



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 87  
Record No. 2017/101

**Peart J.  
Costello J.  
Whelan J.**

**BETWEEN/**

**SEAN ABRAHAM AND PAULINE ABRAHAM**

**PLAINTIFFS/RESPONDENTS**

**- AND -**

**OAKLEY PARK DEVELOPMENTS LTD.**

**DEFENDANT/ APPELLANT**

**JUDGMENT of Ms. Justice Costello delivered on the 20th day of March 2019**

1. This is an appeal against the judgment of O Connor J of the 8th December 2016 ([2016] IEHC 790) where the High Court made a declaration in respect of the boundary between lands comprised in folio 7062F and folio 34848F and an order directing the Property Registration Authority pursuant to s.21 of the Registration of Title Act 1964 to record the boundary between the two folios as set out in the order as a conclusive boundary. The defendant appealed against these orders and, in the event that it was successful in this appeal, it sought to appeal the award of damages awarded against the appellant by O Connor J.

**Conveyancing history**

2. This case has its origins in the subdivision of rural land and is illustrative of the difficulties that can arise therefrom. The lands at issue in these proceedings were originally all part of one folio, 13741F ("the parent folio"). Mr. Brady Sr. purchased the lands which comprised a pub and approximately 37 acres. Included on the lands was a small cottage at the southwestern corner of the folio.

3. In late 1979/1980, Mr Brady Sr. sold a small corner of the parent folio comprising the small cottage and a plot of 0.2 acres to his son, Mr Osmond Brady. As this involved a sub division of the parent folio, 13741F, it was necessary to create a new folio, which was subsequently numbered 7062F. Mr Osmond Brady was registered as the full owner of folio 7062F in 1981. The boundary between folio 7062F and the parent folio to the northwest are central to this case.

4. When Mr Brady Sr. sold the cottage and adjoining lands to his son, Mr Osmond Brady, the parcel of land was fenced to the north with an old steel and post wire fence and a gate. The balance of the lands remained in folio 13741F, which included a 5 acre field to the north and east of folio 7062F.

5. Subsequently, Mr Osmond Brady transferred the title to folio 7062F into the joint names of himself and his wife, Mrs Mary Brady.

6. In 1998 Mr and Mrs Brady acquired further lands from the parent folio, 13741F, from Mr Brady Sr. The lands were contiguous to their existing holding in folio 7062F to the north and east. This involved a second sub division of the parent folio and led to the creation of a new folio, 26791F. These lands comprised a small roughly triangular area to the west of folio 7062F and a 5 acre field to the north of folio 7062F. Mr And Mrs Brady were registered as full owners of this new folio, 26791F.

7. In October 2000 Mr and Mrs Brady agreed to sell lands comprising part of folio 26791F to the appellant. The lands in sale were transferred to the appellant in consideration of the sum of €1.5m. The deed transferred: -

*"ALL THAT AND THOSE part of the lands comprised in folio 26791F of the Register of Freeholders County Kildare 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." (emphasis added)*

8. The attached map was prepared on the Ordnance Survey Ireland rural place map, scale 1:2500. Paul Mealy, architect, certified the area outlined in red as 2.057 hectares = 5.079 acres on the 27th October 2000.

9. The registration of this transfer resulted in the sub division of folio 26791F. Mr and Mrs Brady remained the registered owner of the small part of that folio which was not sold to the appellant. A new folio, KE34848F was opened and the appellant was registered as the full owner of the lands comprised in that new folio.

10. On the 21st April 2008, Osmond and Mary Brady agreed to sell lands to Sean and Pauline Abraham, the respondents. The contract describes the particulars of tenure as:-

*"ALL THAT AND THOSE the lands, hereditaments and premises known as 'Glebe', Straffan, County Kildare, more particularly comprised in folio 7062F and folio 26791F of the Register of Freeholders County Kildare which for identification purposes only is shown on the map annexed hereto."*

11. The deed of transfer by Mr and Mrs Brady to Mr and Mrs Abraham was not apparently adduced in evidence. On the 5th June 2008 the respondents were registered as full owners of folio 26791F and folio 7062F.

**Facts on the ground from 1979-2013**

12. At all material times there was a well-defined physical boundary between the lands and curtilage upon which the cottage was situate and the field to the north west of these lands, referred to as the 5 acre field. Originally the boundary was a steel and wire fence with a gate from the cottage lands into the field. Mr and Mrs Brady replaced the original fencing with a post and rail fence along the same line. They never moved the line of the fence. There is a large copper beech tree to the north of the cottage. At all times this was within the garden of the cottage i.e. it was never in the 5 acre field. When Mr and Mrs Brady acquired the lands which led to

the creation of folio 26791F, they incorporated that part of those lands which did not comprise the 5 acre field and which lay to the west of their existing small holding, into the garden and thereby increased the curtilage of the lands surrounding the cottage. When the respondents purchased the lands comprised in folio 7062F and the remaining lands in folio 26791F, they built a new house and garage and erected a shed and landscaped their garden within the existing physical boundaries. The line of the physical boundary between the 5 acre field to the north west and the cottage and garden to the south was never changed or challenged until August 2013, save for the incorporation of additional land to the east into the garden, and this latter boundary is not in dispute in these proceedings.

### Maps and boundaries

13. The Land Registry operates a non-conclusive boundary system. Section 85 of the Registration of Title Act, 1964 (as amended) states that *"the description of the land in the register or on such maps shall not be conclusive as to the boundaries or extent of the land"*. This situation is neatly encapsulated by an endorsement which appears on all maps attached to folios. It states *"the registry map identifies properties not boundaries meaning neither the description of land in a register nor its identification by reference to a registry map is conclusive as to the boundaries or extent."*

14. All of the maps employed in this case were plotted on rural OS maps scale 1:2500. The accuracy and the amount of information that can be represented on the map is primarily dependant on the scale of the map used. There was evidence that using maps to this scale is subject to a margin of error.

"the typical achievable accuracies are of a low order, mapping discrepancies of +/- 2 metres are quite typical when checked by precise ground survey measurements"

15. Parties applying for first registration of title are required to present a map using either a land registry map or the most up to date map of the Ordnance Survey of Ireland. When Mr Osmond Brady applied to register the new folio 7602 in July 1985 the map attached was required to be based on the then most up to date available OSI map. Subsequently, commencing in 1995, the Ordnance Survey resurveyed the lands in the State using ITM coordinate reference systems. The Land Registry then digitised all of the maps based upon this resurvey of the State using the ITM coordinate reference system. The revised editions of OS maps can vary from earlier editions due to different mapping technology and practices over decades and a move from field surveying to desk top surveying based on aerial photography. This can and does give rise to discrepancies in relation to boundaries.

16. This occurred in relation to the map attached to folio 7062F. Mr. Kestell produced a map marked 1A which shows, outlined in blue, the old Land Registry record for folio 7062F and the current Property Registration Authority extent of lands for folios KE7062F and KE26791F outlined in red. The map is attached to this judgment for ease of reference. The discrepancies between the two maps are immediately apparent. The boundary of the old folio (in blue) runs approximately through the middle of the road to the south of the lands whereas the red outline (the current map attached to the folio) continues well over the meridian and nearly to the far edge of the road. This "movement" of the folio effectively south eastwards has the effect of "moving" the north westerly boundary in a south easterly direction. There is a significant shift of the property to the west and change in the north western boundary, though no transfer of land took place and there was no change in the position on the ground of the physical boundaries. The change was effected within the Land Registry as a result of changes in its mapping practices. Importantly, new folios with revised plans are not sent to registered owners for verification purposes. This accords with the fact that The Register is not conclusive to boundaries or extent as s.85 of the 1964 Act, as substituted by the Registration of Deeds and Titles Act 2006, s.62 and the Land Registration Rules 2012 Rule 8(2) provide.

### Dispute

17. In the summer of 2013, a third party negotiated with the appellant to purchase a house being developed by the appellant whose boundary lay along the disputed land. The intending purchaser was anxious that this boundary be precisely defined. The appellant instructed Mr Holton, a land surveyor who had worked with the Ordnance Survey Ireland for twenty three years, to carry out a survey of the boundary between the two properties. He concluded that the boundary as indicated on the transfer of the 20th December 2000 was in fact slightly inside the physical boundary then marked by a timber fence and a line of trees and in fact takes in a slice of the respondents' shed situate near the north eastern boundary. During the summer of 2013 the director of the appellant, Mr Power and the respondents met on a number of occasions to discuss their common boundary. The appellant indicated that it claimed ownership of part of the lands inside the fence and the respondents maintained that the boundary was as indicated by the line of the existing fence. At the end of August and without any notice to the respondents, the appellant acted upon its assertion that it owned the disputed lands which stood within the curtilage of the lands of the respondents. Two employees of the appellant entered upon the disputed land with sledge hammers and crow bars and started to take down that portion of the fence which the appellant alleged encroached upon the its lands. They also marked a corner of the shed with some paint. A fraught scene ensued and the Gardaí were requested by the respondents to attend. The trial judge was particularly critical of the conduct of the representatives of the appellant and what he referred to as the "uncivilized and unilateral approach of the [appellant] on the 29th August 2013".

18. The dispute was not resolved by the parties or their solicitors so the respondents commenced these proceedings by a plenary summons issued on the 2nd May 2014, they sought the following reliefs:-

(a) an order declaring the plaintiffs to be the owners in fee simple of ALL THAT AND THOSE that part of the Folio Number KE34848F of the Registered Freeholders of the County of Kildare currently and incorrectly registered in the name of the defendants and which is the subject matter of these proceedings;

(b) an order for rectification of the maps attached to the plaintiffs' folios plan 23 of folio KE7062F and plan 38 of KE26791f of the County of Kildare and the defendant's folio number KE34848F of the Register of the County of Kildare so as to show the true extent of both the plaintiffs' and the defendant's lands and the border between same and for an ancillary order to that effect, including an order requiring the Property Registration Authority to amend mapping accordingly;

They also sought various injunctive reliefs and damages for trespass and intimidation and harassment.

19. The appellant counter claimed seeking an order declaring the true boundary between the properties to be as set out in the existing Land Registry map.

20. In its reply and defence to the counter claim the respondents pleaded that the appellant was seeking to rely wrongly on the "digitised" Land Registry map which differs from the previous true Land Registry file plan which formed part of the respondents' documents of title.

### The decision of the High Court

21. The trial judge traced the history of the creation of the relevant folios and maps. He noted that the copper beech tree was located at all times within the garden of Mr and Mrs Brady's cottage before any transfer to either of the parties in these proceedings. The map used in 1979 to create folio 7062F included the area on which the beech tree was located. The trial judge noted that at the time of each of the transfers to the parties there was a steel post and wire fence to the north side of the beech tree which connected to a gateway behind the outhouse and that Mr Osmond Brady replaced this fence with a timber fence. The line of the fences (both steel post and the wooden one) was just to the north side of a row of trees which connected to a gateway behind the outhouse on the property.

22. Special condition 4 of the contract for sale between Mr and Mrs Brady and the appellant provided that the appellant "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. The trial judge noted that the appellant did not carry out a pre contract inspection or arrange for any comparison of maps to identify the boundaries between the 5 acre field and folio 7602F and folio 26791F either before or after execution of the contract with Mr and Mrs Brady in 2000 until August 2013.

23. At all times prior to 2013 the appellant recognised the boundary between the two parcels of land as that marked by the existing line of the fence. The appellant constructed a concrete post and timber fence in 2008 along the line of the acknowledged boundary for health and safety reasons during the development of Bartons Grange. The appellant relied upon the boundary claimed by the respondents and as demarked on the ground when the appellant applied for planning permission to develop the 5 acre field.

24. Mr Holton, the appellant's land surveyor employed in 2013, calculated the area of land in dispute at 61.7 square metres. The trial judge noted that the maximum difference between the line asserted by the respondents and that asserted by the appellant was 1.5metres at any one point as it moved from the north western corner towards the copper beech tree at the north eastern side of the plot. The trial judge also explained that the line of the existing fence on the northern boundary of the respondents' garden according to Mr Kestell's map, 1A, lies slightly closer to the boundary appearing on the Land Registry map than the line of post holes used by Mr Holton, the appellant's expert, to calculate the 61.7 square metres and thus that in fact the area of the disputed sliver of land was in fact less than 61.7m, though he did not establish the actual area of the disputed land.

25. The trial judge noted that OSI maps are derived from a methodology which lacks accuracy and precision for title boundary definition. They do not indicate legal property boundaries and they do not show ownership physical features. The trial referred to a joint statement of the OSI and the PRA from their websites that:-

*"It is not possible to identify the position of a legal boundary from an OSI map"*

He also referred to the Inter Professional Task Force on Property Boundaries published in April 2014 which states as para 3 that:-

*"the primary problem is that the mapping used by the PRAI to record title boundaries is based on OSI mapping, which is published at a scale, and derived from a methodology which lacks the accuracy and precision required for title boundary mapping".*

He referred to the fact that s.85(2) of the Registration of Title Act 1964 (as inserted by s.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.

26. The trial judge concluded that the respondents had established a right in equity to have the Land Registry map rectified. This was so having regard to the history of the conveyancing, the fact that the Land Registry is not conclusive as to boundaries and the fact that the Ordnance Survey maps are not suitable to determine boundaries. He noted there was evidence of the line of the fence and the beech tree which was indicative of the true boundary between the two parcels of land. This dividing line had been observed by all parties, Mr and Mrs Brady, respondents and the appellant. The appellant had acted on the basis that this represented the true boundary, as indicated by its applications for planning permission and erection of a fence in 2008. He also had regard to the fact that the appellant permitted the respondents to redevelop their lands, including the erection of a shed on what the appellant now asserted was part of its land. In addition he took into account the dimensions of the disputed sliver of land, the relative ratio of the size of the sliver of land to each of the parcels owned by the parties, the comparatively greater significance of the boundary line for the respondents to the appellant, the fact that the appellant did not fulfil its contractual duty to satisfy itself as to the boundary of the land it was purchasing, and the fact that Mr and Mrs Brady and the respondents were in actual occupation of the disputed sliver of land and that accordingly the appellant acquired its land subject to their rights as persons in actual occupation of the land pursuant to s.72(1)(j) of the Act of 1964. The court concluded that the discrepancy between the maps and the ground situation was not of such a magnitude as precluded the court from granting orders to correct the PRA mapping and distinguished the current situation from that in *Boyle v. Connaughton (Unreported, Laffoy J., 21st March, 2000, Circuit Appeal)*.

27. The High Court also took the view that the appellant, through its employees from August 2013 onwards had trespassed on the respondent's property and intimidated and harassed the respondents in their family home and he awarded each of the respondents the sum of €15,000 making a total of €30,000 together with a sum of €15,000 for the costs of the work required to remedy the damage occasioned by the various acts of trespass.

28. The appellant appealed the whole of the judgment and order of the High Court on the grounds discussed below.

### **Legal Principles**

29. The former deputy registrar of titles, Mr Deeney, stated in his book 'Registration of Deeds and Title in Ireland (2014)', having noted that boundaries shown on Land Registry maps are not conclusive

*"this means that, in any case where the boundary is not stated to be conclusive or defined, evidence other than the Register or Registry map is admissible to determine the correct boundary and extent of the land" (para 12.07)*

30. It was accepted by both parties that the primary source of the boundary line between any two adjoining properties is the original deed whereby ownership is divided. In this case the relevant sub division is that between the parent folio and folio 7062F in 1981. That deed was not adduced in evidence. A considerable amount of time was spent construing the sub division of folio 26791F and the creation of folio 34848F but the disputed boundary is not to be found in the sub division of folio KE26791F so this had limited bearing on the dispute in this particular case. The key issue was to determine the correct boundary between the two parcels of land and this had to be done in the absence of the deed giving rise to the sub division.

31. The court was referred to a number of English authorities on the construction of deeds in boundary disputes. In *Cameron v Boggiano* [2012] EWCA Civ 157, Mummery LJ reaffirmed the established distinction between the construction of transfers and/or

transfer plans that are clear and unambiguous and those which are not. If the transfer and/or transfer plan is clear and unambiguous, a mismatch between a clear plan and the actual physical features on the ground is not *in itself* a reason to disregard the title documents and determine the position of the disputed boundary by reference to the topographical features alone. On the other hand, the approach to construction and to the use of extrinsic evidence of topographical features is different when the title documents and plans are not sufficiently clear about the position of the boundaries. In that case, if the document is insufficiently clear to the reasonable layman with the plan in his hand to determine the position of the boundary, the court is entitled to seek assistance on the construction of the plan and title documents by taking account of the topographical features at the relevant date (para 63) At para 67 of the judgment he stated:-

*"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 [are] of what is being transacted"*

32. The court was referred to *Fisher v. Winch* [1939] KB 666, a case concerning a boundary dispute. Sir Wilfrid Greene M.R. gave the decision of the Court of Appeal. He said that the initial question should be:-

*"what, on the true construction of the conveyances to the parties, is the boundary of their respective land. If an examination of those conveyances coupled with any evidence that is admissible for the purpose of construing them shows what the boundary is, there is no room at all for the operation of that presumption"*

33. At p.672 of the report he considered the evidence adduced in relation to Ordnance Survey maps. He continued:-

*"The effect of that evidence is that where there is a hedge or a fence running along a parcel, that is the boundary which is taken by the Ordnance Survey for the purpose of delimiting the parcels which are shown on those maps. Of course, the fact that the boundary is shown in a particular place on an Ordnance map is in itself no evidence of what the true boundary is as between the parties, but where the party's title is derived from a document which refers to the Ordnance map, it is necessary to look at the Ordnance map and ascertain where the boundary shown on that map is truly positioned...."*

*[T]here it can be no question on Mr Emery's evidence and the other evidence in the case as to those fences and hedges, that **the boundary referred to on the Ordnance Survey map is the centre line of the hedge and the fence. That being so, when the conveyance is looked at, the boundaries on which are traced by reference to the Ordnance survey, the acreage of which is fixed by reference to the Ordnance survey, it is established beyond possibility of question what the boundary is.**"* (emphasis added)

34. This is authority for the proposition that where there is a hedge or fence running along a parcel that is the boundary which is taken by the Ordnance Survey for the purpose of delimiting the parcels which are shown on the maps. The fact that the boundary is shown in a particular place on the map is itself no evidence of what the true boundary is as between the parties. However, where, as in this case, a party's title is derived from a document which refers to the Ordnance map it was necessary for the court to look at the Ordnance map and ascertain where the boundary shown on the map is truly positioned. The boundaries appearing on the OS map are plotted by reference to the physical boundaries existing at the time the map was produced. If a conveyance follows the line of the plotted physical boundaries as appearing on the OS map, it necessarily follows that the boundaries follow the physical boundaries as they existed when the map was produced. The precise line of the boundaries must refer back to the actual physical boundary that existed at the date the map was prepared. In order to establish where the boundary shown on the map is truly positioned, it was permissible for the court to have regard to the admissible evidence of the expert employed in the Ordnance Survey as to the practice of making up maps and evidence as to the actual line of the old fences and hedges. What evidence will be relevant and admissible will vary from case to case but the exercise is to ascertain where the boundary is truly positioned.

35. The court was referred to one Irish authority on point, *McCoy v McGill* [2008] IEHC 301, where Hedigan J reviewed the authorities in relation to the construction of deeds and maps in the context of boundary disputes. At para 8 of his judgment he held as follows:-

"From the above cases I deduce the following principles applicable herein. In relation to determining boundaries:-

- (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 as 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 rules of construction of a deed:-

- (a) The court must give effect to the intention of the parties as expressed in the deed.
- (b) To determine this, the court must determine what is meant by the words actually used rather than what the court might conjecture they actually meant. The court should only do so where absolutely necessary to avoid defeating the object which the parties clearly had intended.

In relation to the role of a map:-

- (a) A map or plan may be the determining matter where the parcels provide 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 was executed.

36. In so far as this appeal is concerned, this means that, if necessary, deeds may be supplemented by such inferences as may be drawn from topographical features which existed or probably existed when the conveyance was executed and where there is a 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, the conflict may be resolved by reference to topographical features which existed when the conveyance or transfer was executed.

37. The question of the consideration of extrinsic evidence to construe a deed or plan attached to a deed is addressed in *Wylie and Wood, Irish Conveyancing Law* and in *Emmet and Farrand on Title* (19th Edition). *Wylie and Woods* state at para. 17.79 that the general rule is that extrinsic evidence is not admissible to add to, vary or contradict the terms of the deed but notes that there are several exceptions to the rule, including to resolve a latent ambiguity. *Emmet and Farrand* state in para 17.011:-

*"extrinsic evidence (including aerial photographs) was similarly held admissible where the critical parcels clause had described the premises being sold in general terms followed by a precise statement of area (553.4 square acres or thereabouts) and reference to a plan 'for the purposes of identification only' but that stated area was significantly less than the area taking the boundary to be the obvious feature ( a dividing wall) already erected on the ground at the time and shown as such on the plan: Taylor v Lambert [2012] EWCA Civ 3. The statement of area was dismissed as a solicitor's mistake in scaling up from a demolished piggery wall shown on the original conveyance of the undivided property without any double checking but also because it could not by itself identify a boundary (para 47) Lloyd LJ also supported the decision (at paras 40 and 41) by an objective test: what would a reasonable layman in the position of the intending purchaser at the relevant time have thought he was buying under the crucial parcels clause? His answer (at para 41) was: 'the reasonable layman, looking at the land as it stood, with the terms of the document in his hand, could not be expected to think he was buying an area of land defined by this invisible and irregular boundary, rather than one which ran as far as the boundary wall on the south'...*

*Accordingly, in practice, the situation on the ground may be decisive with an ordinary suburban property with existing fences but not with a plot on a building estate unless there is something on the land that would indicate to the objective observer where the boundary lies." (emphasis added)*

38. It follows from these authorities that the first issue for a court construing the meaning of a conveyance or transfer is to decide whether or not the transfer and/or the transfer plan is clear and unambiguous. If the court concludes that it is not, then the court may go on to consider admissible extrinsic evidence to assist in the construction of the title documents and plans.

#### **Grounds of appeal**

39. The appellant's case is that it acquired part of the lands comprised in folio 26791F. It claims that the disputed area was never at any time contained within folio 7062F. It says that its deed of transfer is clear and unambiguous both as to the description and as to the map, which was certified by Mr Mealy. Its case is based upon areas not boundaries and the map in the Land Registry reflects the area of land to which it is entitled. That plan includes the disputed area of land and therefore it correctly forms part of the lands comprised in folio 34848F and conversely was never part of the lands comprised in 7062F.

40. Counsel alleged that the trial judge made the following errors in his decision:

- (i) He had regard to the special conditions in the contract of sale by Mr and Mrs Brady to the appellant. This was incorrect by matter of law as the contract merged with the transfer.
- (ii) He failed to attribute due weight to the fact that in preparing the map for the contract and the transfer, Mr Mealy was the agent of Mr and Mrs Brady, the vendor, and therefore the vendor was bound by the map.
- (iii) The trial judge ought not to have placed any reliance on the absence of pre contract enquiries as to boundaries by the appellant as there is no duty in law on a purchaser to inspect the boundaries.
- (iv) The trial judge failed to have regard to the fact that the sale by Mr and Mrs Brady to the appellant was by auction by reference to a contract map that certified the area in sale and not by private treaty.
- (v) The learned trial judge failed to have regard to the fact that Mr and Mrs Brady transferred the land to the appellant as beneficial owners and therefore incorporated implied covenants to title in respect of the lands comprised in the transfer.
- (vi) The trial judge failed to have regard to the rule *Nemo dat quod non habet* Rule: as Mr and Mrs Brady had transferred the lands comprised in folio 24848F to the appellant, they could not transfer any part of those lands to the respondents in 2008.
- (vii) The trial judge erred in law in having regard to the comparatively greater significance of the boundary line for the respondents than for the appellant.
- (viii) The trial judge erred in law in taking account of the maps presented by the appellant for planning applications.
- (ix) The trial judge ought to have preferred the evidence of the appellant's expert over that of the respondents' expert.
- (x) The trial judge erred in having regard to the provisions of s. 72(1)(j) of the Registration of Title Act, 1964 as Mr and Mrs Brady was the vendor to the appellant and therefore s. 72(1)(j) could not apply in the circumstances.
- (xi) The error in this case was not a minor error and so s.85 of the Act of 1964 could not apply and the trial judge erred in relying on the section.

#### **Was the transfer clear and unambiguous?**

41. The first matter to be considered is whether or not the deed of transfer of 2000 is clear and unambiguous both as to description and as to the map. If it is, then extrinsic evidence may not be admitted to construe the transfer and the trial judge ought not to have taken account of the physical evidence and other matters to which he had regard in reaching his conclusions.

42. The description of the parcels is not clear and unambiguous. It transfers part of the lands comprised in folio 26791F. It does not

include any of the lands in folio 6709F. Other than this limitation, further detail is required in order to be precise as to the lands comprised in the transfer.

43. The transfer goes on to provide that the lands have an area of 2.057 hectares or 5.079 acres. The extent of the land transferred cannot of itself determine the precise boundaries of the lands transferred. Only if all but one of the boundaries is conclusively fixed can the remaining boundary be established by reference to the area of the land. This is a simple matter of logic. This does not apply to folio 34848F. The land comprised in folio 34848F is a field marked on rural place map. Such maps are subject to a margin of error +/- 2 metres and are not suitable to define boundaries conclusively. Further, in *Taylor v Lambert*, Lloyd LJ held that the area could not by itself identify a boundary.

44. The Transfer continues "*and more particularly delineated on the map annexed hereto and thereon surrounded by a red verge line*" Counsel for the appellant was correct to emphasise the fact that the map is annexed to the transfer, not for information purposes but to delineate the lands being transferred. Thus, the map is incorporated into the deed. There are thus two descriptions of the land transferred; the words describing the parcel and the map. If the verbal description is unclear it may be rendered certain by the map. See Wylie and Woods para. 18.66. The appellant argued that where the parties chose to use a map to mark the boundary they will be held to what the maps show. But that begs the question, what does the map show? Does the map in this case make the boundaries of the lands which are not clearly described in the parcels, clear and unambiguous?

45. The answer to this question is no. The map is delineated on the Ordnance Survey map scale 1:2500 which was marked with various field boundaries. As has already been pointed out, these maps are not sufficiently accurate to enable boundaries to be fixed precisely. Rural Place maps are subject to a margin of error. They are plotted by reference to the physical boundaries that existed at the time the map was prepared. The boundaries on the OSI maps are intended to reflect the physical boundaries but do not necessarily determine where the boundary shown on the map is truly positioned. In those circumstances the map cannot render the transfer clear and unambiguous and the court must have recourse to extrinsic evidence to establish the true position of the boundary between the parcels as was held in *Fisher v Winch*.

46. If the document is insufficiently clear to the reasonable layman with the plan in his hand to determine the position of the boundary, then the court is entitled to seek assistance on the construction of the plan by taking account of the topographical features at the relevant date. In this case the evidence of Mr Mealy, the architect employed to certify the extent of the lands in sale, was that he went to the field with a copy of the map and

*"I could see no visual difference between what is now the disputed area and where the boundary is... I was happy that what was on the Ordnance Survey Map was consistent with what I found on the field."*

This was the evidence of the witness called on behalf of the appellant and, to my mind, it satisfies the test to show that the map, and by extension the transfer, was not clear and unambiguous as to the boundaries of the land transferred and now comprised in folio 34848F.

47. On foot of the transfer the appellant was registered as full owner of folio 34848F. the Register is conclusive as to title (subject to certain qualifications which do not arise here). However, s. 85 of the Act of 1964 (as amended) provides that the description of the land in the Register or on the maps is not conclusive as to the boundaries or extent of the land. This means that the boundaries to the appellant's folio 34848F are not conclusive and the area is not conclusive. It equally means that the boundaries and area of a folio 7062F are likewise not conclusive. It follows that the fact that the appellant has been registered as the owner of folio 34848F which includes a map outlining the lands comprised in the folio is not determinative of the dispute in this case. It does not resolve the lack of clarity as to the boundaries I have discussed.

48. For these reasons it was both permissible and necessary to have regard to extrinsic evidence in order to construe the deed of transfer of 2000. But a true construction of the transfer alone would not ascertain the true position of the boundary between folio 6709F and the lands transferred by the deed of transfer of 2000 and now comprised in folio 34848F. Folio 7062F was created nearly twenty years before the transfer to the appellant of part of the lands comprised in folio 26791F. As was accepted by counsel for the appellant, that deed of transfer could not transfer any part of the lands comprised in folio 7062F. Therefore, it is necessary to consider the evidence as to the true boundaries of that folio also and not confine the enquiry into the boundary of folio 34848F.

49. In my judgment the trial judge acted correctly in admitting and considering extrinsic evidence in determining where the true position of the boundary between the two parcels lies. It is not a case of permitting the facts on the ground to supersede the clear provisions of the deed. It is the unclear, imprecise provisions of the deed which are to be construed with the assistance of extrinsic evidence..

50. The following relevant facts were either established in evidence or found as a fact by the trial judge:-

(i) Mr Mealy certified the area based upon the map, he did not survey or certify the boundaries of the 5 acre field in sale.

(ii) There are discrepancies between the physical boundaries and the map attached to folio 34848F relative to the boundary between the folios 34848F and folio 7062F.

(iii) Mr Mealy's map was drawn on an Ordnance Survey map which showed a boundary to the 5 acre field. There was never any other boundary line between the 5 acre field and the curtilage of the cottage other than that marked by the steel and wire fence which was replaced by the timber and post fence and the line of trees. The line of the boundary was not altered from the time Mr Brady Snr. acquired the parent folio which predated the subdivision of the parcel which gave rise to the boundary between the holdings.

(iv) When folio 7062F was opened the map was based on the then up to date Ordnance Survey map and recorded the plan outlined in blue in map 1A prepared by Mr Kestell. After the resurveying of Ireland using ITM coordinated reference system and the subsequent digitisation of Land Registry maps, a new folio plan was attached to folio 7062F as outlined in red in map 1A. There is a clear and significant discrepancy between the two maps. This is the result of a remapping exercise, not a resurveying exercise or an exchange of land between adjoining landowners. The registered owners were not notified of this change.

(v) The original map attached to folio 7062F is closely aligned to the line of the post holes and timber fence, the line of the physical boundary that existed until August 2013.

(vi) The copper beech tree is included in the curtilage of the original map attached to folio 6702F whereas the Land Registry revised map excludes the copper beech tree from the curtilage.

(vii) The evidence in the High Court is that Mr and Mrs Brady sold the "5 acre field" to the north of their cottage and garden to the appellant. They were selling the field and the appellant was buying the field.

(viii) There was no evidence to suggest that Mr and Mrs Brady intended to sell or the appellant intended to buy lands outside the field and inside the garden of the cottage.

(ix) At all times the owners of the cottage and surrounding lands treated the boundary to the lands as that demarked by the fences.

(x) At all times up until August 2013, the appellant treated the boundary as the physical boundary. In its applications for planning permission to develop the 5 acre field it accepted this boundary. When it was developing out the planning permission, it erected its own fence following in the existing physical boundary.

(xi) The appellant was fully aware of the fact that the respondents demolished the cottage and replaced it with their existing family home and a shed which, according to the boundaries on the map attached to their folio 34848f encroached upon its land, yet for five years it sat on its hands and did nothing.

These are all matters to which the trial judge was entitled to have regard when determining the precise location of the correct boundary between the two folios. There was ample admissible evidence before him to conclude that the location of the true boundary was as he determined.

51. In fairness to the parties, it should be pointed out, as counsel for the appellant accepted, the relevant map showed the sold lands to be bounded along the public highway by a redline which appear dot run to the median line of the public highway. The presumption is that the person owning the land adjoining a public (or Private) road owns the soil of one half of the road, so that an assurance of the land is presumed to include this soil. This may well have contributed to any misunderstanding or erroneous assumptions as to the extent or locus of the lands purchased.

52. The appellant argued that the rectification of the Land Registry map sought by the respondents and acceded to by the trial judge was greater than was permissible under s.85 of the Act of 1964. The appellant relied upon the decision of Laffoy J. in *Boyle v. Connaughton* to support its argument that a discrepancy of 61.7 square meters was covered by section 85. The trial judge rejected this argument and, in my opinion, he was correct to do so. The boundaries at issue in *Boyle* were in a housing development in Castleknock between two plots, not a boundary between a residential plot and a 5 acre field in a rural setting in Kildare. Secondly, the boundaries were drawn on rural place maps to a scale of 1:2500, which are not suitable for determining legal boundaries. The trial judge found as a fact that the maximum discrepancy between the line on the land Registry map attached to folio 34848F and the physical true boundary was 1.5m. The OSI maps have margin of error of up to 2 metres due to the manner in which they are produced and the scale. Thirdly, it is possible on the fact in this case that if the PRA had not digitised its maps and the map attached to folio 7602F had not thereby shifted as I have described that in fact no issue may have arisen between the parties.

53. The appellant argued that the respondents were not entitled to rectify the transfer of 2000 but that argument is not relevant to the case actually made. The respondents sought the correction of the maps in the Land Registry, not rectification of any deed.

54. The doctrine of *nemo dat quod non habet* was not relevant to the issue in the case. The issue was whether any part of Mr and Mrs Brady's back garden was ever transferred to the appellant in 2000, not whether, having transferred it to the appellant in 2000, they could not transfer it to the respondents in 2008. For the same reason the fact that Mr and Mrs Brady transferred part of folio 26791F to the appellant as beneficial owner, with implied covenants as to title, is irrelevant if, as was held by the trial judge, the disputed land was never part of folio 26791F and was part of folio 7062F.

55. For these reasons I would refuse the appeal and affirm the decision of the High Court. There was a formal appeal against the quantum of the award of damages but it was contingent on a successful outcome of the appeal on the boundary issue. As that appeal has not succeeded I would affirm the award of damages for trespass and intimidation.

### **Errors in the judgment**

56. The appellant was correct in identifying certain errors of law in the judgment of the trial judge. Having affirmed his decision as correct as a matter of law on the facts of this case, I feel I should set out where in my view he erred lest silence on the part of this Court be considered an endorsement of those errors. In determining where the true boundary between the two properties lay he had regard to certain matters which were not relevant to that assessment.

57. He ought not to have considered the relative ratio of the size of the disputed sliver of land to each of the parties' property and the comparatively greater significance of the boundary line for the respondents as compared to the appellant. The task is to construe the deeds, not to assess the equities as between the parties so he ought not to have considered these factors, even in the peripheral way that he did.

58. Second, ordinarily there is no contractual duty on a purchaser to satisfy himself as to the boundaries of the land in sale and the special condition in this case did not impose one. He may run certain risks if he fails to do so but he is not thereby in breach of any obligation owed to the vendor or any other party. From the perspective of the parties to the contract he is bound by the *caveat emptor* rule. The General Conditions specified that the vendor "shall not be required to define exact boundaries, fences, ditches, hedges or walls or specify which (if any) of same are party in nature". So if a purchaser fails to satisfy himself as to the boundaries of the lands in sale he does so at his own peril. But that is not a relevant matter to take into account when determining objectively the precise line of the boundary between adjoining properties.

59. Third, Mr and Mrs Brady were selling part of their land to the appellant in 2000, therefore they could not be said to be persons in actual occupation of the land *they themselves were disposing of* within the meaning of s.72(1)(j) of the Act of 1964 merely because they remained in occupation of the balance of their land which they did not sell. Insofar as the trial judge had regard to this section. In the circumstances of this case, that was not correct.