



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
LAND REGISTRATION DIVISION**

REF/2015/0778

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

B E T W E E N:

**(1) PETER BERRELL
(2) WENDY BERRELL**

Applicants

and

KAREN CHAMPNEY (Formerly Karen Timms)

Respondent

**Property Address: 6 Tetbury Street, Minchinhampton, Gloucestershire GL6 9JG
Title Number: GR114635**

Before: Mr Max Thorowgood sitting as Judge of the First-Tier Tribunal

**Sitting at: Bristol Civil Justice Centre
On: 19th & 20th January 2017**

Applicants' representation: Thomas Worthen of counsel

Respondent's representation: In person

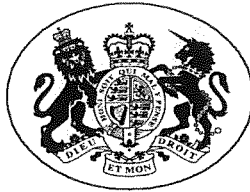
1. Introduction

- 1.1. This reference concerns the Applicants' application dated 22nd June 2015 to determine the position of the western boundary of their land with the Respondent's land by reference to the plan prepared by Ms Julia Stolle and dated 16th June 2015 ("the Plan"). The Plan, which is also annexed hereto is not to be confused with the other illustrative plan annexed to Ms Stolle's expert report.
- 1.2. By the time of the hearing before me the extent of the dispute was confined to the boundary between points D and G on the Plan. Miss Champney conceded in her opening remarks, when asked by me to confirm this point, that the boundary between points A-D, including that part of the gatepost which projects beyond the



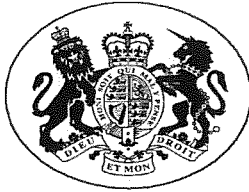
line of the wall, is now as shown on the Plan. Thus, Miss Champney accepts that the flank walls of the two extension to the main building on the Applicants' land as well as the wall of the more recent extension to their kitchen now fall wholly within the Applicants' title.

- 1.3. Thus, it is only the position of the boundary in relation what might be called the 'garden wall' that I need to consider. The wall is of a composite construction. On the Applicants' side it is made of local stone on the Respondent's side it is made of brick. The extent of the dispute is as follows: the Applicants claim ownership of the whole wall; the Respondent claims that the whole of the brick face on her side of the wall belongs to her and that the stone part of the wall, which she says is the original dividing wall between the two parcels and is a party wall, should be divided medially.
- 1.4. The competing claims may be summarised, I think, as follows:
 - 1.4.1. The Applicants say that it is to be inferred from the fact that their predecessors in title built on/up to the brick face of the Wall and/or dealt with the brick face of the Wall as if it were theirs at all material times since the turn of the 19th/20th centuries that they have at all material times been the owners of the paper title to whole of the Wall. Alternatively they say, on the basis of the same facts, that they have acquired title to the brick face of the wall either by adverse possession or because the Respondent is now estopped from asserting her title to it by reason of her predecessors' conduct and/or by an agreement between the parties as to a right of way over the driveway which runs over the Respondent's land to the west of wall ("the Drive").
 - 1.4.2. It is the Respondent's case, in reliance upon the expert evidence of Kay Ross, an architectural historian, and various other circumstantial material that the parcels were originally divided by the stone wall and that that is a party wall. The brick face of the wall in question and indeed that on the other side of the Drive, were added by her predecessor in title to the Close (or, 'The Paddock' as it was then known), W H Smith, in or about 1869 as part of his improvements to the garden of the Close and in particular to facilitate the cultivation of fruit trees. It must follow, she says, the brick face of the wall at least was constructed on her land. Nothing that has happened since in relation either to the part of the boundary which is not in dispute or to the part which is has been sufficient to dispossess of her or estop her from asserting her title either to the brick face of the wall or to her part of the party wall.
- 1.5. I had the considerable benefit of viewing the site in company with the parties and their representatives on 18th January 2017 and the conclusions which I express in this decision are informed by the observations which I was able to make on that occasion.



2. The paper title

- 2.1. Although I heard a considerable amount of evidence and argument on this point, I feel able, ultimately, to express my conclusions in relation to it fairly simply. I am persuaded, essentially for the reasons given by Ms Ross, that the most convincing explanation for the construction of the expensive, high quality, brick facing to the Respondent's side of the wall is that it was done by the relatively new owner of the Close, Mr Smith, at or about the time of his purchase for the purpose of enhancing the garden of the Close.
- 2.2. It seems to me to be highly likely that there were walls of considerable antiquity constructed of the local Cotswold building stone between the gardens of the properties which faced onto Tetbury Street and backed onto what by 1869 was the garden of the Close. Those properties included in particular what is now the Applicants' property, 6 Tetbury Street, and the adjoining property to the west, numbered 140 on the 1830 Tithe Map. The cottage which stood on plot number 140 was demolished at some point between 1830 and 1869 and the land on which it had stood subsequently became the rear access to the Close as appears from the abstract of title at p. 74 of the bundle. I can see no reason why the owner of 6 Tetbury Street would have constructed what would have been an expensive brick facing to the side of the wall which faced his neighbour's property. Similarly, I think it unlikely that the owner of the derelict cottage would have incurred such expenditure. It is much more likely in my view that Mr Smith, who, it would appear from the photographs I have seen, was a wealthy man intent on improving the Close would have done so.
- 2.3. This conclusion is consistent with the photograph taken from the Church tower in which flower beds below the Wall can be seen, at p. 90, with the construction of the wall which surrounds the main garden of the Close and the way in which the brick facing of the Wall ties into that wall at point G.
- 2.4. I agree entirely that it is a notable feature of the evidence that the owners of 6 Tetbury Street should at points between 1885 and 1902 have seen fit to build not one but two extensions onto the wall: one of high quality stone construction; the other of lower quality brick construction.
- 2.5. Still more surprising in some ways is the fact that the second of those extensions should have incorporated in part the more northerly of the elegant stone gateposts which were presumably erected at or about the time the brick facing was added to the wall as an adornment to the Drive. I think these peculiarities can be explained by the fact that it is known that Mr Smith let the Close during the period when there works were apparently done and that his tenant was not so solicitous as Mr Smith would have been to know and preserve the limits of his property, particularly to the rear entrance.
- 2.6. I also accept Mr Worthen's submission that Ms Ross's evidence was to a large degree a matter of inference and supposition. In my view, however, her report was well informed and researched and her inferences and suppositions based on her expert knowledge and judgment offer the best explanation of the available material.



- 2.7. It follows, I think, that the brick face of the wall was built by Mr Smith on land within the title to the Close. Whether the stone wall was a party wall is a more difficult question as to which there is very limited evidence but on balance that seems the most likely conclusion.
- 2.8. The question, therefore, is whether either the Applicants or their predecessors in title have acquired title to the part of the wall within the Respondent's title either by adverse possession or by way of proprietary estoppel.

3. The Tribunal's jurisdiction

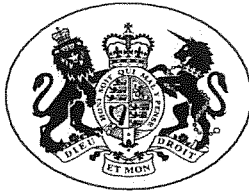
- 3.1. Mr Worthen addressed the question of the Tribunal's jurisdiction to determine the application in the event that his clients were unable to demonstrate a paper title in his skeleton argument. In the event, Miss Champney took no issue with the Tribunal's jurisdiction to determine the matters which remain in dispute but since she cannot confer jurisdiction on the Tribunal by agreement it is necessary for me to say that I am satisfied the Tribunal does have jurisdiction to determine the position of that portion of the boundary which remains in dispute.
- 3.2. There appear to be two possible areas of doubt. First, if, as I have found, the Applicants are bound to rely upon a title by adverse possession or proprietary estoppel must their title on those grounds be determined separately before an application to determine the boundary can be made or can those claims be determined in the course of such an application? Mr Worthen relied upon the decisions of this Tribunal in *May v Starr* [2015] UKFTT 0307 and *Mussett v Shuttlewood* Ref 2005/1745 for the proposition that the Tribunal had jurisdiction to determine claims to adverse possession of land within an application for a determined boundary. Certainly in cases not within the regime prescribed by Schedule 6 of Land Registration Act 2002, which requires a special notice procedure to be adopted, this makes obvious sense because adverse possession of land for the requisite period has the effect of altering the position of the boundaries between parcels of land and it is position of the extant boundary which must be the subject of the application not some previous boundary. Secondly, it would largely frustrate the policy of the law (which is preserved by LRA 2002) to ratify long-standing but erroneously positioned boundaries between adjoining properties if an application to determine the boundary were to be frustrated by some trifling deficiency in the positioning of a long-standing boundary marker. I therefore conclude that if an application to determine a boundary is made the issue for the Tribunal, so far as the position of the boundary is concerned, is: where is the boundary between the parcels of land of which the respective parties are entitled to be in possession? Not, where is the boundary between the parties' respective paper titles? Thus, it is likely to be necessary to determine claims by one or other or even both parties to have been in adverse possession of land in the course of an application to determine a boundary.
- 3.3. The second possible area of doubt is, if the position of some part of the boundary in respect of which the application is made is not in the position depicted on the application plan, must the application fail completely or is it open to the Tribunal



to allow the application in part ? There is no question here that the Plan is accurate to the tolerances prescribed by the Land Registry (insofar as those may be relevant) the only question is whether, in respect of that part of the boundary which remains in dispute, it correctly depicts the boundary line. It is admitted, of course, that in significant part at least it is correct and it is the effect of the decision of Judge Cooke in *Bean v Katz* [2016] UKUT 168 @ para 26 that an application may be allowed in part and, what is more, that by way of a condition as to the partial determination in favour of the application, the Tribunal's decision as to the balance of the boundary may be given effect to.

4. Adverse possession

- 4.1. I shall consider first the claim based on adverse possession.
- 4.2. Although the notion of adverse possession of a part of a wall may have certain specific peculiarities, depending upon the factual context, I do not consider that any special principles apply. The test to be applied in relation to a claim of title to a wall by way of adverse possession was considered by the Court of Appeal in *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85, a decision which pre-dated the well-known and now leading decision of the House of Lords in *J.A. Pye (Oxford) Limited v Graham* [2003] 1 AC 419. In *Prudential* Peter Gibson LJ specifically approved the decision of Slade J in *Powell v MacFarlane* (1977) 38 P & CR 452, which formed the basis for the reasoning of the House of Lords in *Pye*, and analysed the test to be applied in terms consistent in their entirety with the decision in *Pye*. That decision has since been referred to with approval by Tuckey LJ in *Palfrey v Wilson* [2007] EWCA Civ 94, another case relating specifically to adverse possession of a wall. According to those decisions the test to be applied in such cases is:
 - 4.2.1. Has the applicant had possession of the material part of the wall for the requisite period ?
 - 4.2.2. Has that possession been exclusive ?
 - 4.2.3. Has the owner of the paper title either been dispossessed or discontinued possession ?
 - 4.2.4. Did the applicant have the necessary intention to possess that part of the wall in question.
 - 4.2.5. Was the possession must have been adverse possession in the statutory sense, that is to say, possession (properly so-called) by someone other than the owner of the paper title.
- 4.3. In this case, as in *Prudential*, the question is really whether the Applicants or their predecessors in title manifested to the world their *de facto* control of the disputed part of the wall and their belief that they owned it in circumstances where for long



periods the need to consider or examine the question of the ownership did not arise. In this respect it seems to me that Peter Gibson LJ's citation with approval of Park J's decision on the question of *animus possidendi* is of assistance:

“On condition 4 the judge directed himself by reference to two passages from the judgment of Slade J in *Powell v McFarlane*. At p471 Slade J said:

“... the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”

Slade J at p472 continued:

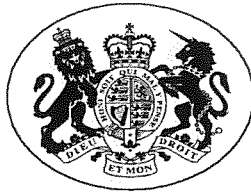
“... the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the true owner.”

The judge then commented:

“The Normandie did not, of course, make some ostentatious pronouncement to the world at large that it intended to exclude everybody, including the owner of Caltex House, from the wall from A to C, but I do not believe that it needed to, and I do not believe that Slade J meant to indicate that it did. I think the learned judge had in mind the conscious trespasser — the dispossessing trespasser who knows what he is doing — not someone like the Normandie who does not realise that he is trespassing at all, especially when scarcely anyone else realises it either. *In any case, it must be right that an intention to exclude everyone else from possession can be taken to have existed when the common-sense assumption that anyone would make is that, if someone else had tried to interfere with the claimant's possession, the claimant would have done something about it. In this case, if other persons, whether or not the owners of Caltex House, had started to interfere with the Normandie's possession of the south face of the wall from A to C (for example by affixing posters to it, or by purporting to license others to affix posters) I do not need specific evidence to enable me to assume that the Normandie would have tried to stop them. In my judgment, that is enough to satisfy me that the Normandie had the necessary intention to possess the crucial stretch of the wall.*” (My emphasis)



- 4.4. In this case the further question arises: to what extent is it appropriate to infer from unequivocal acts of possession in relation to parts of the wall an intention to possess the whole wall ? In this regard Mr Worthen referred me to the decision of Lindsay J in *Roberts v Swangrove* [2007] EWHC 513 which is authority for the proposition that possession of part of an enclosure is evidence but not conclusive evidence of possession of the whole of that enclosure. The question therefore resolves itself back to that which I set out above: would an informed objective observer have concluded from the acts of the Applicants' and their predecessors in title in relation to the whole of the wall between points A and D that they were also in possession of the wall between points D to G and would intervene to assert their ownership if another sought to trespass upon it ?
- 4.5. In view of that analysis I will consider first the acts of possession relied upon by the Applicants in relation to points A to D. It is difficult to imagine much more comprehensive acts of possession of the whole of the wall between points A to D than those which were done by the Applicants' predecessors in title first at the turn of the 19th and 20th centuries and then again in the 1980's. They incorporated the whole of the wall and the gatepost into their various extensions to the building which had stood for many years on the parcel of land known as 6 Tetbury Street.
- 4.6. I heard evidence from Mrs Chalk who had lived at 6 Tetbury Street in the 1980's and who, together with her husband had been responsible for the construction of the extension to the kitchen. Mrs Chalk's evidence was very clear. She said that the owner of the Close at that time, a Mr Christopher Blackstone, was very jealous of his property rights. Mr and Mrs Chalk applied to the local planning authority for permission to build the extension which they received. They then sought Mr Blackstone's permission to obstruct the Drive for a period whilst the extension was being constructed and that permission was given by Mr Blackstone. However, they did not seek Mr Blackstone's permission to use the wall as part of the extension and he did not give it. There can accordingly be no foundation, I think, for Miss Champney's suggestion that Mr Blackstone may have thought he was being consulted about that use of the wall.
- 4.7. I am satisfied that Mrs Chalk's evidence on these points was reliable. I am also satisfied that Mr Blackstone also sought permission from the Chalk's to erect gateposts against the wall.
- 4.8. This evidence is effectively conclusive of the position as regards points A to D, hence Miss Champney's sensible concession of the Applicants' claim in relation to this part of the boundary. I consider that it also points strongly to the conclusion that the informed objective observer would have concluded as a consequence that the boundary followed the line of the brick face of the wall throughout its length and that that is what the parties believed.
- 4.9. Turning then to the acts relied upon by the Applicants in relation to the garden wall these may be summarised as follows:
- 4.9.1. The oral agreement reached in 1968/9 between the owner of The Close, Dr. Graham Knight-Webb, and the owner of 6 Tetbury Street, Miss



Hilda Pegg, for the demolition of a section of the garden wall in order to gain more space for the Doctor to manoeuvre his car in return for the right for Miss Pegg to pass over the Drive to the parking space to the rear of her property thus created.

- 4.9.2. The construction of the kitchen extension.
 - 4.9.3. Works of modification, maintenance and repair carried out to the wall by the Applicants since their ownership of 6 Tetbury Street.
 - 4.9.4. The Respondent's request in connection with the settlement of a dispute with the Applicants concerning their right of way over the Drive that they undertake not to demolish the wall.
-
- 4.10. With the exception of the construction of the kitchen extension, which I have considered above and which when it occurred concerned a section of the garden wall, I do not consider that any of the matters relied upon by the Applicants in respect of the garden wall are in any way conclusive of the matter in their favour. At first blush the agreement with Dr Knight-Webb in 1968/9 to demolish a part of the wall seems the most significant but that significance is substantially diminished by the recognition that, in order to achieve the Doctor's stated object, it was necessary to demolish the whole of the wall at the point in question. Miss Pegg's permission would undoubtedly have been required for that purpose as it would for the Doctor to drive his car over her land. I therefore conclude that no useful inference as to the ownership of the whole of the wall can be drawn from this agreement and I would, in any event, be reluctant to read too much into what was evidently an informal arrangement for the mutual convenience of the parties.
 - 4.11. The same considerations apply to the Respondent's request that the Applicants give an undertaking not to demolish the wall adjacent to the Respondent's garden wall, an undertaking which I note the Applicants gave in consideration of the terms of the settlement as to the right of way.
 - 4.12. As for the works of repair and so forth, these appear to be of relatively recent date and there was limited evidence as to their extent. They are consistent with the Applicants' belief that they owned the wall but I do not consider that, in themselves, they offer any concrete evidence of it.
 - 4.13. Nevertheless, looking at all the matters relied upon by the Applicants in the holistic fashion advocated by Tuckey LJ in *Palfrey v Wilson*, together with the clear fact that until recently there seems to have been a rather vague but general assumption common to the owners of the two properties over several generations that the whole of the wall belonged to 6 Tetbury Street, it does seem to me that it is correct to hold that the Applicants and their predecessors in title over the last 100 years or so have been in possession of the whole of the wall and not just those parts of it onto which they have extended their property.
 - 4.14. This conclusion renders it unnecessary for me to consider the Applicants' alternative case based on proprietary estoppel but, given that it is based



essentially on the same facts, it does not seem to me that it adds anything of substance to the Applicants' claims.

5. Conclusion

5.1. My conclusions are therefore as follows:

5.1.1. That the parties properties were originally divided by a stone wall which was constructed on the line of junction between their properties and was a party wall.

5.1.2. The brick facing was added by W H Smith at or about the time of his purchase in 1869 on land within his title for the purpose of enhancing the garden of the Close and facilitating the cultivation of fruit trees. As such it belonged entirely to the Close.

5.1.3. Since the turn of the 19th/20th centuries, following the construction by the then proprietors of 6 Tetbury Street of substantial extensions to their property onto the wall and their similar act in connection with the kitchen extension in the 1980's, the owners of 6 Tetbury Street have exhibited to the world their factual possession of the wall and a manifest intention to possess it. They have at all material times acted in relation to it as if they were the proprietors of the paper title to it and as such they have established, by reason of their adverse possession, title to the whole of the wall and consequently that the boundary between their property and the Respondent's is as shown on the Plan.

5.2. I shall therefore make an order requiring the Chief Land Registrar to give effect to the Applicants' application to determine the boundary between their property and the Respondent's as if the Respondent's objection had not been made.

5.3. So far as costs are concerned, it would seem, on the basis that the Applicants have succeeded in establishing that the boundary is indeed in the position for which they contend, that the Respondent should pay their costs of this reference. However, I shall invite submissions on that question before deciding it and extend time for seeking permission to appeal accordingly.

ORDER

UPON hearing counsel for the Applicants and the Respondent in person

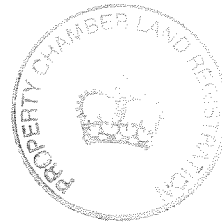
IT IS ORDERED THAT:



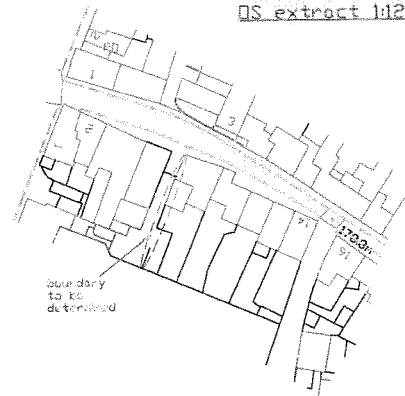
1. The Chief Land Registrar give effect to the Applicants' application dated 22nd June 2015 as if the Respondent's objection had not been made.
2. The Respondent shall file and serve any submissions which she wishes to make in respect of the order which the Tribunal should make concerning the costs of this reference by 5 pm on 11 May 2017.
3. The Applicants shall file and serve such submissions as they may be advised in answer to any submissions made by the Respondent in respect of the costs of this reference by 5 pm on 1 June 2017.
4. The parties' time for applying for permission to appeal against this decision is extended to 28 days after the date of the Tribunal's decision concerning their liability to pay (as opposed to the amount of) the costs of this reference.

Dated this Thursday 13 April 2017

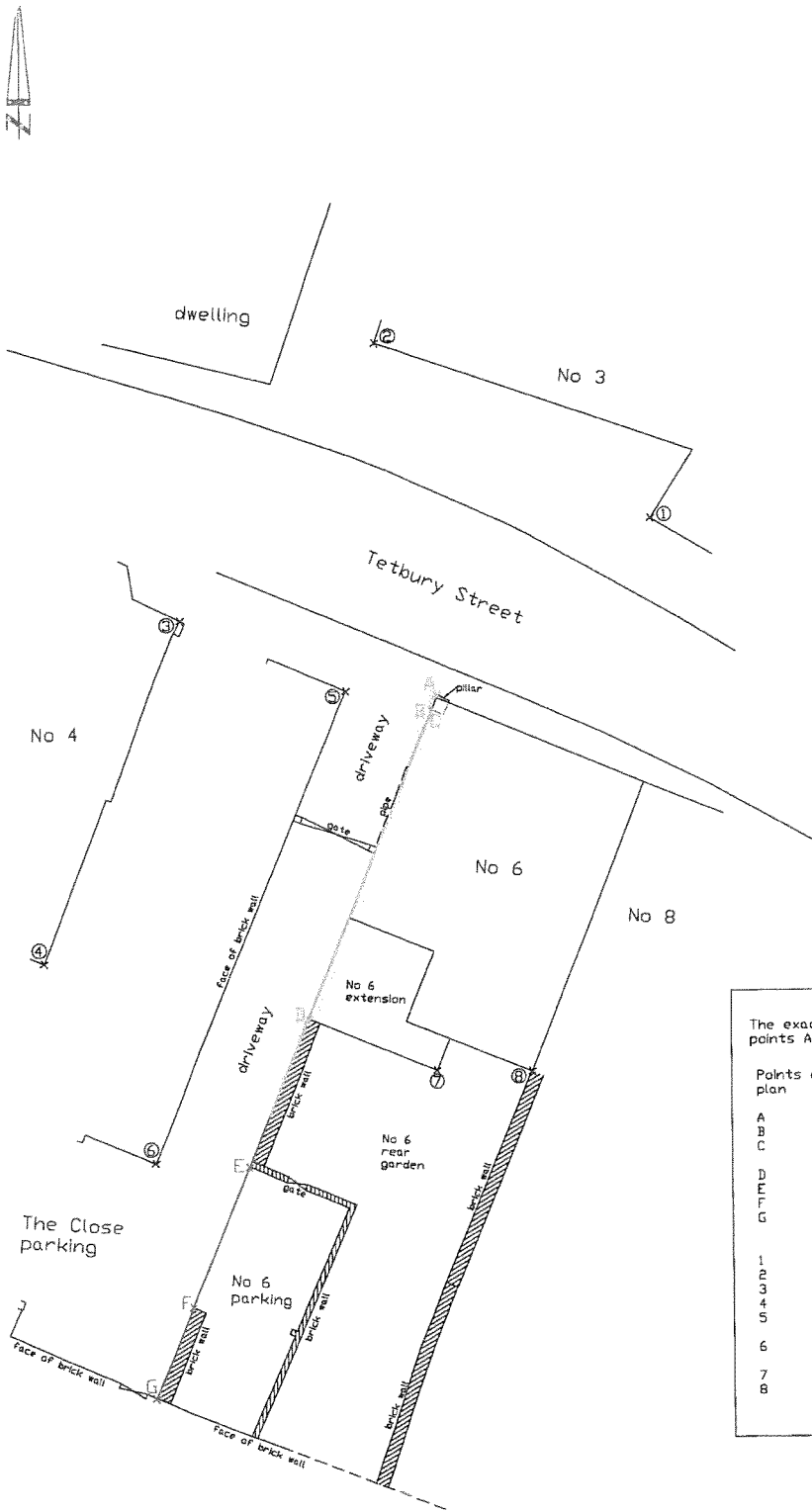
Max Thorowgood



BY ORDER OF THE TRIBUNAL



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Points on plan Measurements in metres

1 - A	11.36
2 - A	14.62
5 - A	3.76
2 - B	15.14
3 - B	10.93
5 - B	3.57
C - D	13.62
2 - C	15.18
3 - C	11.02
5 - C	3.65
4 - D	11.11
6 - D	8.60
7 - D	5.70
D - E	6.47
6 - E	3.86
7 - E	8.63
8 - E	12.24
D - F	12.65
6 - F	6.06
7 - F	13.87
8 - F	16.89
D - G	16.66
6 - G	9.57
7 - G	17.61
8 - G	20.36

The exact line of the boundary to be determined is between the points A-B-C-D-E-F-G. Description of points is below.

Points on plan Description

- A north-western corner of pillar
 - B south-western corner of pillar
 - C point where the southern face of the pillar meets the western face of the building at 6 Tetbury Street
 - D south-western corner of building at 6 Tetbury Street
 - E south-western corner of brick wall
 - F north-western corner of brick wall
 - G south-western corner of brick wall
-
- 1 southern corner of building at 3 Tetbury Street
 - 2 south-western corner of building at 3 Tetbury Street
 - 3 north-eastern corner of building at 4 Tetbury Street
 - 4 south-eastern corner of building at 4 Tetbury Street
 - 5 north-eastern corner of brick wall alongside the western extent of the driveway
 - 6 south-eastern corner of brick wall alongside the western extent of the driveway
 - 7 south-eastern corner of extension at 6 Tetbury Street
 - 8 south-eastern corner of building at 6 Tetbury Street

I certify that the measurements shown on this plan have a relative accuracy of +/- 10mm.

[Signature]

Stolle Surveys Limited

Chartered Land Surveyor

164 Oliver's Battery Road South
Winchester, Hampshire, SO22 4LF

Tel : 07554660503
www.boundaryconsultancy.co.uk

6 Tetbury Street
Minchinhampton, Stroud

Project Ref	CAD Ref
JS-2014-7	JS2014-7 16June2015 - DB Plan
Date	Scale
16 December 2014	
Rev	1:200 @ A3
16 June 2015	

