders and covered with grass. Among other things, the track was used by a truck that came to clear out the septic tank. When Mr Dick Taylor purchased Cathole Farm, a privy lay between the track and the northern end of the tumbledown wall, but Mr Taylor explained that this fell down in about 1970.

11. While Cathole Manor Farm was owned by Mr Browne, he built a retaining wall along the line of the previous tumbledown wall northwards of the electricity pole. Mr Browne also constructed steps leading down from Cathole Manor Farm through the retaining wall. However, Mr Taylor said, and I accept, that his father put up fencing on the orchard side of the retaining wall because he objected to Mr Browne having access to the orchard. North of the steps, hedging was planted next to the retaining wall. Southwards of the retaining wall, there remained the tumbledown wall, followed by a large holly tree and then, on land that was on any view retained by Mr Dick Taylor, an old stone wall running west-south-west.

12. During the period of Mr Browne's ownership of Cathole Manor Farm, Mr Taylor parked a caravan on the track in the orchard from time to time. He moved it, however, after Mr Browne complained.

13. Both before Cathole Manor Farm was sold to Mr Browne and for several years afterwards, the fields comprised in Cathole Farm, including the field immediately to the east of Cathole House and of the southern end of Cathole Manor Farm, were let to a Mr Nigel Everett and his father for grazing. Mr Everett gave evidence to the effect that their cattle grazed right up to the "old stone wall", which I take to be what Mr Taylor spoke of as the tumbledown wall. Mr Everett reckoned that the old wall and change in height sufficed of themselves to keep cattle in the field, without any need for a fence.

14. A Mr Richard Betteridge took over from the Everetts in 1992 and rented until 2008 the fields that Mr Dick Taylor owned, paying £100 an acre for the grazing rights to

the 21 acres of fields. He recalled his cattle grazing right up to the "stone wall". At some stage, perhaps late in his time as a tenant, he put up a barbed wire fence close to the wall to keep cattle away from it.

15. In 1999, Mr Browne had sold Cathole Manor Farm to Mr Brading. Mr Taylor described Mr Brading and his wife Sarah as very good neighbours and referred to their kindness to his parents.

16. On 14 May 2008, Mr Dick Taylor (and his wife) sold the orchard east of Cathole Manor Farm to Mr and Mrs Brading. In advance of the transaction, Mr Taylor installed some new post-and-rail fencing at the western end of the orchard's boundary with the field south of it.

17. Professor and Dr Harrison bought Cathole House and its land from Mr Dick Taylor on 17 July 2009.

18. In 2010-2011, Mr Brading built a new retaining wall south of the electricity pole. The Harrisons accept that the new wall stands on the line of the old tumbledown wall.

19. Disputes developed between the Harrisons and Bradings over the position of the boundary between their properties in three locations: the orchard; the eastern boundary south of the orchard (referred to as "Area A"); and the southern boundary between the gardens (termed "Area B"). I am concerned with only the last two. Happily, the parties appear to have arrived at an accommodation as regards the orchard.

20. Each side advanced arguments based on the construction of the 1989 conveyance to Mr Browne and the law relating to adverse possession. Mr Brading also relied on an alleged boundary agreement.

21. I was referred to various authorities dealing with the interpretation of conveyances. As was noted by Mummery LJ (with whom Longmore and Wilson LJJ agreed) in *Pennock v Hodgson* [2010] EWCA Civ 873 (at paragraph 9), "[t]he construction process starts with the conveyance which contains the parcels clause describing the relevant land". The conveyance is to be looked at "in the light of the circumstances which surrounded it" (per Earl Loreburn in *Eastwood v Ashton* [1915] AC 900, at 906). In *Pennock v Hodgson*, Mummery LJ explained:

> "12. Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction. The rejection of extrinsic evidence which contradicts the clear terms of a conveyance is consistent with this approach: *Partridge v. Lawrence* [2003] EWCA Civ 1121; [2004] 1 P. & C.R. 176 at 187; cf *Beale v. Harvey* [2003] EWCA Civ 1883; [2004] 2 P. &

> C.R. 318 where the court related the conveyance plan to the features on the ground and concluded that, on the facts of that case, the dominant description of the boundary of the property conveyed was red edging in a single straight line on the plan; and *Horn v. Phillips* [2003] EWCA Civ 1877 at paragraphs 9 to 13 where extrinsic evidence was not admissible to contradict the transfer with an annexed plan, which clearly showed the boundary as a straight line and even contained a precise measurement of distance….
>
> 13. Before the judge and in this court it was agreed that the parties' subjective beliefs about the position of the disputed boundary in this case and about who owned the bed of the stream were extrinsic evidence that was inadmissible in the construction of the relevant conveyance: *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896 at 913. The effect of the conveyance is not determined by evidence of what the parties to it believed it means, but what, against the relevant objective factual background, they would reasonably have understood it to mean."

22. On the other hand, subsequent conduct of the parties to a conveyance can sometimes be relevant (see *Norman v Sparling* [2014] EWCA Civ 1152, at paragraph 12). In *Ali v Lane* [2006] EWCA Civ 1532, [2007] 1 P&CR 26, Carnwath LJ (with whom Waller and Maurice Kay LJJ agreed) said (at paragraph 36):

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

Carnwath LJ added, however, that "in principle reference to the intentions of the parties means the parties to the *original* conveyance" (paragraph 38).

23. The significance of "T" marks was discussed in *Lanfear v Chandler* [2013] EWCA Civ 1497. Patten LJ (with whom Moore-Bick and Rafferty LJJ agreed) explained (at paragraph 16):

> "He [i.e. Carnwath LJ in *Seeckts v Derwent* [2004] EWCA Civ 393] recognised that there is a common and well-established practice of using 'T' marks to identify the ownership of the wall or fence marking the boundary. That is undoubtedly a relevant factor to keep in mind when construing a conveyance by reference to a plan which incorporates 'T' marks. But whether it is determinative of the boundary depends upon balancing it against the other relevant terms of the conveyance and the features of the plan coupled, when appropriate, with evidence of the position on the ground. The task of the court is

> to decide by reference to all these elements how the conveyance or transfer should be construed. All are relevant but none is necessarily conclusive. To say that the use of 'T' marks raises a presumption of law (even a rebuttable one) that the boundary feature belongs to the adjoining landowner indicated by the use of the marks seems to me to be wrong in principle and in effect to pre-empt the process of construction on which the court is engaged."

24. "In approaching the relevant law, it is essential to keep in mind the distinction between a plan which is said to be for identification and a plan … which defines a property" (per Black LJ, with whom Longmore LJ and Sir David Keene agreed, in *Dixon v Hodgson* [2011] EWCA Civ 1612, at paragraph 22). A plan that defines the property "has to be accorded full weight": "[e]ven if the plan cannot give the whole answer, it must surely be right to look at it to see what information it does reveal about the boundary, notably its fixed points, its relationship to other features marked on the plan, and its direction of travel" (Black LJ, at paragraph 50).

25. In the present case, I have the benefit of expert evidence from two experienced surveyors: Mr James Richardson, who was called by Professor and Dr Harrison, and Mr Nigel Atkinson, who was called by Mr Brading. They both sought to plot the dimensions that are shown on Plan 2. Each concluded that the measurements indicated a boundary in Area A significantly to the east of the retaining wall and a boundary in Area B south of most of the fence there. On Mr Richardson's calculations, the boundary in Area A would be some four metres from the field side of the retaining wall and that in Area B some 400-700 millimetres south of the bulk of the fence line. Mr Atkinson would site the boundary in Area A slightly (but not very much) closer to the retaining wall and that in Area B slightly (but not very much) further from the fencing. On either version, Mr Brading would be entitled to a proportion of the field beyond the retaining wall and some of the conifers south of the fence between the properties' gardens. Mr Richardson, however, is of the view that the figures given on Plan 2 are unreliable and that the extent of the land conveyed to Mr Browne must be ascertained by reference to the physical features of the land.

26. Mr Matthew Haynes, who appeared for Mr Brading, argued that I should determine that the boundary in Areas A and B follows the line plotted by Mr Atkinson. In contrast, Mr Anthony Verduyn, who appeared for the Harrisons, submitted that the boundary tracks physical features and so follows the retaining wall in Area A and the fence between the gardens in Area B. Among other things, he stressed the "T" marks on Plan 2, the reference to them in clause 2(2) of the conveyance and the fact that no fence or wall is shown on Plan 2 within the boundary line, all of which (he suggested) indicated that the boundary was intended to follow the garden fence and (tumbledown) wall which existed at the date of the conveyance. He said, moreover, that there would have been no logic in Mr Dick Taylor and Mr Browne choosing to position the boundary along Mr Atkinson's line: there was, he commented, no reason for arbitrary boundaries projecting several metres out into pasture, or angled across an orchard, in respect of a disposal of residential property. He contended that the unreliability of the dimensions given on Plan 2 is also evident from the fact that the wall on the western side of the plot sold to Mr Browne has (so Mr Richardson explained) been mis-measured; in the fact that the shape of the plot differs as between

Plan 1 and Plan 2; and in the fact that the dimensions could be taken to imply that some of the track in the orchard was included in the sale when Plan 2 also depicts it as outside the plot conveyed.

27. In my view, Mr Verduyn's contentions are more compelling as regards Area B than Area A. So far as Area B is concerned, the lines that the experts have plotted by reference to the measurements given on Plan 2 do not diverge all that much from the line of the fence between the gardens: as I have mentioned, Mr Richardson spoke of his line lying some 400-700 millimetres south of the fence. Further, the boundary shown on Plan 2 corresponds closely to the fence in the sense that both turn east-north-east a short distance out from the southern wall of Cathole Manor House. Moreover, the "T" mark that features on the southern boundary in Plan 2 (especially taken in conjunction with clause 2(2) of the conveyance and the absence of anything to indicate a fence *within* the plot) tends to suggest that it was to run along a fence or wall. Beyond that, it is inherently improbable that Mr Dick Taylor would have wished to sell Mr Browne anything south of the fence. As was apparent from my site visit, on the ground Area B *feels* as though it is part of the garden of Cathole House and what is done to it could have a significant impact on the rather spectacular views from the property over the Warwickshire countryside to the east.

28. Mr Haynes drew attention to a passage in Mr Brading's witness statement in which he said:

> "After we moved into Cathole Manor Farm Dick [Taylor] made it clear to us where the garden boundary was as he asked us to ensure we cut back the line of conifer trees on the south east boundary complaining that they had not been cut back in a long time. We always made sure thereafter that we maintained the same either ourselves or using contractors …."

Mr Haynes argued this evidence showed that Mr Dick Taylor considered the southern boundary to lie south of the garden fence. I do not, however, accept that that is so. Mr Brading does not claim that Mr Dick Taylor said in terms where he thought the boundary was but rather draws an inference from Mr Dick Taylor having asked for the conifers to be cut back. However, I do not think any inference as to the location of the boundary can be drawn from the fact that Mr Dick Taylor asked Mr Brading to cut back vegetation lying between the properties that could be reached more conveniently from the Bradings' side (as would seem to have been the case).

29. In all the circumstances, it seems to me that the conveyance to Mr Browne did not include any of Area B. To the contrary, on the true construction of the conveyance the southern boundary was to follow the physical features and so run along the fence and then continue eastwards until it reached the eastern boundary.

30. Turning to Area A, it is fair to say (as Mr Verduyn did) that the "T" mark shown on the eastern boundary tends to suggest that it was to follow a fence or wall, that the parties to the 1989 conveyance might have been expected to choose physical features as the boundary and that (as communications from the Land Registry illustrate) the measurements given for the eastern boundary on Plan 2 could be taken to imply that some of the orchard track was being sold to Mr Browne even though Plan 2 itself seems to show otherwise. Against that, the boundary line suggested by the dimensions

on Plan 2 (in particular, the 58 feet figure) is not even close to the retaining wall or the site of the tumbledown wall that it replaced. As Mr Richardson confirmed during his oral evidence, the measurements and geometry found on Plan 2 indicate a boundary some four metres east of the retaining wall. It can also be argued (as Mr Haynes did) that the tumbledown wall will have been much less well-defined than today's retaining wall; that the parties could sensibly have intended Mr Browne to have a strip of land beyond the tumbledown wall that could be used to accommodate, for example, bonfires and garden and other waste; and that, given that there was once room for a privy between the tumbledown wall and the orchard track, the fact that the boundary appears to abut the track on Plan 2 points to the boundary being east of the retaining wall.

31. In the end, accordingly, I have concluded that the 1989 conveyance served to give Mr Browne a strip of field and orchard to the east of the retaining wall. The boundary can, I think, be taken to have been in the position shown by the purple pecked line on page 469 of the bundle (i.e. to accord with Mr Richardson's plotting of the Plan 2 dimensions).

32. The next question is whether either side has gained any land by adverse possession.

33. In *J.A. Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419, Lord Browne-Wilkinson explained (in paragraph 40) that possession has two elements:

> "(1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess')".

In the same case, Lord Browne-Wilkinson approved (at paragraph 41) a passage from Slade J's judgment in *Powell v McFarlane* (1977) 38 P&CR 452 in which the latter said:

> "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

34. In the present case, Mr Haynes argued that, if (as I have held) Area B was not included in the 1989 conveyance, Mr Brading will nevertheless have acquired title to it by adverse possession. In this connection, he relied on Mr Brading's trimming of

the conifers lying to the south of the garden fence. To my mind, however, the evidence does not come close to establishing that Mr Brading or, before him, Mr Browne was ever in possession of Area B. The trimming will have been done from the Cathole Manor Farm side of the fence. There is no evidence that either Mr Brading or Mr Browne ever went onto Area B to cut the trees or for any other purpose. The reality is that Area B continued to form part of the garden of Cathole House, of which Mr Dick Taylor and, in time, the Harrisons were in possession.

35. As regards Area A, Mr Verduyn argued that Mr Dick Taylor acquired title by adverse possession as a result of his letting his fields for grazing between 1989 and 2003 to, first, Mr Everett and his father and, subsequently, Mr Betteridge. Mr Verduyn submitted that the successive tenants grazed their cattle right up to the tumbledown and retaining walls and that, as a result, Mr Dick Taylor is to be considered to have been in possession of the relevant land. He referred me to a passage in Jordan and Radley-Gardner, "Adverse Possession" (2nd ed.) in which the authors say (at paragraph 13-03):

> "When a landlord grants a lease he gives the tenant the right to exclusive possession of the demised premises for the term of the lease. The grant of a lease is thus a strong indication that the grantor has the *animus possidendi*. In *Bristow v Cormican* [(1878) 3 App Cas 641], Lord Hatherley said: 'It has been decided undoubtedly, with respect to old leases in particular, especially where rent has been paid under them, that those leases do amount to a clear and distinct evidence of possession …'."

36. On the other hand, there is also evidence that Mr Brading made use of Area A. Mr Brading said this on the subject in his witness statement:

> "After Sarah and I moved into Cathole Manor Farm in about August 1999 we started work on refurbishing it which created building debris. The debris that was not initially removed from the site we would put on the strip of land at the eastern border of our property near the power pole. We also used the same area to pile up garden debris and to have a bonfire of the same from time to time."

He adhered to this account during his oral evidence and Mr Cliff Jones, who worked for Mr Dick Taylor from about 2003, referred to Mr Brading having tipped cuttings over the retaining wall quite often (perhaps once a fortnight).

37. In contrast, Mr Taylor and Mr Betteridge did not remember significant dumping of debris. Mr Betteridge said in his witness statement that, during the time that he was Mr Dick Taylor's tenant, "the land in front of the telegraph pole was not used for the storage or disposal of garden waste by any of the owners of Cathole Farm", and Mr Taylor said that he had asked the Bradings to remove a pile of tree cuttings he found in Area A and that they had done so. In cross-examination, Mr Taylor also said that he was not aware of Mr Brading having had fires in Area A.

38. While I am in no doubt that Mr Taylor and Mr Betteridge were giving evidence in accordance with their recollections, it seems to me, on balance, that Mr Dick Taylor did not acquire any land in Area A by adverse possession. While Mr Dick Taylor's tenants will have grazed their cattle up to the tumbledown and retaining walls, Mr Brading also, I think, made use of the land east of the walls that (as I have held) was included in the 1989 conveyance. Mr Brading's evidence in this respect is supported not only by Mr Jones' but, to a degree, by the photographs that I have seen: Mr Brading was probably right, as it seems to me, when he referred in cross-examination to debris being visible in certain photographs. It is also to be remembered that Mr Taylor was no longer living at either Cathole Manor Farm or Cathole House and that the Everetts and Mr Betteridge did not graze their cattle on the land they were renting throughout the year but only between about April and October or November. Further, Mr Betteridge may not have taken that much notice of what was happening on the edge of one of the fields he was renting provided that it did not endanger his cattle. In short, I consider that Mr Dick Taylor was not in possession of such of Area A as had been included in the conveyance to Mr Browne throughout a 12-year period between 1989 and 2003. Whatever may have happened when Cathole Manor Farm was owned by Mr Browne, Mr Brading dealt with the strip of land east of the walls "as an occupying owner might have been expected to deal with it" (to quote from *Powell v McFarlane*) from 1999.

39. The remaining question is whether the boundary in Area A has been settled by a boundary agreement.

40. "[A]n agreement to demarcate an unclear boundary is binding on the parties and binds successors in title without the need for a written agreement" (per Lawrence Collins LJ in *Haycocks v Neville* [2007] EWCA Civ 78, at paragraph 25). In *Neilson v Poole* (1969) 20 P&CR. 909, Megarry J observed (at 919):

> "I must, too, bear in mind that a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in the law."

In *Stephenson v Johnson* [2000] E.G. 92 (C.S.), where the Court of Appeal concluded that such an agreement had been made, Bennett J said (at paragraph 57):

> "In summary, in my judgment, the judge was right to find an agreement between Mr Vane and the defendants. It is not strictly necessary for a court to have to find an offer and an acceptance. The course of the parties' conduct, that is to say, Mr Vane and the defendants, should be looked at and if, on the balance of probabilities, an agreement is established, that is sufficient. In my judgment, the conduct of Mr Vane and the defendants does establish such an agreement."

In a similar vein, Pill LJ said (at paragraph 71):

> "in my judgment, the passage which I have just cited [from *Neilson v Poole*] indicates a favourable view of the value of boundary agreements. That value is indorsed by Megarry J and too much formality must not be expected. It is the task of the

> court to consider the evidence as a whole and to reach a conclusion as to whether or not a boundary agreement has been made."

41. In the present case, Mr Brading contends that a boundary agreement arose from events in April and May of 2011, by which time the parties had been at odds over their boundaries for some while. When the Harrisons returned from holiday at the beginning of April 2011, they found that Mr Brading had planted laurel bushes next to the retaining wall in Area A. The Harrisons, I gather, consulted a solicitor and were advised that it would be best to negotiate with Mr Brading. Subsequently, on 15 April, the Harrisons sent Mr Brading an email in which they said:

> "In view of the above considerations we would like to propose some changes in the way we do things:
>
> - We propose that face-to-face negotiations take place only between two individuals at a time, one from each 'side'. This should keep discussions focussed on only the essential elements of the negotiation. The 'other partner' on each side will be available for their 'lead negotiator' to liaise fully with in real time.
>
> - As you know, there are several pending issues between us:
>
> a). The location of upgraded boundary fences and hedges.
>
> b). The final location of the telegraph pole and associated new hardware.
>
> c). The trimming of the trees along the common boundary between our two gardens.
>
> We believe that a negotiated settlement of the three issues is in all our best interests, and we seek a single comprehensive agreement over all of them.
>
> - We wish the agreement to be put into writing and signed by all four of us, once agreed.
>
> - Until agreement has been reached and put into writing, no further works would be carried out in the disputed areas ….
>
> We believe that with the above approach, it should be possible to reach agreement in principle quickly, within hours, or a couple of days at the most. It may take a little longer to finalise the written agreement, but we would hope that all can be settled in writing by the end of April, or thereabouts."

42. Replying the next day, the Bradings said (among other things):

> "We wish for a resolution, however we have already put back completion of the works a season but the field fencing needs resolution within two weeks as a disaster scenario would be prize cattle munching their way through circa £700 of new laurel and fruit trees."

43. Mr Brading emailed Professor Harrison again on 21 April 2011. He said:

> "Hi Paul thanks for letting us know. I'll leave it to Sarah [i.e. Mrs Brading] to iron out the details of things with Theresa [i.e. Dr Harrison] so the fencing can be sorted out in time."

As I understand it, the Harrisons had let the Bradings know that cattle would be arriving.

44. In a further email to Professor Harrison of 9 May 2011, Mr Brading said:

> "The gardeners have responded today to confirm they will come tomorrow to sort out the fencing in the field.
>
> Please could Theresa speak with Sarah if there are any issues with it as now marked up.
>
> Hopefully we are heading towards resolving all matters to everyone's satisfaction."

45. On the following day, contractors working for the Bradings put up post-and-rail fencing in Area A running west-south-west from the orchard. Some of the fencing lies west of the boundary of the plot that I have held to have been conveyed to Mr Browne and, hence, on land belonging to Mr Brading. However, the northern half of the fence lies east of that boundary line and, therefore, on land that had not been included in the sale to Mr Browne.

46. Dr Harrison gave this account of the events of 10 May 2011 in her witness statement:

> "Having been notified of a planned trespass, it is inconceivable that a land-owner, even while tolerating it, would not make herself present to witness the trespass and to exert any influence possible over the hostile action. Indeed, I chose to be present on my land on the 10th May 2011, while the fence erection took place and I observed its installation by the Defendant's contractors. I intervened to limit the extent of the incursion to the degree that I was able, as any landowner would. Later claims by the Defendant have misconstrued this observation and intervention as 'supervision'. My presence did not represent consent to the action being taken by the Defendant and his wife in erecting the fence."

47. During her oral evidence, Dr Harrison explained that on 10 May 2011 she and her husband were threatened with having to pay for any damage to the laurel that Mr Brading had planted. Her position, she said, was that the fence that was being erected

should be so positioned as to protect the laurel and not as far out into the field as it was being placed. She tried, she said, to limit the incursion into what she and her husband regarded as their land. She also, she said, told both Mrs Brading (who, unlike Mr Brading, was present) and the contractors that the fence was to be a temporary measure to protect the hedge while the issues between the parties were resolved.

48. On 14 May 2011, Professor Harrison himself put up some fencing to the west-south-west of that erected on Mr Brading's behalf which he attached to Mr Brading's fence. His fencing, he said in evidence, was designed to protect some self-seeded saplings and always meant to be temporary.

49. There was then a lull until October 2011. Dr Harrison commented in cross-examination that she and her husband breathed a sigh of relief when the Bradings went on holiday for the summer. "You just get fed up with it," she said.

50. On balance, it seems to me that no boundary agreement was ever concluded. Not only did the Harrisons indicate in their 15 April email that they were seeking a "single comprehensive agreement" embodied in writing and signed by each of Professor Harrison, Dr Harrison, Mr Brading and Mrs Brading, but Dr Harrison told Mrs Brading and the contractors on 10 May that the fence that was being erected was to be a temporary measure. In all the circumstances, I do not think that, viewed objectively, the parties ultimately arrived at any agreement.

51. The upshot, in my view, is that:

    i) The 1989 conveyance gave Mr Browne a strip of land to the east of the present day retaining wall in Area A. The boundary of the plot lay in the position shown by the purple pecked line on page 469 of the bundle;

    ii) The land conveyed in 1989 did not include any of Area B. On the true construction of the conveyance, the southern boundary of Mr Browne's plot was to run along the garden fence and then continue eastwards; and

    iii) The boundaries have not changed since 1989.

52. I shall hear counsel on the terms of the order that I should make to give effect to my conclusions.