

BETWEEN

SEAN ABRAHAM AND PAULINE ABRAHAM

PLAINTIFFS

AND

OAKLEY PARK DEVELOPMENTS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on 8th day of December, 2016**Introduction**

1. This judgment concerns a boundary dispute which emerged in August 2013. The Court is asked now to determine a boundary between Land Registry folios. The Court is also required to consider the inviolability of the Plaintiffs' family home garden and the remedies available to protect same.

Generally

2. The former Deputy Registrar of Titles, Mr. John Deeney, succinctly explained at [12.07] in his book entitled Registration of Deeds and Title in Ireland (2014) :-

"Under present arrangements, whether the title to land is registered or unregistered, the primary source of the boundary line between any two adjoining properties is the original deed whereby the ownership is divided. On first registration, this might comprise the descriptions contained in a deed or map endorsed on such deed or a prior deed or both deeds and maps read together. These matters together with possession, the contract map, the application map, use and occupation, other deeds, features, witnesses, inferences and presumptions, can all be taken into account if the issue of the precise position of a boundary line falls to be determined by the court. However, it is not the case that the boundary as shown on the Land Registry map is of no relevance in the case of a neighbour dispute, as in the absence of any other evidence, it may well prove conclusive. An effect of the rule is that the State guarantee does not apply in the case of non-conclusive boundaries; thus compensation is not payable for discrepancies within the acceptable margins of error... It is to be noted that whether or not a discrepancy is substantial or minor in nature may not necessarily depend on the significance to the title of the portion involved".

3. The non conclusive nature of boundaries and file plans [save for entries made pursuant to Sections 86 to 88 of the Registration of Title Act ("ROTA 1964")], is widely known and publicised by the Property Registration Authority ("PRA").

The Creation of the Relevant Folios and Maps

4. Mr. Osmond Brady testified that his late father bought a farm and pub in the late 1950s. These lands containing some 37 acres in Straffan, Co. Kildare were comprised in Folio 13741F Co. Kildare ("the Parent Folio").

5. In 1979, Mr. Brady agreed to buy from his father a small corner of the Parent Folio containing 0.24 of an acre (0.097 hectare) acre which was carved off into Folio KE7062F and identified as Plan 23 ("Plot 23"). Folio KE7062F and its file plan remained the same despite the transfer into the joint names of Mr. Brady and his wife ("the Bradys") in 1985 and the subsequent transfer to the Plaintiffs in 2008. The land was identified on an Ordnance Survey of Ireland ("OSi") map which was then last revised before 1970 for the purpose of registration.

6. In 1998, the Bradys, following agreement with Mr. Brady's father, increased the area for the garden around their home by creating a semi-circular area and moved their road entrance. This transaction resulted in the creation of Folio KE34848F which is now registered in the name of the Defendant while the extra part transferred to the Bradys for their garden extension, remained in Folio KE26791F and is identified on Plan number 38 ("Plot 38"). The slightly curved boundary on the northern side for the Plaintiffs' boundary became more apparent on the map for the garden as a result.

Physical Features.

7. According to Mr. Kestell's draft map 1a, a beech tree ("the beech tree") was located within the garden of the Bradys' home garden before any transfer to the parties in these proceedings. Therefore the map which was used in 1979 to create Folio KE7062F included the area on which the beech tree was located in Plot 23. The map which was used to create the Defendant's folio (KE34848F) in March 2001 according to the surveys of Mr. Kestell and Mr. Holton indicated that the beech tree fell just outside the more slightly curved line for the northern boundary of Folio KE7062F.

Fencing.

8. At the time of each of the transfers to the parties in these proceedings, there was a steel post and wire fence to the northern side of the beech tree which connected to a gateway behind the outhouse. Mr. Brady replaced fencing with "stud farm fencing" (two rails between timber posts). The demarcation of the garden by the fencing remained the same at the time when the Bradys sold each part of the lands to the Defendant in 2000 and the Plaintiffs in 2008.

9. Particularly relevant for this judgment was the undisputed evidence of Mr. Brady that there was a steel post and wire fence to the northern side of a row of trees which connected to a gateway behind the outhouse. This fencing was in place when the Defendant agreed to purchase part of the lands comprised in Folio KE26791F for which the Transfer described the lands as *"having an area of 2.057 hectares or 5.079 acres and more particularly delineated on the map annexed hereto and thereon surrounded by a red verge line"* ("the two hectare field").

Absence of Conclusive Boundaries Condition

10. Special Condition 4 of the contract in 2000 between the Bradys and the Defendant provided that the Defendant *"shall be conclusively deemed to have full knowledge of and to have satisfied itself as to the identity, boundaries, extent and measurements of the"* land.

Rural Place

11. The Transfer to the Defendant dated 20th December 2000 ("the Transfer"), which referred to a consideration of IRE1,500,000.00 included a certificate for stamp duty purposes that *"the sale is wholly attributable to property which is not residential property"*. (Emphasis added). The witnesses who saw the land prior to 2000 knew that the land purchased by the Defendant in 2000 was a field and that part of it had been used as a football pitch. The Defendant purchased it in the hope of obtaining planning permission for a residential development which was later issued for relatively low density housing.

12. The parties in 2000 were not bringing an exactitude which one might expect for boundary definition in an urban development. On the contrary, the Bradys and the Defendant acknowledged the boundary as it existed on the ground by the fencing and tree line which marked the reality.

13. As explained, the subdivision of Folio 26791KE created the Defendant's Folio KE34848 and it required the lodgement of a map in the Land Registry. A copy of this map was attached to the Transfer dated 20th December 2000. It was an OSi "Rural Place Map" with a 1:2500 scale which showed a curved shape to the northern boundaries of Plots 23 and 38 with a red line superimposed rather roughly over a black line.

14. In summary, by December 2000 when the Defendant acquired the two hectare field, there was physical evidence on the ground of the boundary between the Bradys' then home garden and the two hectare field bought by the Defendant. Mr. Power of the Defendant accepted that the fence along which the Defendant constructed a concrete post and timber fence in 2008 existed since the Defendant acquired the two hectare field. He also explained that a mesh steel fence supported by concrete base blocks was completed by the Defendant in 2008 further along that line on to the western boundary to secure the Defendant's building site for health and safety reasons.

15. The Court is satisfied from the evidence that the Bradys, and then the Plaintiffs, have remained in possession of the disputed stretch of land ("the sliver of land") before and after each of the transactions since Mr. Brady became the first registered owner of Folio KE7062F in 1981. Furthermore, an inspection of the boundary between the lands now owned by the parties to these proceedings whether viewed in December 2000 or in April 2008 would have revealed more or less the same physical boundary which went undisturbed until 29th August 2013.

Pre-Contract Inspection

16. The first named plaintiff, Mr. Abraham, attended at the office of the Land Registry to inspect both of the folios which he and his wife were interested in buying for some time. He compared the information which he got from the Land Registry to the situation on the ground before executing his contracts to purchase. This was the first time that he had purchased a house which was not in an estate. One can readily understand his interest in doing so. He was preparing for his growing family's move and he was familiar with plans, albeit for a different technical area, due to his career as an electrical engineer. He did not notice anything untoward or different between the file plan and the situation on the ground before their contract and transfer were executed in 2008.

17. On the other hand, Mr. Power who has had a long involvement with housing developments and ran the Defendant developer type company, did not arrange for any comparison of maps to identify the boundaries between the two hectare field and the folios now owned by the Plaintiffs at any stage before or after the execution of the contract with the Bradys in 2000 until an unidentified date at the end of the Summer 2013.

The Pleadings

18. The Plaintiffs issued a plenary summons on 2nd May 2014, which sought orders which may be summarised as follows:-

- (i) Declaring the Plaintiffs to be the owners of part of Folio KE34848F which is currently and incorrectly registered in the name of the Defendants;
- (ii) Directing rectification of the maps attached to Plan 23 of Folio KE7062F and Plan 38 of Folio KE26791 so as to show the true extent of the border between the lands of the Plaintiffs and the Defendants including an order requiring the PRA to amend its mapping;
- (iii) Restraining the Defendant from trespassing on the Plaintiffs' lands including that part of Folio KE34848F currently and incorrectly registered in the name of the Defendant;
- (iv) Restraining the Defendant from harassing and intimidating the Plaintiffs or their family;
- (v) Requiring the Defendant to remove the fencing recently erected and to reinstate the Plaintiffs' garden and fencing to the true boundary between the parties' respective lands which had existed for many years;
- (vi) Damages for trespass;
- (vii) Damages for intimidation and harassment.

19. The position of the Plaintiffs was emphasised in the Reply to Defence and Counterclaim delivered on 15th April 2016 when it was asserted that *"the defendant seeks to rely wrongly on the "digitized" Land Registry map which differs from the previous true Land Registry file plan produced in forming part of the Plaintiffs' title documentation"*.

Acts of the Defendant

20. The Plaintiffs further asserted that the Defendant recognized the true boundary by relying upon same in the Defendant's own planning application to the local authority. There was no dispute in the pleadings or at trial that the Defendant relied upon the boundary claimed by the Plaintiffs in its application for planning permission to develop the two hectare field. In fact, Mr. Holton's map admitted into evidence at the request of the Defendant has a line with a legend *"Line of post and wire fence plotted by BPM Land Surveyors in 2001 and identified as Planning Boundary."* That supports the said assertion in the Statement of Claim delivered on 10th June 2014.

21. It was also alleged by the Plaintiffs that the Defendant erected post and rail fencing in 2008 along the line of the boundary which they claimed to be the true position. There was no dispute that the Defendant erected such fencing.

Defence and Counterclaim

22. The original Defence and Counterclaim delivered in September 2014 obliged the Plaintiffs to prove their ownership of the sliver of land, the alleged trespass and intimidation. It denied that *"the timber panel fence and the timber post and rail fence"* were accepted

as the true boundary for Plots 23 and 38. More significantly, the Defendant pleaded that the post and rail fencing erected by the Defendant was for the purpose of protecting the established hedge and tree planting and not for the purpose of defining a boundary. This alleged reason for erecting the post and rail fencing was not supported by the evidence adduced at trial.

23. The Defence and Counterclaim delivered on 26th October 2016, denied that the Plaintiffs were successors in title to the sliver of land insofar as the Plaintiffs' claim was based on adverse possession under the Statute of Limitations Act 1957.

Surveyors

24. Mr. Holton (a land surveyor who had worked with OSi for 23 years) carried out a survey on 20th August 2013, at the request of the Defendant's architect. Mr. Power of the Defendant was made aware around this time of a potential discrepancy between the 25 inch OS map (revised in 1971) on which Plot 23 had been outlined with a thick red straight line and the physical situation of the boundary fencing between the two hectare field and the Plaintiffs' garden.

25. There was little contention at trial surrounding the interpretation and application of the OSi and PRA mapping by Mr. Holton, (who now practices as a land surveyor). His views tallied to a great extent with the information and views expressed by Mr. Kestell, a chartered land surveyor, engaged to advise the plaintiffs. Each survey undertaken had a different emphasis.

26. I have sought to explain the principal physical features of the dispute in this judgment but it will help a more complete understanding of the situation to view the coloured copies of the following which are attached to this judgment:-

(i) Mr. Holton's drawing. He elaborated in evidence by giving a measurement of 61.71 square metres for the shaded area which denotes the difference between the boundary indicated on the Transfer to the Defendant dated 20th December 2000, and the maps used by the Defendant for a planning application in 2001 in respect of the two hectare field. The relative position of the beech tree is also marked on this drawing.

(ii) Mr. Kestell's "*draft map 1a*" issued on 9th November 2015, which outlined:-

- i. The line of post holes which indicated that the Plaintiffs' back boundary was marked out as the Plaintiffs have claimed as the boundary;
- ii. The extent of the land in the Plaintiffs' folios according to the PRA mapping now;
- iii. The original and latest Land Registry recorded northern boundary for Folio KE7062F; and
- iv. The location of the fence now standing at the back of the Plaintiffs' garden after the new fence was erected since August 2013;
- v. The beech tree.

The Defendant's Architect

27. The evidence of Mr. Mealy contextualised for the purpose of these proceedings the development of the two hectare field from 2001 to 29th November 2013, when the Defendant executed a supplemental agreement with the owners of the recently completed dormer bungalow at the back of the Plaintiffs' garden. This agreement was supplemental to a contract for sale and a building agreement for a dormer bungalow between those owners and the Defendant executed in November 2013. In effect, the Defendant in November 2015 agreed with the owners of the dormer bungalow to "*reinstate the physical boundary back to the original position*" if it lost these proceedings and to transfer the area in dispute in these proceedings to those owners if it "wins" these proceedings. It also provided for other works to be undertaken by those owners and the Defendant with an adjustment of the price paid by those owners irrespective of the outcome to these proceedings.

28. Little turns on Mr. Mealy's evidence other than that he fairly acknowledged in answer to the Court's question that developers "*in normal circumstances would have*" identified boundaries before agreeing to purchase. He qualified that by referring to occasions when purchasers did not even look at OSi survey maps when buying property.

29. In 2001, Mr. Mealy coincidentally had provided the map to an agent of the Bradys prior to the purchase of the two hectare field by the Defendant. He was subsequently engaged by the Defendant for planning and the construction of houses on the two hectare field. As explained, the planning applications did not suggest that the boundary lay along the line now suggested by the Defendant. Lest any inference might be drawn, Mr. Mealy's conduct was never questioned before or at trial. The crucial fact is that he was not engaged by the Defendant to check the boundaries before it agreed to purchase the two hectare field and had no cause to do so until a site plan was required for the sale of a new dormer bungalow which had a boundary at the back of the Plaintiffs' garden.

Concerns

30. The detail given in this judgment is greater than the Court would prefer to give for an unfortunately common enough dispute which many professionals handle in their careers. In these proceedings, finality needs to be brought to the issues raised by both sides while particular issues identified in submissions need to be addressed by the Court.

Nemo Dat Quod Non Habet

31. Counsel for the Defendant submitted that the Defendant in 2000 took the land identified in a detailed map which included the sliver of land. The Latin phrase *nemo dat quod non habet* was uttered on a few occasions to make the point that the Plaintiffs could not now have the sliver of land along the northern boundary because it had been transferred to the Defendant by the Bradys in 2000 having regard to the description in the deed and outline on the map attached to the Transfer.

32. That submission glosses over the continued uninterrupted possession, the acknowledgment through actions like planning applications, erection of replacement fences along the same line and the comparative greater significance of the boundary line for the Plaintiffs than for the Defendant as matters for the Court to take into account when determining the disputed boundary. The boundary marked on a map attached to a transfer or on a Land Registry map is indeed relevant to the Court's determination but such maps are not conclusive.

Area of the Sliver of land

33. It was suggested that the 61.7 square metres calculated by Mr Holton represented an extraordinarily high percentage of the total

land comprised in Folio KE7062F. In this regard, it should be explained that the line of the existing fence on the northern boundary of the Plaintiffs' garden according to Mr Kestell's draft map 1a, actually lies slightly closer to the boundary appearing on the Land Registry map than the line of post holes used by Mr. Holton to calculate the 61.7 square metres.

34. Therefore, the position of the fence which now exists is closer to the shed and house of the Plaintiffs than which existed along the line of post holes. This means that the figure of 61.7 square metres is more than the area of sliver of land which falls on the side of the Plaintiffs' side of the boundary fence. It is also worth noting that the 61.7 square metres takes in a slice of the Plaintiffs' shed. Mr. Power of the Defendant accepted that he never considered demolition of the Plaintiffs' shed to be an outcome of the dispute which he commenced in 2013.

35. The beech tree was not considered at any stage by the Bradys or the Plaintiffs to be outside the curtilage of the Plaintiffs' garden. The Defendant did not make any suggestion which contradicted that position until after Mr. Holton's survey on 20th August 2013. In fact, it had erected a concrete post and timber panel fence in 2008 according to Mr. Holton's map which supports the view of the boundary line relied upon by the Plaintiffs.

Ratios

36. In respect of Plot 23, which is comprised in the Plaintiffs' Folio KE7062F, there is a measurement of 0.240 acres for the area of land comprised in this Folio according to the printed Folio. This equates to 0.0971 hectare.

37. On the other hand, the Defendant according to the Transfer dated 20th December 2000, acquired 2.057 hectares.

OSi maps

38. The OSi provide general mapping for the State and its maps have many uses including a use to identify property and to outline title boundaries thereon. It is well recognised (among professionals at least) that OSi mapping lacks detail. Rural maps are published at a scale of 1:2,500 whereas urban area maps are now published on a scale of 1:1,000. OSi maps are derived from a methodology which lacks accuracy and precision for title boundary definition.

39. OSi maps do not indicate legal property boundaries and they do not show ownership of physical features. A joint statement of the OSi and the PRA which is available on their websites advises that *"it is not possible to identify the position of a legal property boundary from an OSi map"*.

40. Furthermore, para. 3 of the Inter-Professional Task Force on property boundaries published in April 2014, ("the IPTF report") stated: *"the primary problem is that the mapping used by the PRA to record title boundaries is based on OSi mapping, which is published at a scale, and derived by a methodology which lacks the accuracy and precision required for title boundary mapping"*. The IPTF report made a series of recommendations to minimise the risk of demanding disputes like that before the Court now which have yet to be acted upon.

Property Registration Authority

41. Section 85(2) of the ROTA 1964, as inserted by Section 62 of the Registration of Deeds and Title Act 2006, gives effect to the long established non-conclusive boundaries principle in respect of maps in the registry of the PRA.

Discrepancies Allowed

42. It was urged upon this Court that the successful submission of Mr. Boyle representing himself in *Boyle v. Connaughton* [2000] IEHC 28 that *"the discrepancies between the Land Registry map position and the ground position were of an order of magnitude beyond the discrepancies envisaged in s. 85"* should be heeded by this Court.

43. Laffoy J. in that judgment referred to:-

1. Glover on "Registration of Ownership of Land in Ireland" (1933) where it was stated that the restriction on conclusiveness *"protects the Insurance fund against claims for loss from errors due to those discrepancies of a few rods or perches in the calculation of agricultural land or of feet or inches in the dimensions of town property, that arise from the different methods of survey, and the varying skill of surveyors; it is not meant to be, and cannot be relied on as, a protection against substantial misstatements of the area or dimensions of a parcel of land as it exists"*.

2. McAllister on "Registration of Title" (1973 at p. 59) which mentioned that s. 85 of ROTA 1964 only intended to cover minor errors in calculation.

44. In that particular appeal from the Circuit Court, Laffoy J. relied on s. 72 (1) (j) of ROTA 1964 to decide that the defendants/respondents were entitled to an order directing the amendment of the maps in the Land Registry to conform with a map depicting the situation on the ground between the folios of the parties. Laffoy J concluded that the problem area was roughly 0.01 hectare.

45. The defendant emphasised the portion of the judgment of Laffoy J. which stated that *"...the discrepancies at issue are not covered by s.85"*. Laffoy J. found that the original vendor and purchasers were ad idem as to the location of the site in Castleknock Co. Dublin in 1982 when the map attached to the transfer *"did not properly depict the extent and boundaries of the site the subject of the agreement between the parties, probably because of the difficulty of depicting the site accurately on a map of the scale used."* Counsel for the defendant sought to distinguish that finding from the circumstances giving rise to the Plaintiffs' claim on the grounds that Mr Boyle was aware before he completed his purchase that the disputed area fell inside his neighbours' folio whereas the defendant in these proceedings was not aware that the sliver of land was occupied by the Bradys and then the Plaintiffs.

Section 72 (1)(j) of the Registration Of Title Act 1964

46. Section 72 (1) (j) of the ROTA 1964 provides that *"the rights of every person in actual occupation of the land ... save where upon enquiry of such person, the rights are not disclosed"* affect registered land whether registered or not. In this case the evidence was that the Defendant did not fulfil its contractual duty to satisfy itself of the boundary. Furthermore, the submissions made do not address the matter such as possession which the Court can take into account when the precise position of a boundary falls to be determined by the Court. As in *Boyle v Connaughton* the Plaintiffs have established a right in equity to have the Land Registry map rectified. There is therefore no need to address the Statute of Limitations issue which the Defendant highlighted in its latest defence delivered on 26th October 2016.

Equity

47. Copper fastening the Court's view from the equity perspective is that the Plaintiffs and the Defendant itself carried out works and acted until 2013 in a manner which supported the Plaintiffs' version of the boundary line. In that way, the Defendant has acquiesced and caused the Plaintiffs to maintain and build on the sliver of land.

Section 85 of the Registration of Title Act 1964

48. If the Plaintiffs for some reason cannot rely on the lack of enquiry or acquiescence to the boundary line on the part of the Defendant from December 2000 until August 2013, the maps for Plots 23 and 38 which were lodged in the Land Registry were not conclusive. The references to minor errors in the quoted extracts from *Glover* and *McAllister* do not preclude the Court from offering a remedy to ensure that the sliver of land is included on the PRA records in the future for the Plaintiffs' folios. The long recognized inconclusive nature of boundaries on PRA maps can be addressed by the Court when a dispute arises by making such orders as best facilitates more accurate mapping in the PRA.

49. In 2000, the equivalent of around .006 hectares of a two hectare field in a rural area in 2000 was not expected to have the exactitude of description and mapping as might be expected in an established urban area. The OSi maps used for registration following the relevant subdivisions were rural place maps. Nothing which has been said by those learned authors or by Laffoy J. prevents this Court from making an order to align the boundary indicated on the PRA maps to the established physical situation of the boundary on the ground.

Rectification Remedy

50. It was submitted that the Court cannot rectify the register or the Transfer from the Bradys to the Defendant thereof because:-

(i) Mr. Brady accepted in cross-examination that he was not making a claim for rectification and that neither he nor his agent made a mistake when using the map for the contract and the Transfer in 2000; and

(ii) No suggestion of fraud arises in this case which would allow the Court to rectify the area.

51. Much emphasis was laid by counsel for the Defendant on the following:-

(i) Lord Watson's statement in *Gibbs v. Messer* [1891] AC 248 (which case concerned a forged transfer) that the object of the registration of title legislation was to save persons from the trouble of going behind the register;

(ii) The fact that Hedigan J. in setting out the principles for determining boundaries in *McCoy v. McGill* [2010] 2 I.R. 417 at 423 was concerned with conveyances rather than transfers which save interested persons from looking behind the register;

(iii) The use of the phrase "more particularly delineated on the map and marked annexed..." in the Transfer from the Bradys to the Defendant in 2000 denoted a definition which secures the conclusiveness of the boundaries.

52. Laffoy J. in *Boyle v. Connaughton* afforded the defendants a rectification remedy. That took account of the limited power to vary maps in the Land Registry in an area where there was existing housing in Castleknock Co. Dublin.

53. The effect of the submissions made for the Defendant is to seek a right and a sense of entitlement for transferees due to the registration of land in the PRA to ignore physical boundaries such as long established fences without any corresponding duty (as provided in the contract by which the Defendant purchased) to satisfy itself about the boundaries. The claim made by the Defendant over the sliver of land has escalated out of control and appears somewhat contrived for reasons best known to the Defendant.

54. Most boundary disputes concern a parcel of land that has been shared, a plot that has been vacant, the correct position of a boundary feature erected after a conveyance, the precise position of the boundary in a broad feature such as a bank, ditch or hedge or an ambiguity as to which of two possible features represents the boundary. In this case, the boundary was and remains manifest on the ground. It lies inside the line of post holes behind a line of trees as marked on map 1a issued by Mr. Kestell on 9th November 2015.

55. The Plaintiffs and their predecessors, the Bradys, always occupied the sliver of land. The phrase *nemo dat quod non habet* does not allow the Defendant to overcome the use and occupation of the sliver of land which supports the Plaintiffs' position on the boundary. The absence of any reference on the maps lodged in the Land Registry to the established tree and fence line allows for a comparison of the PRA mapping to the physical situation on the ground whether in 2000, 2008 or 2013.

Interpreting the Transfer.

56. If the Court had to interpret the map attached to the Transfer to the Defendant in 2000, there is a two stage approach. Once the Court cannot ascertain without difficulty a feature which marks the boundary (as in this case), the Court proceeds to a second stage which involves the resolution of any ambiguity. This two stage process was adopted in *Willsher v. Scott* [2007] EWCA Civ 195 which was about a boundary dispute in Cornwall. The claimant argued that the boundary was identified by a map and hedge while the defendant argued for a fence constructed to mark other boundaries which were obliged to be identified. It is instructive to quote from para. 19 of that judgment of Laws L.J. at para. 19:-

"In all these circumstances the Ordnance Survey maps offer, in my judgment, an uncertain guide as to the precise boundary line."

57. In view of the submissions made on behalf of the Defendant that one should not look behind the Transfer or the folio map, I refer to the following quote from Mummery L.J. of the English Court of Appeal in *Cameron v. Boggiano* [2012] EWCA Civ 157 at para. 67:-

"The recourse of the reasonable lay man to the topography of [the particular house] for enlightenment does not mean ditching the title documents... It is not a case of substituting the physical features on the ground for the boundaries shown on the plan. It is a matter of sticking with the plan in the hand and, because it is insufficiently clear on the matter of boundaries, to use the topography at the crucial date to inform and to make sense of where the boundaries of what is being transacted".

58. In the present case, one takes the Transfer map. Then a surveyor notices that the map does not match the situation on the ground. Therefore, the actual boundary between the two hectare field and the Bradys' garden can only be ascertained to a limited degree from the map. The parties make sense by looking at the physical topography. The line of trees and a long standing fence exist which helps to identify with precision the actual boundary.

59. For completeness, I refer to the summary of principles for determining boundaries, albeit boundaries which were not identified in plans attached to folios, by Hedigan J. in *McCoy v. McGill* [2010] 2 I.R. 417:-“

(a) The primary source for defining a boundary line is the deeds in the chain of title;

(b) The plan attached (if there is one) is usually for the purposes of identification only. It cannot normally be relied upon and is delineating precise boundaries;

(c) If necessary the deeds will have to be supplemented by such inferences as may be drawn from topographical features which existed or probably did when the conveyance was executed.”

..... *"In relation to the role of a map:-*

(a) A map or plan may be the determining matter where the parcels provides that the map is to determine the nature and extent of the land in question;

(b) A map may be an essential part of the grant where it is worded such as to make it so and where there can be no certainty without it;

(c) Any conflict between dimensions set out in figures on a plan by which the property is conveyed or transferred and those calculated by scaling off the plan may be resolved by reference to topographical features which existed when the conveyances or transfer were executed.”

Findings about the Boundary:

60. Therefore, the Court finds that:-

(i) the maps and the Transfer which the Defendant now relies upon are not conclusive of the boundary which is in dispute

(ii) the Plaintiffs, the Defendant and the Bradys acted as if the boundary line asserted by the Plaintiffs in these proceedings was correct until August 2013 when the mapping was discovered not to reflect the situation on the ground;

(iii) the maps and deed relied upon by the Defendant now do not identify the topographical features which have existed for a long time and from which the disputed boundary can be identified;

(iv) the beech tree, the location of the Plaintiffs' shed and the line of the back fence to the Plaintiffs' home are closer to their house than the line of the old post and wire fence when the Defendant purchased the two hectare field in 2000 and the Plaintiffs bought in 2008;

(v) the discrepancy between the maps and the ground situation is not of such a magnitude as precludes the Court from granting orders to correct the PRA mapping.

Torts:

August 2013

51. Mr. Power first visited the Plaintiffs' home and left his mobile number on a date not established in evidence. This detail is not crucial for the causes of action pursued by the Plaintiffs but the Court observed Mr. Power's responses carefully in relation to his recall from 2000 to 2013 and particularly about the lead up to the events on 29th August 2013. Mr. Power's memory of events was poor when compared with the Plaintiffs' account. Mr. Power said that he had a map when he visited but he could not remember whether he showed a map to either of the Plaintiffs. Both Plaintiffs confirmed the he did not leave or show a map to them on any of his visits to their home.

61. The Court accepts Mr. Abraham's evidence that he telephoned back Mr. Power promptly after his first visit. The parties were in no doubt that the Plaintiffs had bought the property with the fence as it was situated at the time of Mr. Power's visit.

62. Later, Mr. Power visited the Plaintiffs' home again and the Court accepts Mr. Abraham's evidence that he outlined the line of posts to Mr. Power while explaining that he was rushing to work.

63. Mr. Power and Mr. Abraham gave evidence that they could not meet while they were both on holidays. Following the reference in direct examination to the Galway race week, Mr. Power outlined his memory of unsuccessful attempts to contact Mr. Abraham in early August 2013 leading up to his decision to visit the Plaintiffs' home. Mr. Power said that he was left *"feeling a bit foolish"* on the visit during which Mr. Abraham had to rush off to work.

64. Mr. Power's hurt pride and his own subjective perceptions of others throughout all of his encounters with the Plaintiffs caused him to react. He did not take the opportunity to look at matters objectively. He had professional advice readily available as was shown by the two page detailed reply of the Defendant's solicitor dated 6th September 2013, to the letter from the Plaintiffs' solicitor dated 30th August 2013, which had outlined the events of the previous day. In any event, Mr. Power took it upon himself to define, without further reference to the Plaintiffs, the boundary according to his map and without paying any heed to the lack of conclusiveness of an OSi map or a PRA plan in this type of situation. He concluded that a small part of the Plaintiffs' shed was on the Defendant's land. At the end of August and without any notice to the plaintiffs, someone on behalf of the Defendant painted a line which Mr Power insisted was a dot, on the Plaintiffs' shed. He then instructed two employees of the Defendant (including a Mr. Farrell) to take down that portion of the Plaintiffs' fence which encroached on the Defendant's land according to Mr. Power's own determination.

Submission about the Court

65. Counsel for the Defendant in closing submissions said that I *"was very wrong and injudicious"* in asking Mr. Farrell to clarify his replies to questions. The Court's question was *"so you just took your instructions and went ahead with it?"* and Mr. Farrell answered

"yes". The Court is conscious of impressions which it gives but it is not the case that "*I disregarded his evidence*" after this reply, as was suggested in closing submissions.

66. It is important for the Court to take all of the evidence into account. I have had the benefit of considering responses of witnesses, a typed transcript and my own notes about witnesses and the evidence. Whatever about the impressions that a Court may give during the course of trial, I believe that it is necessary for a trial judge to consider the evidence while observing and probing to determine differences of accounts. I seek to assimilate all the factors which can be considered to establish the true picture.

67. At this stage, the Court takes the opportunity to explain that the attention to detail, calmness and evident honesty of Mr. Abraham when giving evidence satisfied the Court that his version of events where there was a dispute about fact was the most reliable evidence given at the trial. Mrs. Abraham's agitated state in discovering ongoing demolition with sledge hammers and crow bars still allowed her to describe a natural reaction to the presence of the muscular and strong Mr. Farrell accompanied by his fellow employee (who did not give evidence) taking down her back fence from just before 9am on Tuesday 29th August 2013.

68. Mr. Farrell and Mrs. Abraham agreed that Mr. Farrell had a crowbar and a sledge hammer. Mr. Farrell may not have wished to have added insult to the Plaintiffs by smiling when giving evidence about Mrs. Abraham and her two adolescent sons trying to unravel a hose. His repetition of the Defendant's entitlement based on Mr. Power's determination of the boundary, emerged as if he would support Mr Power in any way that he could, as Mr. Power was the owner of the company which employs Mr Farrell.

69. Too much was made by Mr. Power and Mr. Farrell of Mr. Farrell's arm having been impacted in some way by Mrs. Abraham when Mr. Farrell left his crowbar and sledge hammer on the ground. I do not find it necessary to determine whether he was so hit but any strike (if any) was of a very minor nature. The Gardaí who attended at the request of the Plaintiffs did not give evidence and Mrs. Abraham denied hitting Mr. Farrell. I am satisfied that I should pay no regard to whether the alleged hitting of the arm of a well built and strong labourer justified any action then taken or later taken by the Defendant.

Trespass

70. In view of the findings of the Court which have been summarised at para. 60, the Defendant's employees trespassed onto the Plaintiffs' property to demolish the lawfully erected fence and to put a mark on the Plaintiff's shed. The Defendant maintained throughout that its employees remained on what the Defendant determined through Mr. Power in particular as the property of the Defendant.

71. Even if the Defendant was correct in its assertion of ownership of the sliver of land, the very disruptive scene caused by the Defendant's employees including Mr. Power's traipsing around both sides of the boundary, the beech tree and in front of the Plaintiffs' play room where the Plaintiffs' two young children were located persuaded me to find that the Defendant's employees committed a trespass then.

72. Following the uncivilised and unilateral approach of the Defendant on 29th August 2013, the Defendant was obliged by the Health and Safety Authority, as prompted by the Plaintiffs, to erect building site mesh fencing to prevent access to the Defendant's two hectare field on which construction continued.

73. Then over Easter in April 2014, the Plaintiffs arranged for a relative to erect post and rail fencing along the original boundary. This was pulled up by the Defendant's employees once it was discovered by Mr. Power.

74. At one stage, Mr. Power was captured on the Plaintiffs' CCTV standing in the Plaintiffs' garden while the Plaintiffs' son was alone in the house and studying. Mr. Power did not deny directing the Defendant's teleporter to drop blocks onto the disputed boundary line which remained there in excess of fifteen months. In addition, Mr. Farrell confirmed that he collected rubble from the Plaintiffs' fence line and dumped it into an area behind the Plaintiffs' shed without any notice to the Plaintiffs.

75. The temporary fencing was replaced at some stage following the Defendant's agreement to sell the site on which the dormer bungalow at the back of the Plaintiffs' property is now built. The owners of this dormer bungalow entered into a supplemental agreement described at para. 27 above.

76. By way of conclusion, the Defendant has caused trespass and has disrupted the Plaintiffs in the enjoyment of their home by its dogged insistence and intimidating type of conduct to assert its view of the boundary line or a good compromise of same. Apart from seeking to define the boundary for the purchasers of the newly constructed dormer bungalow (which could have been undertaken if generosity and civility prevailed), the only other apparent reason to maintain an assertion of title to the sliver of land up to and during the trial was to assist the defence of the torts committed by the Defendant's director and employees.

77. Moreover, the reference to 61.7 square metres of a potential difference between the positions of the parties failed to take account of the fact that the line of the Plaintiffs' back boundary when it was demolished without notice, fell within approximately 1.5 metres at any one point and less as it moved towards the beech tree from the boundary claimed by the Defendant.

Damages

78. The Plaintiffs' claim for damages has been couched in the following way:-

- (i) €1,500 for replacement works which are required to give effect to the Court's determination that the boundary line as was always asserted by the Plaintiffs is correct and arising from the trespass found by the Court and;
- (ii) General damages for harassment and/or intimidation.

Harassment

79. The term "harassment" is used in s. 10 of the Non-Fatal Offences Against the Person Act 1997. It also crops up in work and discrimination related cases. The conduct of the Defendant and its employees in acting unilaterally and the Defendant's own determination to disturb the boundary fence without adopting a measured approach might not immediately fall within a common understanding of "harassment". However, it is clear that the Defendant's assertion of its perceived right to ownership of the sliver of land took no account of a corresponding duty to moderate its behaviour which a civilised society demands when asserting such a right. In that context, the repeated scant regard to the demands of society and the lack of proportionality on the part of the Defendant when seeking to have its view accepted by the Plaintiffs without a Court determination does amount to a form of harassment and intimidation.

80. In *Sullivan v. Boylan Contractors* (No. 2) [2013] IEHC 104 the second named defendant was aggressively pursuing the plaintiff for an alleged debt. The defendant had on one occasion entered the plaintiff's premises and sent threatening text messages. In an earlier judgment in the same proceedings, [2012] IEHC 389 at para 18, Hogan J. found that it was:

"...difficult to speak with moderation in respect of the conduct of Mr. McCartan. His behaviour has, however, been contemptible, irresponsible and outrageous. He has sought to harass, bully, defame, vilify and intimidate Ms. Sullivan and to all but imprison her in her own home. It is behaviour which in a civilised society cannot be tolerated for an instant and it represents conduct which this Court cannot and will not allow".

81. That same case lead to a separate hearing for the assessment of damages because judgment in default had been given against a Mr. McCartan who was the third named defendant in the proceedings. Hogan J. analysed the law as it has evolved in this area in *Sullivan v. Boylan* [2013] 1 IR 510; [2013] IEHC 104. As Hogan J. stated at para [44]: *"I am accordingly obliged as a result to fashion remedies which will uphold that constitutional right"* to the inviolability of the home. Therefore, any constraints relating to the actions pleaded as founded on harassment or intimidation in the circumstances of this case can be overcome by that obligation to fashion a remedy to vindicate the rights of the Plaintiffs to the inviolability of their family home. Despite my invitation the Defendant did not make a submission about the jurisdiction of the Court to award damages if the Court found that the Defendant's director and employees were guilty of wrongdoing.

82. In this case, the Defendant's employees in addition to causing events of intimidation and harassment, also trespassed onto the Plaintiffs' property to traipse around the Plaintiffs' garden at various times, to put a mark on the Plaintiff's shed and to demolish the lawfully erected fence.

Level of Damages

83. Hogan J. calculated the appropriate level of damages in *Sullivan v. Boylan* and usefully examined judgments starting with the comments of Finlay C.J. in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305 to his own judgment in *Raducan v. Minister for Justice* [2011] IEHC 224. I adopt the same approach in this case.

84. The right to enjoy the peace of the family home has been seriously and unlawfully interfered with by the Defendant's director and employees. Each of the Plaintiffs suffered loss and attacks on their jointly owned family home.

85. The series of events beginning on 29th August 2013, as described earlier in this judgment, right up to and including the necessity to be involved in the four day trial in November 2016 in order to vindicate their rights lead me to conclude that the following award of general damages should be made:-

(i) €15,000 to each of the Plaintiffs being a sum in total of €30,000;

in addition to

(ii) €1,500 for the cost of the works required as given in evidence.

86. No claim for aggravated damages was made and it is to the credit of the Plaintiffs and their advisors to have taken a measured approach in claiming damages bearing in mind their appreciation of Mr. Power's belief (however unreasonably expressed by Mr. Power) in the correctness of his actions on behalf of the Defendant.

87. The Court requests Counsel to assist the Court in formulating the terms of the order which will reflect this judgement and allow for a conclusive boundary between Folio KE 7062F and Folio KE 34848F to be registered.

ADDENDUM

On the 8th February 2017 the parties submitted a map (the third map attached to this judgement) with proposed terms for the order to reflect the findings of the Court. The Court made an order on the 8th February 2017 along those lines and granted a limited stay in the event of an appeal.