

Neutral Citation No: [2021] NICH 26

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 20/12/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

PETER MICHAEL GIRVAN

Plaintiff

and

JONATHAN HARRIS EDWIN HOOL
and
GILLIAN PATRICIA HOOL

Defendants

Richard Coghlin QC and Alistair Fletcher (instructed by Russell & Co) for the Plaintiff
Mark Orr QC and Graeme Watt (instructed by Agnew Andress Higgins) for the
Defendants

HUMPHREYS J

Introduction

[1] In Hamlet, Act IV scene IV, one of Fortinbras's captains explains to the Prince:

"We go to gain a little patch of ground. That hath in it no profit but the name."

[2] Hence in *Alan Wibberley Building v Insley* [1999] UKHL 15, Lord Hoffman memorably commented:

"Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army."

[3] Boundary disputes are notoriously time consuming, expensive, emotional and difficult to resolve. However, the parties to this dispute and their advisors are to be commended on their industry and resolve in their approach to this matter. Constructive agreement on preliminary issues, together with focussed evidence and legal submissions, has allowed for substantial progress within just eight months of proceedings being served.

Background

[4] The plaintiff is the owner of premises situate at and known as X Ballygrainey Road, Holywood, Co Down, comprised within Folio DN 159109, having purchased these from his parents, Sir Paul and Lady Karen Girvan, in June 2014. The defendants are the owners of the neighbouring premises at Y Ballygrainey Road, being comprised in Folio DN 186337, their title having been acquired in March 1991 by way of a conveyance from Elizabeth Gracey.

[5] The plaintiff's predecessors in title successfully applied for first registration under section 16 of the Land Registration (Northern Ireland) Act 1970 ("the 1970 Act") on 21 September 2007. The defendants followed suit in May 2012. The registered title to each of the Folios in question is shown on the plan at Annex 1 to this judgment.

[6] On 3 May 2016 outline planning permission was granted to the defendants for the construction of a dwelling house and garage to the east of Ballygrainey Road, adjacent to the boundary with the plaintiff's lands. Approval for reserved matters was granted on 17 April 2019. This house was to be constructed at the top of the site, close to the Ballygrainey Road.

[7] In late October 2019 the defendants caused the removal of a large hedge which had represented the physical boundary between the respective parcels of land, such work being preparatory to the construction of the new dwelling house. As a result, the plaintiff sought legal advice and instructed a surveyor to report on the location of the boundary.

[8] In February 2021 a series of exchanges began between the parties where differing views were expressed on the boundary issue. The plaintiff issued proceedings that month and served them in April 2021. Matters came to a head when an unseemly incident occurred at the site on 5 May 2021. This precipitated an application to the court for an interlocutory injunction. Mutual undertakings were given and the parties sensibly agreed a set of preliminary issues for determination.

The Boundary Dispute

[9] The plaintiff's case is that the boundary between the respective properties is properly represented by the centre line of the hedge which was removed in October 2019. This is as shown in red on the map at Annex 2.

[10] The defendants say that the true boundary runs in a straight line from old stone gate posts to the Ballygrainey Road, as is shown marked 'HO' on the map at Annex 3.

The Preliminary Issues

[11] The parties agreed certain preliminary issues for determination. In exercising its power under Order 33 rule 3 of the Rules of the Court of Judicature (NI) 1980, the court has amended these in light of the evidence and submissions which were heard:

- (i) Where was the line of division between the Hool property and the Girvan property according to the 1955 grant, properly construed, in light of the admissible evidence?
- (ii) Has the possession and control of any party, or their predecessors in title, of any lands extinguished the title of the other party to those lands? If so, where does the line of division lie as a result of that adverse possession?
- (iii) Did the parties enter into an implied or inferred boundary agreement in relation to the line of division? If so, where does the line of division lie as a result of such agreement?
- (iv) Is the line of division consistent with the description of the lands at the Land Registry so that the parties are entitled to have that line of division entered on the register as the conclusive boundary?
- (v) If the line of division is not consistent with the description of the lands at the Land Registry, is the discrepancy an error which can be rectified?

The Legal Principles

(1) Interpretation of Conveyances

[12] Section 11 of the 1970 Act provides that the register is conclusive evidence of the title shown on it save as is otherwise provided by the Act. In essence, this greatly simplified the conveyancing process in that parties did not need to investigate the history of the title. However, section 64 states:

"The description of any land in the register shall not be conclusive as to the boundaries or extent of the land"

[13] It is open to land owners, under section 64(2), to apply to the Land Registry to have an entry placed on the register to the effect that the boundaries are conclusive.

However, in the absence of that, neighbouring owners can contend that the Land Registry line does not represent the true and exact boundary of the premises.

[14] The first step in any inquiry as to a 'true' boundary is to examine the conveyance whereby the ownership of property was divided – see Sara on Boundaries and Easements (7th Edition) at 1-001.

[15] Interpretation of conveyances requires adherence to a number of fundamental principles:

- (i) The starting point is the 'parcels clause' which contains the description of the property being conveyed;
- (ii) The weight to be given to any plan attached to a conveyance will depend upon the words used. Where the words "for the purposes of identification only" are included, the plan will be subordinate to the words of the parcels clause. Where it states "more particularly delineated on the plan attached hereto", this means the plan prevails in the case of any ambiguity;
- (iii) The traditional rules of the construction of documents apply and therefore the task is to ascertain the meaning which a reasonable person having all the background knowledge available to the parties would have understood the words to mean – cf. *Arnold v Britton* [2015] UKSC 36;
- (iv) Where there is any ambiguity or doubt, extrinsic evidence is admissible as an aid to interpretation – see, for instance, *Vance v Collerton* [2019] EWHC 2866 (Ch.);
- (v) The authorities make it clear that the critical question on construction is an objective one: "What would a reasonable layman think he was in fact buying?" – see, for example, *Cameron v Boggiano* [2012] EWCA Civ 157.

[16] The task was summarised by Lord Briggs in his dissenting judgment in *Lovering v Atkinson* [2020] UKPC 14:

"It is common in unregistered conveyancing ... to find parcels of land described both by a plan and by words. Where each method of description (viewed separately) leads to the same result, then no difficulty of construction arises. Sometimes the two work together, each filling in gaps left by the other or adding to the detail. But sometimes they point to different outcomes in terms of the extent and boundaries of the land being conveyed. In such a case it is a question of construction as

to which should prevail, or be given the greater weight. Conveyancers frequently use well known phrases to resolve that issue. A plan may be referred to "for identification purposes only." This usually means that the verbal description will prevail, where it differs from the plan. Or the land being conveyed may be described as "more particularly delineated on the plan annexed hereto" in which a case the plan will generally prevail over the verbal description." [para 50]

[17] In *Alan Wibberley* [supra] Lord Hoffman observed:

"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"

(2) Boundary Agreements

[18] As long ago as 1750, in a case concerning the proper boundary between Pennsylvania and Maryland, Lord Hardwicke LC held:

"To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits."
(Penn v Lord Baltimore 27 ER 1132)

[19] In *Neilson v Poole* [1969] 20 P & CR 126, Megarry J confirmed that an agreement which identifies a boundary does not amount to a contract to convey an interest in land and is not therefore subject to the formalities requirements (in this jurisdiction imposed by section 2 of the Statute of Frauds (Ire) 1695). The learned judge expressed the view:

"...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."

He analysed the juridical basis of such an agreement thus:

"Now a boundary agreement may constitute a contract to convey land. The parties may agree that in return for a concession by A in one place, straightening the line of division, B will make a concession in another place; and the agreement may thus be one for the conveyance of land. But there is another type of boundary agreement. This does no more than identify on the ground what the documents describe in words or

delineate on plans. Nothing is transferred, at any rate consciously; the agreement is to identify and not to convey. In such a case, I do not see how the agreement can be said to constitute a contract to convey land. In general, I think that a boundary agreement will be presumed to fall into this latter category.”

[20] Such an agreement may be express but may also be implied or inferred by or from the parties' conduct. In *Acco Properties v Severn* [2011] EWHC 1362 (Ch.) HHJ Simon Barker QC observed:

“Such agreements are usually oral and the result of neighbours meeting to avoid or resolve a potential or actual dispute. However, there is scope for a boundary agreement to be implied or inferred – that is, to be the logical conclusion to be drawn from primary facts.”

[21] In *Burns v Morton* [1999] EWCA Civ 1514 the conduct relied upon as the basis for the inference or implication of a boundary agreement was the building of a wall by the defendant. Swinton Thomas LJ said:

“The judge had to draw inferences from the facts that he had. He had to consider whether he had evidence from which he could properly imply an agreement between the parties to the effect that the boundary between the two properties should be in the position when the wall was built in 1979. The wall, by the time the judge gave his judgment in this case, had been there for some 20 years. It had, clearly, by that time been accepted by the owner of the adjoining property as being the true boundary to the property. The judge found, and in my judgment rightly found, that when the wall was built by Mr Morton it was indeed intended to demarcate the boundary between the two properties, and was accepted by both owners as the boundary from then onwards.”

[22] In *Bean v Katz* [2016] UKUT 168, a boundary agreement was inferred from the long standing acceptance of a boundary line comprised of an old fence and hedge.

[23] The defendants embarked on an ambitious legal submission which sought to contend that a jurist of the eminence of Sir Robert Megarry in the field of real property had erred in holding that boundary agreements could effect a means of the informal transfer of land. The authorities reveal that it is a well established principle which has a sound policy based rationale and has been endorsed in this jurisdiction by Deeny J in *Agnew v McCartney* [2004] NIQB 43. It remains good law.

(3) Adverse Possession

[24] Article 21 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order") provides that an owner of land may not bring an action to recover possession after the expiry of 12 years from the date of accrual of the cause of action. By Article 26, the title of the owner is extinguished at the expiry of this time limit.

[25] The well-known authorities of *Powell v McFarlane* [1977] 38 P & CR 452 and *J A Pye (Oxford) v Graham* [2002] UKHL 30 establish the following principles:

- (i) The owner of paper title to land is deemed to be in possession of it;
- (ii) A person without paper title must show both actual possession and the requisite intention to possess;
- (iii) Factual possession requires an appropriate level of physical control;
- (iv) The intention to possess must encompass the exclusion of the world at large, including the paper title owner;
- (v) The permission, whether actual or implied, of the paper title owner to the possession defeats any claim to adverse possession.

(4) Rectification

[26] Section 69(1) of the 1970 Act provides that where any error occurs in the register, the court may order rectification on such terms as it sees fit. By section 69(3), rectification shall not be ordered unless it can be made without loss or damage to any person claiming in good faith and for valuable consideration through a registered owner and unless:

- "(a) the registered owner or, as the case may be, a person claiming as aforesaid through the registered owner or anyone acting on behalf of either has, by his act, neglect or default, been in any way responsible for, or has contributed to, the error; or*
- (b) in the case of an error made before such registered owner was so registered, he was, in fact, aware of such error at the time of his registration as owner; or*
- (c) in the case of an error made after such registered owner was so registered, he or a solicitor acting on his behalf became aware of such error at a time when such error was capable of being rectified without causing loss or*

damage to any person except the expense of such rectification; or

- (d) *the immediate disposition to such registered owner, or the disposition to any person through whom he claims otherwise than for valuable consideration, was void; or*
- (e) *such registered owner acquired the land otherwise than for valuable consideration and rectification of the error could have been made against the person through whom he claims if such person had been the registered owner; or*
- (f) *such registered owner consents to rectification."*

[27] The court's power to order rectification is expressly limited to situations where the registered owner is in possession but section 69(3) does not limit the power of the court to rectify the register in any particular case if the court is satisfied that it would be unjust not to rectify the register against the registered owner.

[28] In *Hayes v McGuigan* (No. 2) [2011] NI Ch 25, Deeny J referred to the heavy onus of proof of any party seeking rectification of the register.

[29] The defendants have sought relief by way of rectification pursuant to section 69 in their pleadings but, in argument, developed a case that there was no 'error' which required rectification of the register since, in any event, boundaries on registry maps are not conclusive. Reliance is placed on a decision of the English Court of Appeal in *Lee v Barrey* [1957] Ch 251 in which Lord Evershed MR held:

"This plan cannot be set up to overturn the plain effect of what otherwise would have resulted from the bargain made between the defendant and his vendor as had been recorded in his contract and in his instrument of transfer."

The 1955 Conveyance

[30] The root of title of both properties is a Fee Farm Grant dated 1 May 1906 and made between Robert John Kennedy of Cultra House and William Hugh Greenfield of Jackson Hall. The Kennedys of Cultra owned some 4,000 acres of land and Sir Robert Kennedy, the 1906 grantor, constructed Cultra Manor. The lands conveyed in the 1906 Grant included the substantial property at Jackson Hall and two other adjacent smaller properties, Carrig and Garden Lodge. Both Jackson Hall and Carrig remain in situ today, being 173 and 175 Bangor Road respectively, whilst Garden Lodge was later demolished and those lands now largely comprise the plaintiff's property.

[31] In 1913 all the Fee Farm Grant lands were conveyed to Helen Keith who, shortly thereafter, married and became Helen Freeland. Between 1955 and 1968, Mrs Freeland and her trustees disposed of a number of plots of land. The first such sale was by way of a conveyance dated 1 June 1955 from Freeland to Megrān. The parcels clause provided:

"ALL THAT piece or parcel of land situate on the north west side of the Ballygrainey Road in the Townland of Ballygrainey Parish of Holywood Barony of Lower Castlereagh and County of Down containing in front to said road three hundred and thirty four feet six inches or thereabouts from front to rere on the north east side One hundred and eighty four feet or thereabouts and from front to rere on the south west side Two hundred and ninety nine feet or thereabouts be the same more or less BOUNDED on the south east or front by Ballygrainey Road aforesaid on the north west or rere and north east by other property of the vendors and on the south west by a laneway which said premises are more particularly delineated and described on the Map endorsed hereon and therein coloured redAND ALSO EXCEPTING AN RESERVING unto the Vendors the right to draw water from the well on the premises hereby conveyed as shown on the said Map through the existing pipes or such pipes as may be substituted therefor laid there-in and also to enter upon the land hereby conveyed for the purpose of cleansing and maintaining the said well and pipes making good any damage caused thereon and provided the said well is covered over."

[32] The defendants derive their title from this conveyance and, given that this was the first division of the lands in the 1906 Grant, it is the starting point for the interpretation of the correct locus of the boundary. It contains detailed measurements, refers to a map and identifies certain physical features. The map attached to the 1955 conveyance forms Annex 4 to this judgment.

[33] An additional portion of lands, of around 0.1 acres, was conveyed by Freeland to Megrān on 10 April 1959.

[34] The 1955 conveyance therefore provides that the land in question has:

- (i) A boundary to south east of 334' 6" bounded by the Ballygrainey Road;
- (ii) A boundary to the south west of 299' bounded by a laneway;
- (iii) A boundary to lands retained by the vendor to the north east of 184';
- (iv) A boundary to lands retained by the vendor to the north of 233.'

[35] The wording of the parcels clause is of the “more particularly delineated” nature and therefore, in the case of doubt or ambiguity, the map will prevail over the words of the demise. The map shows the northern boundary (iv) as running eastwards from the laneway for the defined distance of 233.’ There is no *terminus ad quem* in the form of any geographical feature on the ground.

[36] The court had the benefit of expert evidence from Mr Michael Simms, consultant surveyor instructed on behalf of the plaintiff and Mr Wally Gamble, mapper and former Land Registry official, instructed on behalf of the defendants.

[37] The experts prepared detailed reports and plans. They met and minuted their points of agreement and disagreement and ultimately gave their evidence concurrently. These steps proved to be an efficient use of court time, distilling down the issues between them.

[38] Insofar as the 1955 conveyance was concerned, the experts agreed that the eastern boundary (now the boundary between the parties’ respective properties) runs south to the Ballygrainey Road at an angle of 80 degrees from the terminus of the northern boundary. However, they disagreed as to the location of this terminus. In the opinion of Mr Gamble, this was a pair of old stone pillars next to 173 Bangor Road. Mr Simms concluded that this point was some 14’6” short of the stone pillars.

[39] The experts concurred that the northern boundary was properly measured from the laneway and followed a line of old pig iron posts which were to be found on the ground. In order to make good his case, Mr Gamble was driven to contend that the laneway was not in its current location at the time of the 1955 conveyance but rather was to be found some 14’6” to the east. He was unable to point to any evidence to substantiate this claim. Mr Simms, by way of riposte, showed on a map that, if this contention was correct, then the western boundary of the property conveyed in 1955 would have been inside the old gate posts which are now found on the property belonging to the defendants.

[40] The court carefully considered the hypothesis presented by Mr Gamble but found it to be lacking in any evidential support. The starting point for the interpretation of the 1955 conveyance is the deed itself. It expressly states that the northern boundary runs from the laneway and a measurement of 233’ from that point stops well short of the stone pillars. Neither the deed nor the map suggest that the terminus of the northern boundary is represented by the old stone pillars. There is nothing doubtful or ambiguous arising from the parcels clause or the map nor is there any reason to believe that the laneway is now in a different location. There is therefore no basis for the admission of extrinsic evidence on this issue, even if it were helpful to one party’s case.

[41] I therefore conclude that the northern boundary of the property conveyed in 1955 runs from the laneway to a point 14’6” from the old stone pillars of 173 Bangor

Road. This creates an offsetting to the west of the feature and what was described in court as a 'nib.'

[42] If I had determined that extrinsic evidence was admissible on this issue, it would have served to drive the court to the same conclusion. The Ordnance Survey map dated 1937/47 shows the presence of an outbuilding which, if it remained in place in 1955, would have been bisected by a boundary line running at 80 degrees from the old stone pillars. By contrast, a boundary line running from the point 14'6" from the stone pillars passes the western gable of the outbuilding. The Irish Grid Map dated 1967 includes the same outbuilding. If it were necessary, I would have found that this extrinsic evidence supported the plaintiff's case in relation to the boundary created by the 1955 conveyance.

The 1968 Conveyance

[43] On 23 October 1968 Helen Freeland conveyed to James Francis Kielty the lands now within the ownership of the plaintiff, formerly containing the Garden Lodge. This was the last of the conveyances entered into by Mrs Freeland, the other plots having been sold between 1955 and 1961. The recital to the 1968 deed states:

"AND WHEREAS the portions of the hereditaments and premises comprised in and granted by the Grant [being the 1906 Fee Farm Grant] as are set out in the documents mentioned and described in the First Schedule hereto have been sold AND WHEREAS the Vendor is now the owner of all the estate and interest of the Grantee in and to so much of the hereditaments and premises comprised in and granted by the Grant as are not comprised in the said documents set out in the First Schedule hereto"

[44] The parcels clause of the 1968 conveyance provides that the vendor conveyed to the purchaser the portions of ground "*which as to situation measurements and boundaries are more particularly delineated and described in the map thereof annexed hereto and thereon edged in red which map shall be deemed to form part of these presents.*"

[45] The annexed map shows a boundary to the Ballygrainey Road of 209'0" marked with the word 'hedge.' Mr Gamble has measured the existing boundary to the plaintiff's property as being 220', a difference of 11'. There are, however, a number of issues with the 1968 conveyance:

- (i) The measurements on it do not tally with a previous 1958 lease;
- (ii) It is the 1955 conveyance, as the first division, which defines the boundary between the properties and insofar as they are inconsistent, the 1955 conveyance must take precedence; and

(iii) It was clearly the intention of the vendor in 1968 to dispose of all the remaining lands held under the 1906 Fee Farm Grant.

[46] The western boundary is measured at 178'0" and similarly labelled 'hedge.' It is evident therefore that a hedge represented a boundary feature between the respective properties from at least 1968, predating the ownership of either of the parties by many years.

[47] The evidence of Mr Simms is that the boundary identified by the 1955 conveyance follows closely the approximate mid line of the substantial hedge which was removed by the defendants in 2019 and, in turn, this follows the red line on the Land Registry maps.

[48] If one asks the question what would a reasonable layman think he was buying in 2014, the inescapable conclusion is the lands as marked by the boundary in the Land Registry and bounded physically by the large hedge.

The Evidence

[49] The plaintiff gave evidence that he moved into the property in 2014. From then on he had maintained the large hedge using the services of a gardener, Alan McKee. A video was shown to the court of a child's birthday party from which one could see the large hedge in situ, the access via steps to the upper terrace and a path running along by the hedge to the lower garden.

[50] The plaintiff was contacted by the first defendant some time in 2016 in relation to a planning application for a 'bungalow' which was said to be located at the bottom of the garden. Reference was made to a previous conversation with the plaintiff's father about these plans. He stated that he did not receive any neighbour notification in relation to the planning application and had no awareness of the detail of the defendants' proposed works until the hedge was removed in October 2019.

[51] The plaintiff sought legal advice and a surveyor was instructed to report. The advice he received was to the effect that the hedge was within his ownership and the property which the defendants proposed to construct would extend over his lands.

[52] In February 2021 correspondence ensued between the parties. On 8 February the first defendant wrote to the plaintiff alleging that:

- (i) A long rectangular portion of land had been 'over-registered' to the plaintiff; and
- (ii) A fence erected by the Government 25 years ago or more formed the physical boundary between the properties.

[53] The plaintiff was invited to make the actual physical fence line the legal boundary between the properties and a draft Land Registry form MD1 was enclosed for that purpose.

[54] The plaintiff's solicitor responded stating:

- (i) The Land Registry line represented accurately the legal boundary; and
- (ii) The fencing was simply placed where it was topographically convenient to do so and was for security purposes.

[55] A further letter emanated from the first defendant on 22 February. On this occasion, it was stated:

"I suggest that the true boundary between the properties is the mid-point of the hedge which stood for many years immediately abutting the security fence and was in existence both when your parents (in 1996) and my wife and I (five years earlier in March 1991) purchased their respective properties."

[56] The plaintiff's solicitor replied, alluding to the fact that the first defendant had applied for voluntary first registration, certifying the title and boundary in accordance with the previous 2007 application by the plaintiff's parents. It was claimed to be 'irrefutable' that the true boundary is represented by the Land Registry line.

[57] The riposte of the first defendant on 30 March was to say:

"Mrs Hool and I have resided at number Y Ballygrainey Road for exactly 30 years. Throughout the whole of that time the hedge and since 1996 the security fence, have formed the common boundary with no X."

[58] Following this exchange, the defendants took steps to remove the remnants of the hedge and also some hedging and a tree which abutted the Ballygrainey Road. This was done in full knowledge of the plaintiff's assertion in relation to the legal boundary between the properties. This led to the service of proceedings and a further escalation of matters, culminating in a confrontation between contractors engaged by the plaintiff and the first defendant himself on 5 May 2021.

[59] Sir Paul Girvan gave evidence on behalf of the plaintiff. He referred to the purchase of the property in 1996 and how the first defendant had assisted his solicitor with some aspects of the conveyance. There was no issue raised about the boundary at that time or, indeed, at any time with Sir Paul. He described the hedge as being high and thick, and lying along the boundary between the two properties. It provided both privacy and protection. At the time of purchase, the NIO was

satisfied in relation to security provided by this boundary whilst fencing was erected around the rest of the property including at the front of the property near the Ballygrainey Road. Sir Paul recounted how, in September 2007, a tree surgeon had carried out more extensive pruning than was intended to the large hedge. This resulted in a reduction of the privacy and protection afforded and the erection by the NIO of further security fencing along this side of the property.

[60] Sir Paul deposed to his clear understanding that the boundary of the property was as shown on the Land Registry maps, and was represented by the midline of the hedge. He maintained the hedge on his side and also installed some wire fencing within it to prevent dogs from straying. He is a keen gardener and planted flowers and shrubs around the gazebo and upper terrace on this side of the property. After the installation of the security fence in 2007, maintenance of the hedge became more difficult but it was still carried out.

[61] When asked about the boundary line as asserted by the first defendant, Sir Paul made the point that this line went right through part of the garden, which he tended and maintained and also encompassed part of a set of stone steps running from the upper terrace to the lower part of the garden. He stressed that this case was never made to him during his 18 years of living at the property.

[62] In relation to the proposed development, Sir Paul recalled a vague conversation about the first defendant building a retirement bungalow on the lower part of the site but no details around this were conveyed nor was any consent given to construction in a particular location.

[63] The first defendant gave evidence that the hedge which was removed by him was entirely within the ownership of the defendants. He asserted that their lands were bounded only by the fence erected by the NIO.

[64] In an affidavit sworn on 1 June 2021, he deposed:

"When I came to register the Hool property in 2012, I had no reason to believe the line registered by Sir Paul and Lady Karen Girvan in their own voluntary first registration of 2007 did not fully respect the boundary created in the 1955 conveyance as confirmed by the 1968 conveyance."

[65] However, he went on to say, the application was inaccurate and incorrectly mapped in that it wrongly includes part of the defendants' garden. The true boundary, he stated, ran in a straight line from the eastern face of a telegraph pole on the Ballygrainey Road to the southern face of the old stone pillars.

[66] The first defendant denied assisting Sir Paul's solicitor in the conveyancing process. He confirmed that the hedge had been 'scalped' in 2007 and security fencing was subsequently erected. In relation to the correspondence concerning to

the true location of the boundary, the first defendant claimed that these were proposals in an effort to find a compromise rather than any statement of the legal position.

[67] Mr Hool was cross examined in detail about the application for voluntary first registration. He accepted that he was an experienced conveyancing solicitor, familiar with title deeds and their interpretation, and had lived at the property for some 16 years by the time of the application. When he was pressed as to why he registered a title different from the legal boundary which he was now asserting, the first defendant replied that he could only register what was available. This was a *fait accompli*, it was claimed, since the Girvans had achieved first registration some 5 years previously.

[68] In the 2012 application for registration, the first defendant, as a practising solicitor made a specific representation to the Land Registry that he had fully investigated the title. The map which he attached to the application respected the boundary line as asserted by the Girvans, including the 'nib'.

[69] He then stated in evidence, contrary to the sworn averment in his affidavit, that:

"At the time there was an uncertainty in my mind."

Mr Hool claimed that he could not speak to his neighbours about his concerns and uncertainty because, at that time, he was having difficulties with his partnership and this was not something he wished to raise with them, the registration being for the purpose of raised secured lending.

[70] The unfortunate reality is that either the sworn evidence given in the affidavit or that put forward in the witness box was untrue. Either the first defendant had no reason to doubt the boundary registered by the Girvans or he did have such reason. This fundamental inconsistency cast doubt over the veracity of the witness's testimony as a whole.

[71] The evidence in relation to the investigation of the concerns which had been present since 2012 concluded with a claim that it was not until an architect produced a plan in January 2021 that he found out his concerns were justified. This was demonstrably untrue. The planning application drawings prepared by Emma Rayner, architect, in August 2018 clearly show the proposed new dwelling impinging on the boundary with X Ballygrainey Road. The first defendant well knew that the existing physical boundary of the hedge would be removed and new planting required. He also knew where the registered boundary lay, having fully investigated the title in 2012.

[72] When pressed about his claim to ownership to part of the plaintiff's garden the first defendant accepted that it was likely that the extent of the defendants' paper

title would be affected by the doctrine of adverse possession. It was evident therefore that the defendants were making a claim which they knew was likely to prove unsustainable, at least in part. His evidence was that he 'stood by' his offer of 8 February 2021, i.e. to agree the legal boundary as the line of the 2007 security fencing, albeit that letter claimed the fencing was over 25 years old.

[73] I have applied the well-known principles set out by Gillen J in *Thornton v NIHE* [2010] NIQB 4 in assessing the credibility of the witness evidence in this case. Having considered their demeanour, in particular under cross-examination, and bearing in mind the fundamental inconsistency referred to above, the court prefers the evidence of the plaintiff and his witness on all material matters.

[74] Having weighed up the evidence, I make the following findings of fact relevant to this dispute:

- (i) The first defendant as an experienced and competent conveyancing solicitor had the ability and the means to address any concern about the boundary;
- (ii) At no time between 1996 and 2021 did he ever make any claim over the hedge or the lands on the other side of it;
- (iii) In 2012 he fully investigated the title to the property and represented to the Land Registry that the boundary with the Girvans' property was properly demarcated by the red line;
- (iv) Had he any issue or concern, he could have raised it with his neighbours by suggesting a deed of rectification as he did with the plaintiff in February 2021;
- (v) The first defendant was well aware that the property he intended to build transgressed the boundary between the properties;
- (vi) The first defendant's assertion that the security fencing to the western boundary had been in place for 25 years was a disingenuous attempt to invoke the doctrine of adverse possession;
- (vii) The letter of 22 February 2021 was not an offer of compromise but an acknowledgement of the true location of the boundary;
- (viii) The attempt to persuade the plaintiff to agree to the security fence as the legal boundary was made in order to facilitate the construction of the proposed dwelling house;

- (ix) The first defendant was forced to admit whilst giving evidence that the claim being advanced by him as to the true location of the boundary was unsustainable.

The Boundary Agreement

[75] In light of the primary facts as found, and the applicable principles set out above, I have no hesitation in inferring a boundary agreement from the conduct of the plaintiff, his predecessors in title and the defendants in this case. Had I found the boundary as established by the paper title to be other than that claimed by the plaintiff, I would have held that the legal boundary had been altered by agreement.

[76] The actions taken by the respective parties in relation to voluntary first registration are particularly compelling. First registration is, to an extent, based on a ‘first come, first served’ model and an unscrupulous landowner can seek to acquire title to other lands by this means. However, there are a suite of options available to anyone affected by an error in registration at the Land Registry, including an application for rectification or declaratory relief from the court as to the true location of a boundary. Having identified in 2012 the boundary registered by Sir Paul and Lady Karen Girvan back in 2007, the first defendant well knew what options were open to him. He elected to take none of those. I have concluded that the reason for this inaction was that he agreed the red line in the Land Registry represented the true boundary.

[77] This line also represented the position on the ground. The physical feature of the large hedge formed the boundary between the properties. Its size was such that the NIO elected not to erect any security fencing in the 1990’s on that boundary to the property. At all times the parties accepted that the hedge represented the demarcation of their respective properties and conducted themselves as if this was the case. The evidence indicates that the hedge was well established by the time of the 1968 deed to the extent that it was specifically referenced by the draftsman.

Adverse Possession

[78] In light of my factual findings, there are no acts of possession which the defendants can establish which could ground a claim of adverse possession. The fact that the security fence was erected in 2007 on the Girvans’ side of the hedge does not begin to make a case that the defendants were in factual possession of any lands on that side of the hedge. There was no physical control exerted by them.

[79] Equally, in light of my factual findings, the defendants never had the requisite intention of possessing the lands.

[80] Had I found that the boundary as per the paper title to the properties was as contended for by the defendants, then the question of whether the plaintiff could have extinguished part of this by adverse possession would have arisen.

[81] I would have found that the plaintiff and his predecessors in title had been in uninterrupted possession of lands from the defendants' claimed boundary line to the mid line of the hedge from a period from at least 1996 until the hedge was destroyed by the defendants in 2019.

[82] The following acts of factual possession represented physical control by the plaintiff and his parents:

- (i) Fencing and mesh was installed at the front of the property near the Ballygrainey Road;
- (ii) Security fencing was installed in 2007;
- (iii) The hedge and surrounding garden areas were actively maintained by the owners and contractors instructed on their behalf.

[83] I would have found that such acts of possession were adverse to the defendants and excluded the world at large. It was clearly the intention of the Girvans to own these lands and there was no evidence of any permission being granted by the defendants.

[84] It was recognised by Mr Hool in evidence that adverse possession would serve to deprive him of at least part of the lands he claimed, perhaps those to the east of the security fencing. It was evident however that there was no reason to differentiate between the lands either side of the fencing installed in 2007.

[85] Had the paper title been as claimed by the defendants, and no boundary agreement been inferred, I would have held that the defendants' title beyond the mid line of the hedge was extinguished by operation of Article 26 of the 1989 Order.

Rectification

[86] In the event, this issue does not arise. However, any claim for rectification advanced by the defendants under section 69 of the 1970 Act would have failed for the following reasons:

- (i) The plaintiff was a purchaser of the property for value and in good faith;
- (ii) Rectification would diminish the value and amenity of the plaintiff's property;
- (iii) The plaintiff has not in any way contributed to the 'error' in the Land Registry;

- (iv) There was no injustice to the defendants since they contributed to any such 'error' by registering an identical boundary in 2012;
- (v) The first defendant represented that he had investigated the title at that time;
- (vi) On any view there has been substantial delay in the assertion of any legal right.

[87] However, the court would have accepted the submission that relief by way of a declaration as to the conclusiveness of a boundary does not necessarily invoke the section 69 jurisdiction. Since, by definition, boundaries are not conclusive, it can be argued that there is no 'error' in the register which requires rectification. This may be a question of degree in any given case but an action brought to define a boundary does not, *prima facie* at least, face the same bars as a statutory rectification claim involving registered land.

Conclusions

[88] The court answers the preliminary questions as follows:

- (i) Where was the line of division between the Hool property and the Girvan property according to the 1955 grant, properly construed, in light of the admissible evidence?

Answer: The boundary is as shown on the map in Annex 2

- (ii) Has the possession and control of any party, or their predecessors in title, of any lands extinguished the title of the other party to those lands? If so, where does the line of division lie as a result of that adverse possession?

Answer: No

- (iii) Did the parties enter into an implied or inferred boundary agreement in relation to the line of division? If so, where does the line of division lie as a result of such agreement?

Answer: The parties agreed that the Land Registry boundary was the line of division

- (iv) Is the line of division consistent with the description of the lands at the Land Registry so that the parties are entitled to have that line of division entered on the register as the conclusive boundary?

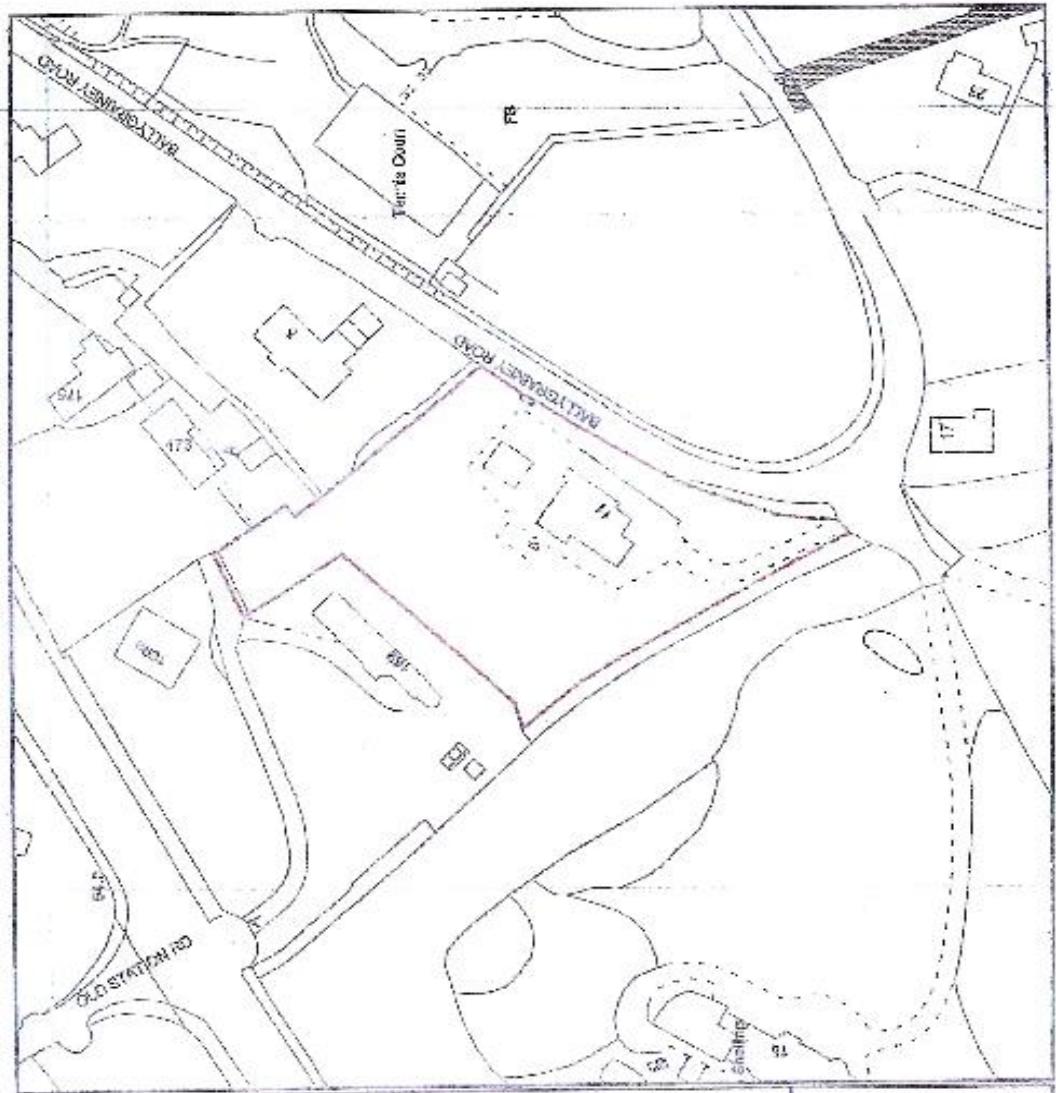
Answer: Yes

- (v) If the line of division is not consistent with the description of the lands at the Land Registry, is the discrepancy an error which can be rectified?

Answer: This does not arise. If it had done, it was not open to the defendants to seek rectification pursuant to section 69 of the 1970 Act but it may have been possible to seek declaratory relief in relation to the true location of the boundary.

[89] I will hear the parties on the question of costs and in relation to directions in order to determine the other outstanding issues in the litigation.

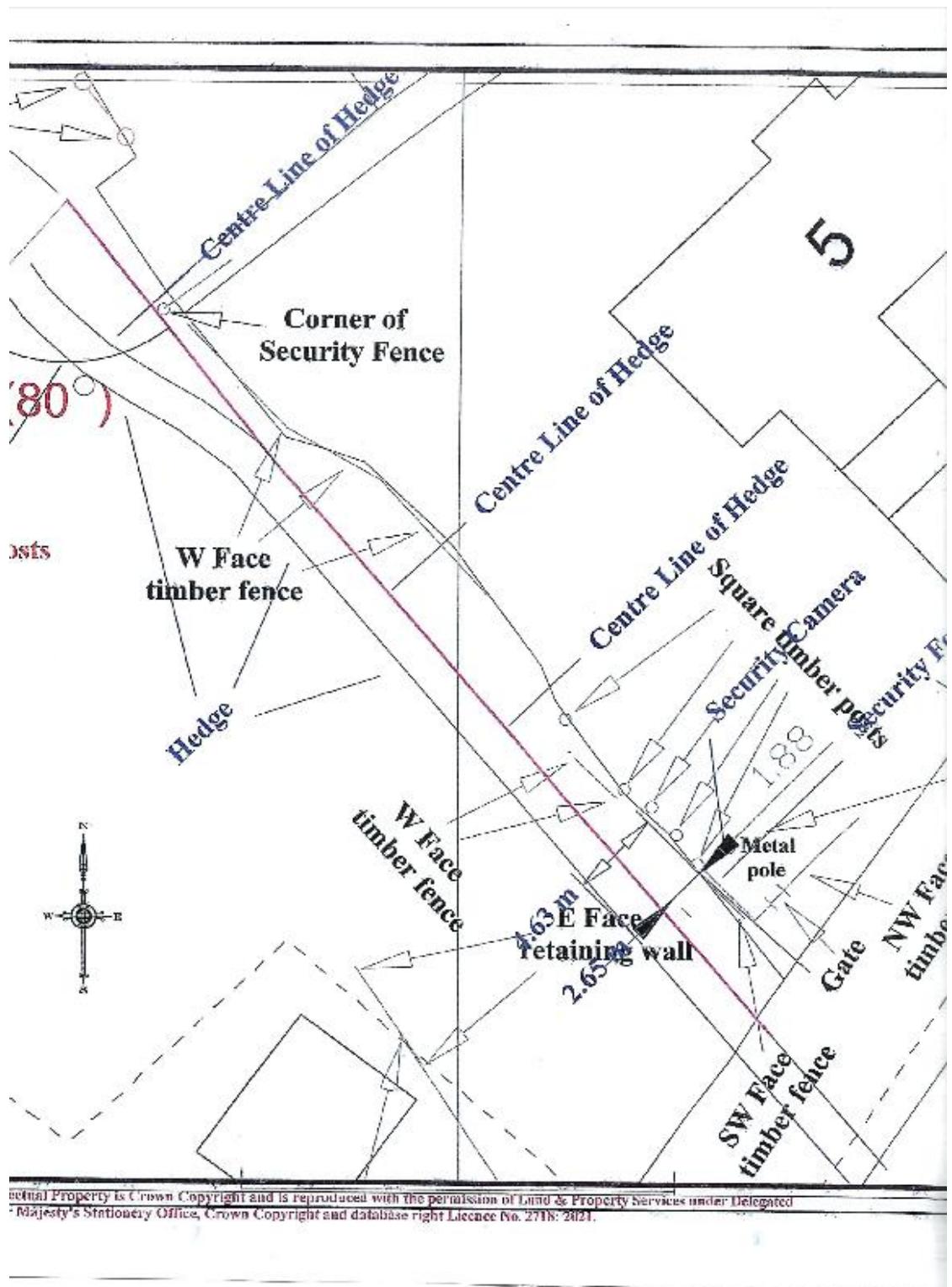
Annex 1



Land & Property Services Searches/Tellus & Aerial Photograph Requests	
Post Box 1400, Belfast, Northern Ireland, BT7 1NN	
Date: 25 Feb 2021	
Customer:	Doyle
Editor:	DN133S37
Design:	13260
Our Ref:	Administrator
Your Ref:	800
Plan Ref/Ref:	1151SNW11613ME5,11812S952,
Sheet 1 of 1	
Key to Data Labels	
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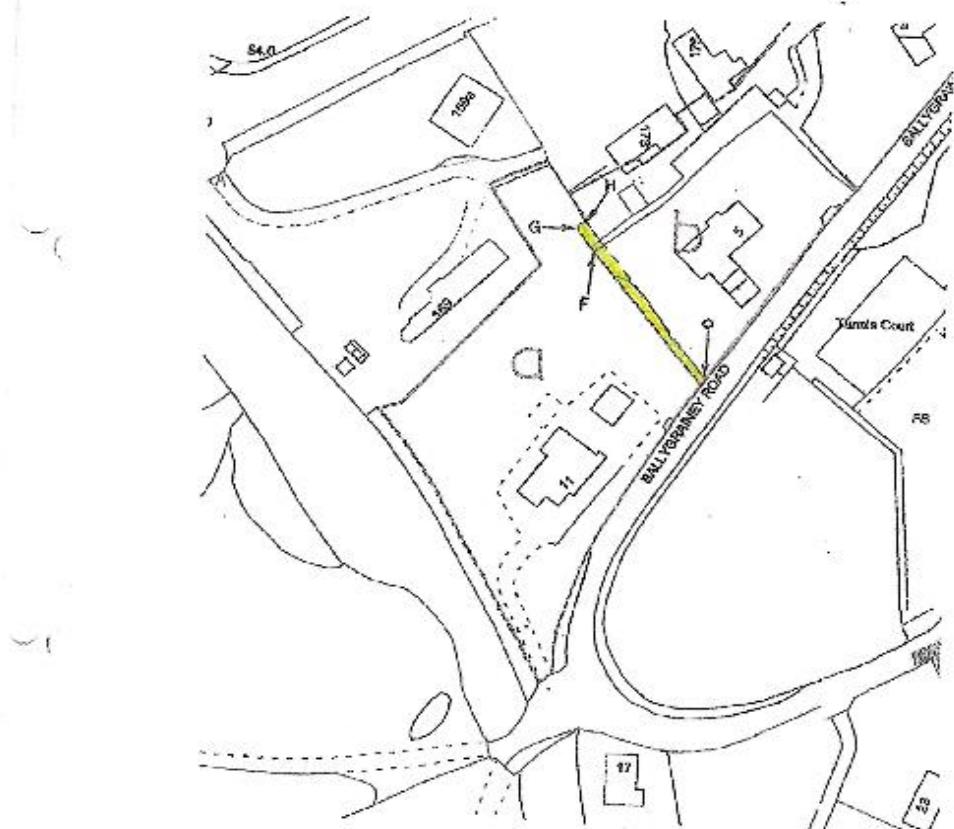
Annex 2



Annex 3

Map No 12

Plan No: 115-13SW
Scale: 1 - 1250

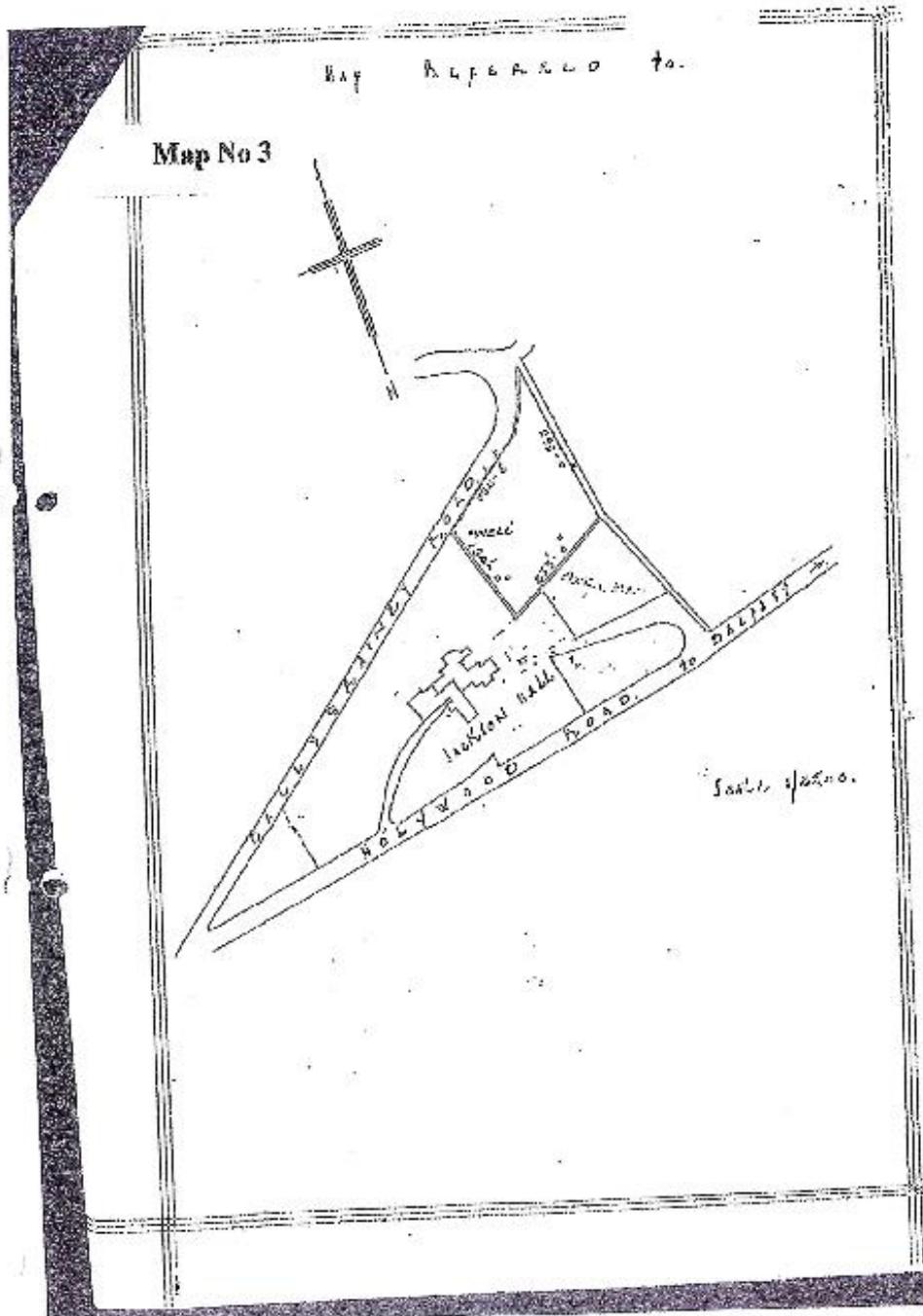


Key

Edged red a - folio DN186337
Edged red b - folio DN159109

Annex 4

TAB 01f 1955 Conveyance Map



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