Neutral Citation Number: [2014] EWCA Civ 1152
Case No: B2/2013/1090/CCRTF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARDIFF CIVIL JUSTICE CENTRE
CHANCERY BUSINESS
(HHJ MILWYN JARMAN QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 25 June 2014

B E F O R E:

LORD JUSTICE MAURICE KAY
LORD JUSTICE ELIAS
LORD JUSTICE PITCHFORD

	ROGER ARNOLD SPARLING	**Appellant**
	-v-	
	JOHN ARTHUR NORMAN **SYLVIA ARTHUR NORMAN**	**Respondents**

(DAR Transcript of
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Michael Collard (instructed by Mary Evans & Co Carmarthen SA31 3AL) appeared on behalf of the Appellants
Philip Morris (instructed by JCP Solicitors, Swansea SA6 8QP) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE ELIAS: The appellant and his wife own and occupy Hebron Farm Cottage in Carmarthenshire. The respondents, Mr and Mrs Norman, are the owners of an adjoining property to the west of Hebron Farm known as Arnwood. Sadly there has been friction between the parties leading to expensive litigation out of all proportion to the interests at stake. We are concerned with a dispute about precisely where the boundary runs between the two properties. There is a hedge bank between the properties and the respondents say that the top of the bank delineates the boundaries. The appellants submit that the boundary runs along a line towards the bottom of the bank on the Arnwood side.

2. HHJ Milwyn Jarman QC, sitting at the Cardiff County Court, found in favour of the respondents and declared the boundary to be at the top of the bank. Mr Sparling, who appeals by leave of Patten LJ, submits that the learned judge erred in reaching that conclusion.

The History

3. The background to the dispute is as follows. The two properties, Hebron Farm and Arnwood, were at one time in the common ownership of David and Jean Birch, who farmed Hebron Farm. By a deed of gift, dated 18 July 1988, Mr and Mrs Birch gave a plot of land to Mr Birch's mother. That is the land upon which the property at Arnwood was subsequently built. The parcels' clause was set out in the first schedule as follows:

> "All that piece or parcel or plot of land forming part of Hebron Farm in the County of Dyfed and forming part of OS number 323 on the Ordinance Survey map or plan for the parish and having a frontage of 110 feet or thereabouts between the points E to D and measurements of 102 feet or thereabouts between the points E to A and 85 feet or thereabouts between the points A to B and 42 feet or thereabouts between points C to D, all of which are shown for identification purposes only on the plan annexed to and edged red."

This description makes the precise boundary difficult to determine for reasons given by the judge at paragraph 7 of his decision**:**

> "Despite warnings by the courts going back many years as to the undesirability of using small scale plans, the plan referred to in this case appears to be a photocopy of an Ordnance Survey plan which was surveyed in 1888. The scale was 208.33 feet to one inch. The plot therefore is less than an inch on the plan. It shows a shape which has A to B on the northern or rear boundary, B to C to D along the boundary in dispute which is the eastern boundary of Arnwood, points E to D along its frontage which adjoins the highway and E to A along the western

> boundary which is the boundary with Pleasant View. There were submissions as to whether the line B to C to D in fact shows a curve or two straight lines. It is not, in my judgment, possible to be very accurate about this because of the scale. It seems to me that the red edging does suggest something of a curve."

4. Some months after the transfer of the property to Mrs Birch, on 19 December 1989, she conveyed what subsequently became known as Arnwood to Mrs Norman and her daughter. The parcels clause in that conveyance reads as follows:

> "All that piece or plot of land forming part of Hebron Farm, Hebron, in the County of Dyfed is the same as described in the documents set out in the second schedule hereto."

The effect of this was that she was seeking to convey precisely the same land as had been gifted to her.

5. There were subsequent changes in ownership. We are told that some three or four years ago Mr Norman became a joint owner with Mrs Norman and her daughter ceased to have any interest in Arnwood.

6. In 2000 Mr Sparling purchased Hebron Farm from Mr Birch. Relationships between the Normans and Mr Birch had been cordial. Mr Norman gave evidence that at the time he purchased Arnwood Mr Birch had inserted poles at the top of the bank demonstrating where the boundary was to run. Mr Birch himself gave written evidence, which was before the court in the form of a letter, in which he confirmed that he had constructed the bank with the intention that it should mark the boundary, this being the top of the bank. Mr Norman thereafter planted bushes and other plants on his side of the bank without any objection from Mr Birch.

7. The judge made certain highly material findings of fact. First he found that there was no bank in existence prior to the deed of gift; and second, that it was, however, constructed very shortly thereafter and before Mrs Birch had conveyed the property to Mrs Norman and her daughter. The evidence was that the plot which had been gifted to his mother had been a dung heap and contained much rubbish. A contractor had been engaged to push the materials together to form the bank.

Mr Atkinson's Report

8. A report was prepared by an experienced chartered land surveyor, Mr Nigel Atkinson. He noted that the coloured markings by the Land Registry only indicated the boundary in a very general way. They did not provide any precision as to the exact line separating the two boundaries. Mr Atkinson sought to identify the boundary as best he could, but at paragraph 6.5 of the report he noted the difficulty of his task:

> "The 1989 Deed of Gift quotes dimensions for the Arnwood sides. Their accuracy is impossible to assess without knowing how they were measured. Uncertainty over the datum points means that in practice they

do not define the boundaries with any great accuracy."

He then summarised how he had approached his task and concluded that there were three possible boundary lines, whilst accepting that in fact these were not exhaustive of all possibilities. He said this at paragraph 7.3:

> "The plan at Appendix II shows these three alternative positions in blue, but others are possible. However, the clear conclusion that arises from my plan is that all the alternatives give the boundary B-C-D generally at the bottom of the bank on the Arnwood side. This is in accordance with Mr Young's conclusion in his report. However, in my opinion none of the lines defined by the dimensions are entirely satisfactory since they appear to enclose a bank forming part of the Arnwood Garden and in two cases the lines run through the entrance gate which would mean that one of the gateposts is encroaching."

9. Mr Sparling has accepted that of the three possible boundary lines identified by Mr Atkinson he is prepared to accept the most favourable line to the Normans, that is the most eastern boundary line. He would recognise that as being the appropriate boundary. It still encompasses some of the bank on the Arnwood side.

The Principles of Construction

10. The principles are not in dispute and were identified by the judge. The basic principle was enunciated by Lord Hoffmann in the case of Alan Wibberley Building Ltd v. Insley [1999] 1 WLR 894 at 895H to 896B:

> "The first resort in the event of a boundary dispute is to look at the deeds. Under the old system of unregistered CONVEYANCING, this means the chain of conveyances and other instruments, going back beyond the period of limitation, which demonstrates that the owner's title is in practical terms secure against adverse claims. These conveyances will each identify the subject matter in a clause known as the parcels which contains the description of the land. Sometimes it is no more than a reference to the land conveyed by an earlier conveyance, which will then have to be consulted. Older conveyances of farm property often describe the property as being the house and land in the occupation of the vendor or his tenant. The parcels may refer to a plan attached to the conveyance, but this is usually said to be for the purposes of identification only. It cannot therefore be relied upon as delineating the precise boundaries and in any case the scale is often so small and the lines marking the boundaries so thick as to be useless for any purpose except general identification. It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which existed, or may be supposed to have existed, when the conveyances were

executed.

The same is true in the case of registered conveyancing..."

This is a case where the route of title lies in the terms of the gift from Mr Birch to his mother, rather than the conveyance from Mrs Birch to the Norman family.

11. In Pennock v Hodgson [2010] EWCA (Civ) 873 Mummery LJ identified the following principles which he said could be discerned from the Wibberley decision:

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

The relevant evidence does not, however, include the subjective beliefs about where the boundaries lie, as Mummery LJ made clear in paragraph 13 of his decision. The way in which he suggested the question of construction could be approached was set out in paragraph 12 in the following way:

> "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;..."

12. There is an additional source of extrinsic evidence that may assist in interpreting the conveyance, to which Mummery LJ did not expressly refer in that case. This is the

subsequent conduct of the parties to the conveyance. There is a well-established line of cases which demonstrates that in an appropriate case this is potentially probative and material evidence: see Watcham v Attorney General East Africa Protectorate [1919] AC 533 explained and applied in Liaquat Ali v Lane [2006] EWCA Civ, [2007] 1 P&CR 26. Liaquat Ali has in turn been followed in more recent cases including Bradford v James [2008] EWCA Civ 837 and Piper v Wakeford [2008] EWCA Civ 1378, [2009] 1 P&CR DG16). I consider the scope and application of that principle later in this judgment.

The Judge's Conclusions

13. The judge set out the law and his findings of fact and then he summarised his conclusions as follows:

> "I accept Mr Spackman's submission that the court should be slow to come to any other conclusion than that suggested by the measurements specifically referred to in the deed. On the other hand, as has been indicated, that deed refers to a plan which is very small scale, it is not certain where the datum points are and there is of course an important measurement missing from B to C. Whilst accepting I should be slow, therefore, to come to any other conclusion that that shown by the blue lines in Mr Atkinson's report, I am satisfied on all of the evidence and having regard to the background matters as they existed at the time of the conveyance, that what was intended to be conveyed was the plot -- and of course I must take the intention as that of Mrs Birch senior not of her son but what was intended to be conveyed was the side of the bank up to its top. The bank is a very steep one which is clear from the photographs. In my judgment, it is unlikely that the parties would intend that both sides of that bank should belong to Hebron Farm Cottage. It is more likely, in my judgment, that the bank facing the plot, the side of the bank facing the plot should belong to it and accordingly, in my judgment, the correct boundary is that shown as the red line on Mr Atkinson's plan."

14. This analysis suggests that the judge was focusing on the transfer from Mrs Birch to the Normans, by which time the bank was of course in place. But the relevant transfer here on which he needed to focus was that from Mr Birch to his mother Mrs Birch, because that was the land which subsequently Mrs Birch was seeking to transfer. The bank was not in existence at the time of that conveyance. The critical question was: "Where was the boundary at that time?"

15. As Patten LJ pointed out in granting permission, if one is simply focusing on the background matters, existing at the time of the conveyance, it could not be appropriate to have regard to this bank. If indeed the boundary was properly to be situated on the western side of the bank, then Mrs Birch could not convey to the Normans any more than had originally been conveyed to her. If the bank had subsequently been built in a place other than on the boundary, it could not entitle her to treat the top of the bank as

the boundary and thereby transfer land to the Normans which was not hers.

The Grounds of Appeal

16. The principal ground of appeal reflects the concerns about the judgment expressed by Patten LJ. Since the bank was not in existence at all on the date of the gift to Mrs Birch, it cannot be taken into consideration in determining the boundaries of Arnwood. It could not have any proper bearing at all on the construction of the parcel of land gifted to Mrs Birch by her son.

17. The respondents accept that the judgment is not wholly satisfactory and that the reasoning is open to criticism. They contend, however, that in fact there is extrinsic evidence that overwhelmingly demonstrates that the boundary was marked by the top of the bank. Both Mr Norman and Mr Birch have confirmed that Mr Birch has identified the boundary as being in that position. The detailed measurements intended to identify the relevant parcel of land were never sufficient to provide any precise understanding, and there was no measurement at all of the length of B to C. Given the lack of clarity, it was in accordance with the principle of taking into account subsequent evidence that the evidence from Mr Birch and Mr Norman could be admitted. This demonstrated beyond doubt, that the top of the bank was properly to be treated as the relevant boundary.

Subsequent Conduct of Probative Evidence

18. The leading case is Liaquat Ali, to which I have made reference. In that case too the dispute concerned only a few metres of land of no apparent interest to either party. Carnwath LJ, giving the judgment of the court, referred to a number of cases where the court had accepted, contrary to the general rule in contract law, that subsequent conduct may sometimes be relevant to the construction of a parcels clause in a conveyance. In Neilson v Poole [1969] 20 P&CR 909 Megarry J had expressed the justification for this approach as follows:

> "...in the construction of the parcels clause of a conveyance and the ascertainment of a boundary the court is under strong pressure to produce a decisive result. The prime function of a conveyance is to convey. As to any particular parcel of land, either the conveyance conveys it, or it does not; the boundary between what is conveyed and what is not conveyed must therefore be proclaimed. The court cannot simply say that the boundaries are uncertain, and leave the plot conveyed fuzzy at the edges, as it were. Yet modern conveyances are all too often indefinite or contradictory in their parcels. In such circumstances, to reject any evidence afforded by what the common vendor has done in subsequent conveyances seems to me to require justification by some convincing ground of judicial policy; and I have heard none." (page 915)

This was followed in Clarke v O'Keefe [1997] 18 P&CR 126. In that case the parties to a conveyance had together [to] state the boundary of which precise position was

unclear. Peter Gibson LJ said this (p.133):

> "I have to say that it would seem to me to be somewhat absurd, in a case where there is no verbal description of the land such as would serve to identify its boundary accurately and where the plan is imprecise in showing the boundary as following a vegetation line in 1977, and where both vendor and purchasers agree its exact position, if the court were then to shut its eyes to evidence of what they agreed was the true boundary."

19. In the case of Watcham v Attorney General of East Africa Protectorate [1999] AC 533 the Watchman family were given a land on the shores of the Nairobi river by the Crown. The certificate conveying the land referred to the plot as being of 66¾ acres, but a description by reference to physical features suggested that it was in the region of 160 acres. There was evidence that the Watcham family had never occupied this large area; on the contrary, it had been occupied, without their objection, by third parties. That evidence was held to be admissible to show that the description was false. Some doubts about the application of the principle in Watcham were expressed by the Court of Appeal in the case of Beale v Harvey [2004] 2 P&CR 18, but in the Liaquat Ali case Carnwath LJ, after analysing the earlier authorities, confirmed the principle in the following terms:

> "36. The conclusion I would be inclined to draw from this review is that Watcham remains good law within the narrow limits of what it decided. 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.
>
> 37. The qualification is crucial. When one speaks of "probative value" it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise related, to physical features which were in existence in 1947. Similarly, evidence of Mr Attridge Senior's understanding of the position of the boundary, or actions by him apparently relating to that boundary, is of limited probative value, even if admissible. Such evidence begs the questions whether his understanding of the boundary was well-founded, and if so how strict he was in observing it, particularly having regard to the disused state of the disputed land during that period.
>
> 38. I would add that in principle reference to the intentions of the parties means the parties to the original conveyance. Thus in Watcham the user relied on by the Privy Council was that of the Watcham family, who were the beneficiaries of the original certificate. In none of the cases reviewed

above was account taken of the conduct of subsequent owners. Megarry J might possibly have been willing to go further. ..."

20. Liaquat Ali has since been followed in a number of cases, including Piper v Wakeford. In that case a party to a conveyance in 1908 at some later date planted pine trees in the area of the boundary in the same way as here done on other boundaries on his land. Lloyd LJ accepted that this was probative evidence of where the boundary under the original conveyance was intended to be.

Discussion

21. In my judgment the principles identified in Liaquat Ali apply here. I accept that the judge does appear to have erred in the reasons he gave for reaching his conclusion because although the bank was in place at the time of the conveyance by Mrs Birch to the Normans, it was not in place when Arnwood had been gifted to her. But it does seem to me implicit in the analysis of the judge that he was accepting that Mr Birch had subsequently constructed the boundary where he considered it to be.

22. In my judgment, there is ample evidence to permit the court to have regard to the subsequent conduct of Mr Birch and, once that is taken into consideration, the inevitable conclusion, it seems to me, is that the top of the bank marked the boundary. The boundary itself cannot be precisely determined from the terms of the deed and therefore it is legitimate to see how the parties to the original deed conducted themselves with respect to the property. The evidence was that Mr Birch, having gifted the property, sought thereafter to mark the boundary of the land he had gifted without any objection from his mother. Subsequently he allowed Mr Norman to plant bushes and other plants on his side of the bank without objection. He also, at the time of the conveyance of Arnwood from his mother to the Normans, put posts along the top of the bank to indicate the boundary line.

23. In my judgment, this is highly probative evidence which justifies the judge's conclusion that the top of the bank marks the boundary. It is not a question of Mr Birch's subjective understanding. He was a party to the original gift to his mother and indeed determined with his wife precisely what parcel of land would be given to her. His subsequent conduct reflects and reveals where the boundary is of the land he had intended to convey. The boundary is certainly very close to those other possible boundary lines which Mr Atkinson has identified , and Mr Atkinson himself accepted that these were by no means exhaustive of other possibilities.

24. I would accept that the boundary indicated by subsequent conduct cannot be at odds with the description of the parcel of the land; it must be consistent with it. But in my view, taking the boundary to be the top of the bank is within the limits of tolerance permitted by the description itself. There would appear to be no purpose in Mr Birch constructing this boundary anywhere other than where he intended the boundary to be, and his own evidence confirms that this is what he was intending to do. He was not intending to refix the boundary. It is true that he could have constructed the bank with the intention that both sides should lie on the Hebron side of the boundary, but his own

evidence was inconsistent with that analysis, as is clear from the evidence of Mr Norman. Furthermore, in my view, the judge was entitled to conclude that the steepness of the boundary itself also indicated that the boundary was likely to be at the top of the bank, rather than in any other place on the bank.

25. Mr Collard raises three objections to this analysis. First he submits in fact, contrary to the view of the judge, it was possible to identify the parcel of land conveyed by the gift with precision. Accordingly there was no justification for any extrinsic evidence at all. Mr Birch could not, at a later date, fix the boundary at any place other than that revealed by the descriptions in the parcels clause.

26. In my judgment, the difficulty with this is that it was never the way in which the case was advanced below. Indeed, it is wholly inconsistent with the evidence before the judge. As I have indicated, Mr Atkinson himself identified a range of problems in seeking to make sense of the parcels clause, not least because the distance between B and C was never identified. Mr Collard suggested that the precise boundaries could be discovered readily easily, for example, by applying the Pythagoras principle. That, in turn, presupposes that the angles between the various sides could be measured with precision. I wholly reject this submission. In this connection Mr Collard also contends that, in any event, the boundary fixed at the top of the bank is outside the tolerance limits of the parcels clause. The three boundaries identified by Mr Atkinson were all towards the bottom of the bank on the Arnwood side, although the extent to which that was so varied along the lengths of the boundary.

27. I do not accept that submission either. The precise measurements of the parcel are never clear and given the fact that Mr Atkinson's three proposed boundaries were not, on his own admission, exhausting all possibilities, I consider that to fix the boundary at the top of the bank is within the tolerance limits and is not inconsistent with the terms of the parcel clause.

28. Second, Mr Collard contends that the evidence of Mr Birch and of Mr Norman, to the extent that it is consistent, is not truly probative at all. It relies upon subsequent conduct which was unrelated to the original gift. It is not clear, for example, that the contractor who built the bank intended to build it on the boundary.

29. I reject this submission too. It is a reasonable inference that the bank was constructed by the contractor where Mr Birch wished it to be, and his evidence shows that this was on the boundary line. It seems to me that this evidence is relevant in much the same way as was the evidence of the parties staking out an unclear boundary in the case of Clarke v O'Keefe. The division of the land by the boundary is identifying very shortly after the gift has been conveyed precisely what has been transferred. In any event, Mr Birch's evidence, which was not disputed and was accepted to be admissible evidence, in my view satisfies the wider principles in Liaquat Ali.

30. The third objection is that even if the Liaquat Ali principle has traction it is inappropriate for this court to reach a conclusion as to where the boundary should lie. The matters should be remitted for a fresh determination in the light of all relevant

principles.

31. I accept that if I were in any real doubt as to the outcome I should accede to that submission. But in my judgment the weight of the evidence here is overwhelming. There is, in truth, no reason why the bank would be constructed anywhere other than on the boundary. The extrinsic evidence both from Mr Birch and Mr Norman, and the fact that Mr Norman was allowed to plant bushes without any objection or complaint, confirms that conclusion. For these reasons, therefore, although I am differing in part from the reasoning of the judge below, in my judgment he reached the right conclusion and the appeal fails.

32. There is a further submission following on from this, which relates to the question of costs. The position, putting it very summarily, was that initially the Normans were claiming that the boundary fell on the Hebron Farm side of the bank. However, by a letter dated 6 December 2010, they indicated that they were prepared to accept that the boundary line was indeed the top of the bank. That offer was apparently given to Mr Sparling at a case management conference on 21 December. It was not accepted. The judge, when considering the question of costs, concluded that until that letter was sent, because the Normans were claiming more than they were entitled to, they should pay the costs. Thereafter, however, allowing a period of some six weeks or so from the date of the letter for acceptance or rejection, he concluded that the costs should be borne by Mr Sparling. Accordingly he ordered that they should bear the costs as from 23 January 2011.

33. The submission is that the judge was not entitled to exercise his discretion in this way. There are a number of good reasons, it is alleged, why Mr Sparling did not accept the offer at that time: firstly, there was still a drainage issue outstanding, which meant that it was desirable that the issues should all be determined together; secondly, the letter of 6 December did not specifically deal with the question of costs; and thirdly, there was an expert's report that was awaited.

34. In my judgment none of these reasons justifies interfering with the sensible conclusion of the judge. There was an offer and had it been accepted then, so far as the boundary dispute issue was concerned, it would have been resolved at that date. Mr Collard accepted, in any event, that his client would need to pay the costs from 6 September 2011, because at that stage the Normans were making it plain, in the litigation process itself, that they were not seeking to contend that the boundary was on the Hebron Farm side of the bank but was indeed at the top of the bank. So we are not, in truth, talking about very significant costs here, merely the costs incurred between 23 January 2011 and 6 September 2011. As I say, in my judgment, the judge was entitled to reach the conclusion that he did and I would not interfere.

35. LORD JUSTICE PITCHFORD: I agree and add words of my own only by reason of the assault upon the learned judge's reasons for reaching the conclusion he did. The judge found at paragraphs 7 and 22 of his judgment that it was not possible accurately to assess the boundaries between Arnwood and Hebron Cottage and Arnwood and Pleasant View solely by reference to the deed of gift, dated 18 July 1989, because (1)

there was no reference point identified in the deed from which to make the measurements, (2) the scale of the plan was woefully too small and (3) the boundary lines that were marked on the plan were far too wide adequately to define a boundary from the plan.

36. Accordingly, having considered the guidance given by Mummery LJ in Pennock v Hodgson [2010] EWCA (Civ) 873 and, in particular, at paragraph 9(3), the judge resolved that the boundary could only be decided by extrinsic evidence of its physical position as at the date of the deed of gift.

37. That extrinsic evidence established that by 19 December 1989, the date of the conveyance by Marion Birch of the Arnwood plot to Mr and Mrs Norman at the instructions of Mr Birch (a grantor of Arnwood to his mother) a contractor had erected a bank between Arnwood and Hebron Farm Cottage. The owner of Hebron and the grantor of the gift, Mr Birch, then erected a post at the top of the bank to mark the position of the boundary. Later plants and shrubs were planted by the Normans on their side of the bank without objection from their neighbour. This was the evidence summarised by the judge at paragraphs 9 and 10 of his judgment.

38. On 4 April 2009, Mr Birch wrote a letter to Mr Sparling (the defendant in the action) saying that he had personally measured and marked out the Arnwood plot, for the purpose of the deed of gift, and the new bank between Arnwood and Hebron Farm was erected to show the boundary line at the top of the bank. The parties are not agreed as to the scale in measurement terms of the dispute between them. One side says that the dispute involves a measurement of land of approximately 1 metre and the other of approximately 3 metres. Whichever it is it seems to me that it is well within the margin which permits the application of extrinsic evidence, even if its application results in a conclusion which is, on its face, inconsistent with the deed.

39. The judge recognised the force of the defendant's argument, that since there was a pre-existing bank and hedge on the boundary between Arnwood and Pleasant View the measurements in the deed of gift must refer to a date of point by reference to that bank. He so recognised the force of the argument in paragraph 21 of his judgment. However, he thought, having regard to the lie of the land, that it was most unlikely that the boundary between Arnwood and Hebron Cottage would have been drawn in the position claimed by the defendant, since that would require the boundary to dissect the retaining wall and the gate giving access to the plot. He concluded that it was more probable that the land conveyed was that which Mr Birch identified in his letter of 4 April 2009. The choice was between accepting the accuracy of measurements from one of the datum points on the west side of the property, or holding that the bank on the east side accurately represented the boundary described in the deed of gift.

40. In my view there was a missing, but implicit, finding of fact by the judge that the bank had been erected in the position at which Mr Birch had marked out the boundary before the conveyance to Marion Birch in July 1989. Having considered the judge's judgment as a whole I do not accept that he made an elementary error by regarding, as critical, not the extent of the land originally conveyed by the deed of gift, but that

conveyed in December 1989. That assumption is, in my view, contradicted by the judge's accurate statement of the law at paragraphs 3 and 4 of his judgment, and also his recognition at paragraph 20 of the defendant's argument as to the significance of the dates.

41. While the judge's concluding findings were unhappily expressed, it is my view that the background extrinsic evidence, as he accepted, was overwhelmingly to the effect that the boundary represented by the top of the bank was in the same position as the boundary as it had stood at the time of the deed of gift. I would therefore dismiss the appeal on the substantive issue. I would also dismiss the appeal against the judge's costs order for the reasons given by my Lord.

42. LORD JUSTICE MAURICE KAY: I also agree. Once it is accepted, as it must be, that the measurements referred to in the deed of gift, dated 18 July 1989, do not lend themselves to a precise plotting of the disputed boundary, it is necessary to approach the issue by reference to the totality of the admissible evidence. I am entirely satisfied that for the reasons given by Elias LJ the natural inference is that the boundary was as declared by the judge, there being nothing of substance pointing to an alternative. I also agree that there is no basis upon which this court could interfere with the judge's order as to costs.

43. Accordingly, in the circumstances, the appeal will be dismissed and the judge's order stands.