



Neutral Citation Number: [2018] EWHC 2743 (Ch)

Case No: CH-2017-000117

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**CHANCERY APPEALS (CHANCERY DIVISION)**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 24 October 2018

Before :

**MR JUSTICE ARNOLD**

Between :

**CLARE ALEXANDRA POLLOCK**

**Claimant/  
Appellant**

- and -

**(1) ROBERT CHARLES OLDFIELD**  
**(2) JENNIFER OLDFIELD**

**Defendants/  
Respondents**

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**Nathaniel Duckworth** (instructed by **Macfarlanes**) for the **Claimant/Appellant**  
**Stephen Jones** (instructed by **Watkins Ryder**) for the **Defendants/Respondents**

Hearing dates: 16 October 2018  
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**Approved Judgment**

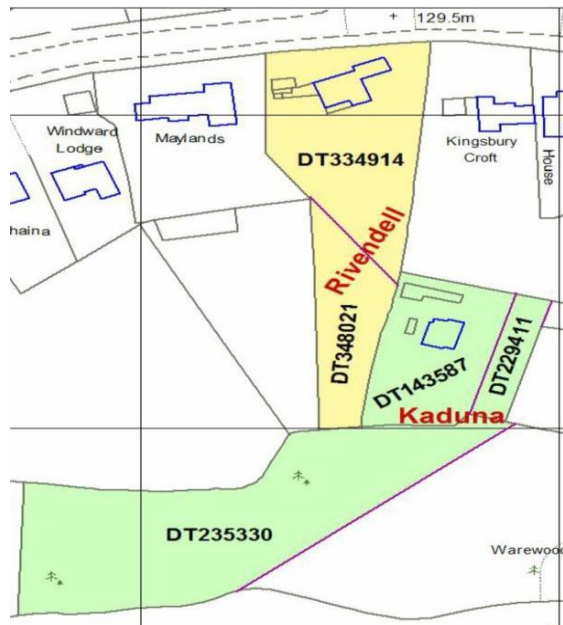
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ARNOLD

**MR JUSTICE ARNOLD :**

Introduction

1. This is a boundary dispute concerning two properties in Lyme Regis called “Kaduna”, which is owned by the Claimant (“Ms Pollock”), and “Rivendell”, which is owned by the Defendants (“the Oldfields”). The location of the properties is shown in the plan reproduced below.



2. Ms Pollock exchanged contracts to buy Kaduna on 7 March 2014 and completed on 22 April 2014. When she took possession of the property, she found that a 6 metre or so high line of hedging plants (including blackthorn and hazel) and trees along Kaduna’s western boundary had been cut back to the level of the earth bank on which it grew. Ms Pollock was unhappy about this, and brought a claim against the Oldfields for damages and an injunction on the basis that the bank and hedge were part of Kaduna. The Oldfields accepted that the work on the hedge had been carried out by Mr Oldfield and another neighbour. The Defendants denied any wrongdoing on the grounds that (i) the bank and hedge were part of Rivendell and (ii) in any event the work had been done before Ms Pollock acquired any interest in Kaduna.
3. There were three issues at trial. First, where was the boundary between Kaduna and Rivendell? The boundary area consists of (i) the bank and hedge which runs between the two properties for a distance of about 30 metres from the northern end and (ii) a lonicera hedge without a bank which occupies the final 12.5 metres or so of the boundary at the southern end. Ms Pollock contended that the boundary was to the west of the bank. The Oldfields contended that the boundary was to the east of the bank. Secondly, when had the hedge been cut back? Ms Pollock contended that it was in mid-April 2014, the Oldfields that it was in late February 2014. Thirdly, if the cutting back of the hedge was wrongful, what was the appropriate relief? Ms Pollock claimed damages of about £100,000 and an injunction. The Oldfields contended that she had suffered no loss and no injunction was required.

4. So far as the boundary issue was concerned, it was common ground at trial that:
  - i) this issue depended on the proper interpretation of a conveyance dated 16 November 1928 (referred to at trial as “the Operative Conveyance”) by which a field which is now part of Rivendell (Field 170) was transferred out of common ownership with a field upon part of which Kaduna now stands (Field 174) following an auction on 26 September 1928;
  - ii) the Operative Conveyance was to be interpreted by reference to what a reasonable person with the document in his hand and all the admissible information available, which would include the topographical features of the land at the date of document, would understand it to mean;
  - iii) the relevant boundary was marked by a line on a plan attached to the Operative Conveyance on which there is a “T-mark” indicating that the boundary feature was owned by the purchaser of Field 170;
  - iv) the bank had been there for a very long time, and hence had been present at the time of the Operative Conveyance; and
  - v) the bank had at all material times stopped short of the southern boundary leaving a gap.
5. Ms Pollock’s case was that the line on the plan in the Operative Conveyance represented a stock-proof fence running along the western side of the bank. The Oldfields’ case was that the line on the plan represented the centre line of the bank extrapolated to the southern boundary and that, by virtue of the T-mark, the legal boundary lay along the eastern edge of the bank. Thus a key factual issue was whether, at the time of the Operative Conveyance, a stock-proof fence had been in existence to the west of the bank. A related question was what, if anything, had occupied the gap between the bank and the southern boundary. Ms Pollock’s case was that the stock-proof fence had extended to the southern boundary. The Oldfields’ case was that the gap had been filled by a hedge.
6. The action was tried by HHJ Parfitt sitting in the County Court at Central London between 12 December 2016 and 26 January 2017. He had the benefit of a site visit. In addition to the site visit, the trial took six days, during which the judge heard evidence from eight witnesses of fact and four experts. On 6 April 2017 the judge handed down a careful and detailed reserved judgment running to 105 paragraphs. He concluded that there was no stock-proof fence to the west of the bank at the time of the Operative Conveyance, and that the proper interpretation of the Operative Conveyance was that the line on the plan denoted the bank. Accordingly, he found in favour of the Oldfields on the boundary issue and dismissed the claim. On the second issue, he found that the works were done in April 2014 and thus the works would have constituted an actionable wrong if the hedge had formed part of Kaduna. On the third issue, he assessed damages at £22,500, but held that an injunction was unnecessary.
7. Ms Pollock now appeals against the judge’s conclusion on the boundary issue with permission granted by Snowden J on three out of six proposed grounds of appeal.

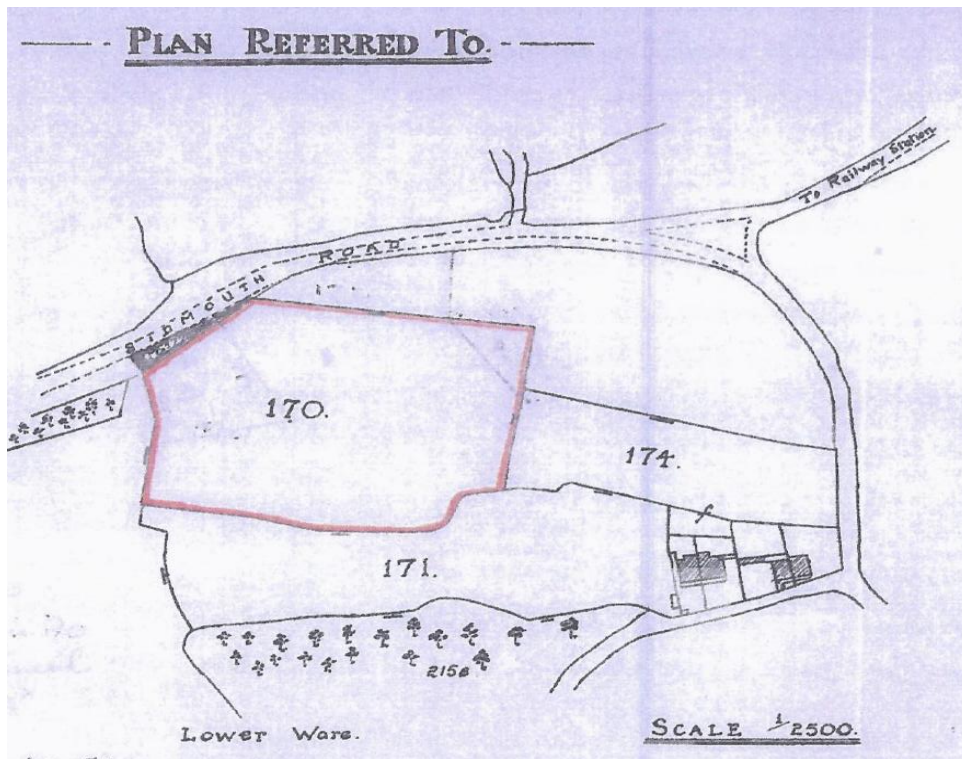
There is no challenge by the Oldfields to the judge's conclusions on the second and third issues if Ms Pollock succeeds on the boundary issue.

### The Operative Conveyance

8. By the Operative Conveyance, the land which now comprises the southern garden of Rivendell was conveyed by a Mr Woodroffe to a Mr Worth as part of Field 170. The parcels clause of the 1928 Conveyance conveyed:

“ALL THAT piece or parcel of land situate on the Sidmouth Road in the Parish of Lyme Regis in the County of Dorset containing an area of Three acres two roods and thirty four perches or thereabouts and more particularly delineated and described on the plan drawn on these presents, Numbered 170 and surrounded with the colour pink...”.

9. The plan is reproduced below.

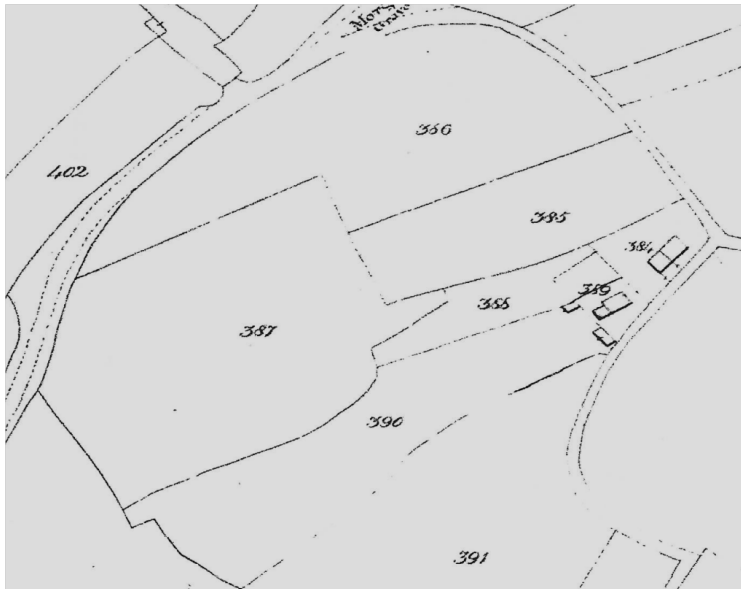


10. The plan shows a number of T-marks on the boundaries of Field 170, including a T-mark on the boundary between Field 170 and Field 174 facing inwards towards Field 170 showing that that boundary was the responsibility of the owner of Field 170.
11. Field 171, which contains a woodland plot now forming part of Kaduna, was separately conveyed by Mr Woodroffe to Mr Worth on the same day. The main plot at

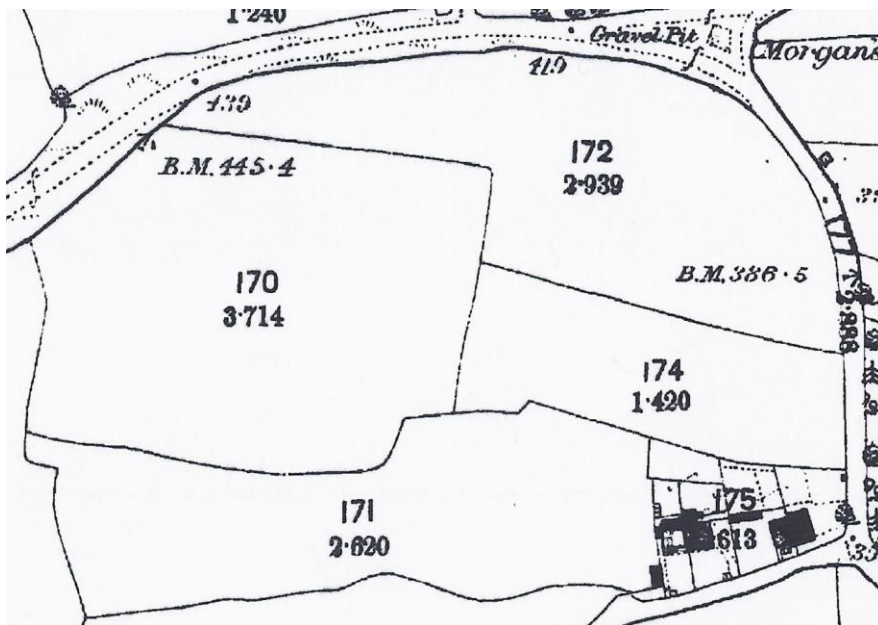
Kaduna, which formed part of Field 174, was conveyed to a Mr Lane four days later on 20 November 1928.

The documentary evidence

12. The principal items of documentary evidence which are relevant to the issue as to whether there was a stock-proof fence to the west of the bank are as follows.
13. *The 1841 Tithe map.* The 1841 Tithe map, which is reproduced below, shows a “tongue” of land extending from what became Field 170 (then known as 387) into Field 174 (then known as 385). Thus, whilst the bank was probably in place in 1841, no boundary feature is shown in the gap to the south. The tithe apportionments record that Field 170 and Field 174 were both arable fields.

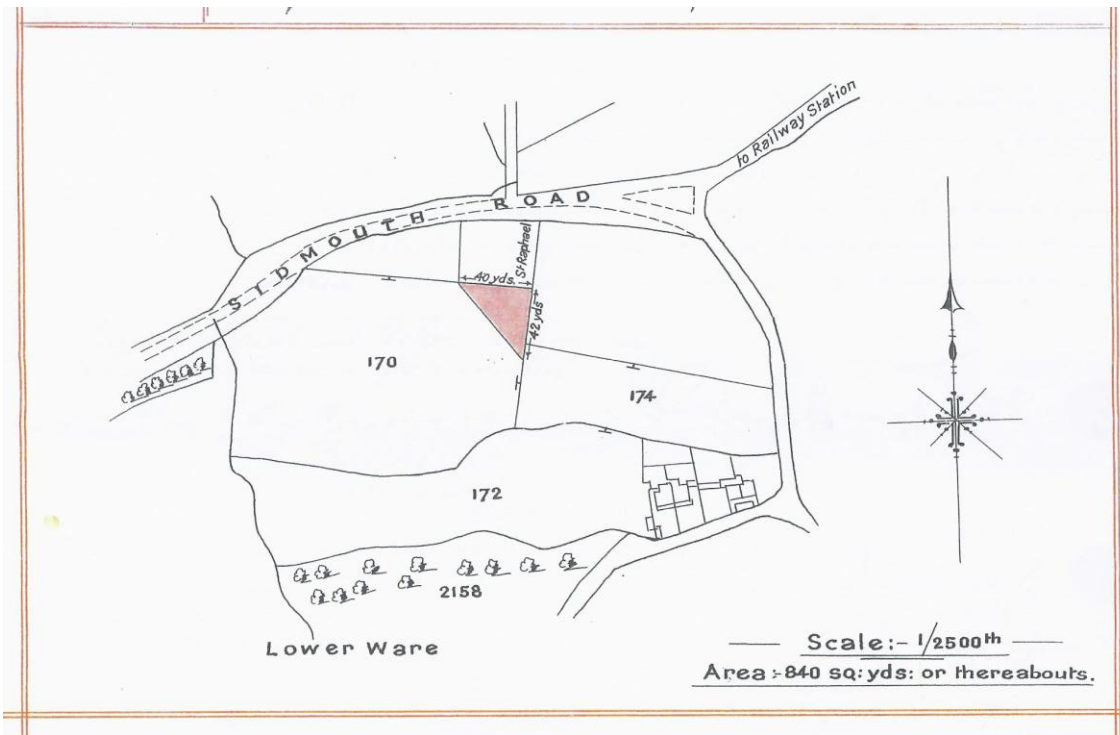


14. *The 1890 OS map.* By the time of the 1890 Ordnance Survey (“OS”) map, which is reproduced below, a re-organisation of the fields had taken place: the “tongue” of Field 170 had been absorbed into Field 174 and the map shows a boundary feature which extends all the way to the southern boundary.



15. Counsel for Ms Pollock submitted that Field 170 had become a pasture field by this date. I was not shown any evidence which establishes this; but the point does not matter because it is clear (for the reason explained in paragraph 18 below) that it was a pasture field by 1928.
16. Subsequent OS maps in 1903 and 1929 (which was probably based on a survey in 1928) show that Fields 170 and 174 retained the same basic configuration up until 1928.
17. *The 1890 and 1909 photographs.* Two photographs, taken in 1890 and 1909, of other fields nearby in Lyme Regis, show stock-proof fences in place. In the case of the 1909 photograph, it shows a fence in front of a hedge. The point of this evidence is simply to show that stock-proof fences were in use in the area in the relevant period.
18. *The auction particulars.* Fields 170, 171 and 174 comprised three of seven lots sold at auction on 26 September 1928. The auction particulars described Lot 4 (Field 170) as “a valuable pasture field”, Lot 3 (Field 171) as “pasture land and shed” and Lot 5 (Field 174) as “a very valuable arable field”. All three fields were sold subject to a tenancy in favour of a farmer, a Mr Hallett, but he had served notice to quit at 25 December 1928. Lot 2 was a farm which included “Cowstall with 17 tyings”, also let to Mr Hallett. Note 8 to the particulars stated:

“BOUNDARIES: Should any dispute arise with regard to the boundary or boundary fences of any Lot where it adjoins any other Lot, or the Vendor’s property, the same shall be submitted to the sole arbitration of the Auctioneers.”
19. *The 1936 Conveyance.* By a conveyance dated 3 March 1936 (“the 1936 Conveyance”) Mr Worth conveyed to a Mrs O’Donnell a triangle of Field 170 as shown by the plan reproduced below.



20. The 1936 Conveyance imposed a covenant on Mrs O'Donnell to "erect a sufficient stock proof fence on the south west boundary of the property hereby conveyed, and ... thereafter maintain the same". It can be seen from the plan that the south-west boundary forms the hypotenuse of the triangle.
21. *The 1935 and 1936 letters.* During the conveyancing process, Mr Worth's solicitors wrote to Mrs O'Donnell's solicitors on 17 December 1935 ("the 1935 letter") saying:

"We duly received your letter of 13<sup>th</sup> inst. and have spoken to our client thereon. He would like the matter to stand over for a time and to meet your client on the spot, as thinks there is some slight discrepancy in the measurements, probably due to the breadth of the hedge [bank], but he is sure that they can come to an agreement as to this."

The copy of the letter in evidence is in manuscript and the word in brackets is unclear, but it is probably "bank". Thus this letter provides some evidence of a hedge on the bank at that date.

22. Mr Worth's solicitors wrote to Mr Worth on 19 February 1936 ("the 1936 letter") asking about the answers to some requisitions on title they had received from Mrs O'Donnell's solicitors, one of which was:

"To whom does the easterly hedge belong – we assume this is yours, but would like you to confirm."

The "easterly hedge" is presumably a reference to a hedge on the bank. What Mr Worth said in response to this question is unknown.

23. *The 1940 photograph.* An aerial photograph was taken by the RAF on 18 August 1940, the relevant part of which is reproduced below.



24. The photograph shows the house that was constructed on Field 174 (i.e. Kaduna) during the course of the 1930s. Field 170 appears to remain a pasture field. The triangular plot sold to Mrs O'Donnell is clearly visible, as is the hedge on the bank. A physical feature is just about visible in the gap between the bank and the southern boundary next to what might be a driveway or area of hard standing.
25. *The 1946 photograph.* Two aerial photographs were taken by the RAF on 13 April 1946. Mr Maynard used these to form a stereo-pair capable of being viewed in three dimensions, which aids interpretation. While Mr Maynard's interpretation was based on the stereo-pair, it is sufficient for present purposes to refer to one of these photographs, the relevant part of which is reproduced below. It shows a physical feature extending between the hedge on the bank and the southern boundary. As Mr



Maynard pointed out, the feature in question appears to be aligned to the western edge of the hedge, and hence the bank.



26. Later photographs taken in 1951, 1957, 1962, 1995 and 2000 appear to show the hedge on the bank growing ever bigger.

#### Witness evidence

27. Field 170 remained a pasture field right up until 2006 when the Oldfields purchased part of it. Evidence was provided by a number of farmers who had used Field 170 over the last 20-30 years to keep sheep. They had all maintained a stock-proof fence both in front of the bank and across the gap to keep their sheep in the field.

#### The judge's reasoning

28. The judge's reasoning with respect to the boundary issue extends over 43 paragraphs of his judgment ([18]-[60]). He first considered the Operative Conveyance ([18]-[20]), then the non-topographical context (consisting primarily of the auction particulars) ([21]-[25]), then the topographical context ([26]-[54]) before turning to the interpretation of the Operative Conveyance ([55]-[60]). He divided his consideration of the topographical context into the following headings: the bank ([26]-[28]), the area south of the bank ([29]-[43]), the use of Field 174 in 1928 ([44]) and the presence of a parallel fence in 1928 ([45]-[54]).
29. The judge's reasoning on the question of whether there was a stock-proof fence along the line of the bank and filling the gap in 1928 can be summarised as follows.
30. First, the judge considered the OS maps and concluded as follows:

- “31. ... It is relevant that the OS maps from 1890 to 1929 all show a feature which ran along the full extent of the boundary. This could be the bank plus something else or it could be a fence. ...
33. ... I agree with Mr Rocks that ... the lines on the OS maps all represent the bank for that part of the field division where the bank was. For present purposes, that does not take matters very far since it is common ground that the bank was present in 1928.
34. What is more interesting is the continuation of the OS line south of the terminus of the bank. I conclude that (a) from at least 1890 onwards there was a physical feature that closed off the two fields south of the bank; (b) that it is possible that from that time onwards that feature was a fence that also continued up the line of the bank; (c) but it is as best equally possible – looking only at the OS maps – that the feature to the south of the bank only occupied the space to the south of the bank.”
31. Secondly, the judge accepted Ms Pollock’s contention that the feature in question was most likely to have been a fence and rejected the Oldfields’ contention that it was most likely to have been a hedge:
- “50.(a) *A fence as the likely way in which the gap was sealed.* In general, I agree with this, at least to the extent that if there was an immediate requirement to fill the gap then a fence would be the most likely way for that to be done. ...
- 51.(b) *The surveyable feature to the south of the terminus of the bank was most likely to have been a hedge.* I have indicated above that the OS maps show no break at the end of the bank and so something carried on the line of the bank (or perhaps within 1.5 metres of the centre line of the bank) to complete the separation between the two fields. I cannot find any evidence (or common-sense) that would lead me to conclude that it was more likely a hedge than a fence. If there was an agricultural need to close off the field split, then it is much more likely to have been a fence than a hedge that would have been used to meet a particular need at a particular time.”
32. Thirdly, the judge reasoned as follows:
- “53. The assertion that in 1928 there was a stock proof fence which ran the full length of the boundary on the Rivendell side is an issue of fact upon which the burden lies on the Claimant since it is the Claimant who asserts the existence of the fence at that time. I am not satisfied that it is more likely than not that such a fence existed in November 1928. Although I have taken everything raised by the parties into account, including in detail those matters addressed above, the core of my reasoning is as follows:

- (a) On analysis the Claimant has no persuasive evidence that a stock proof fence would have been required along the full line of the bank in 1928. I consider that a properly maintained bank with hedge on top could have provided a stock proof barrier (where the bank was) sufficient for the purposes of Mr Hallett's dairy farming. I consider that more persuasive and relevant expert evidence than that of Mr Maynard would have been necessary if the Claimant was to tip the balance in her favour on this issue.
  - (b) The OS maps' line point to the existence of the bank and a feature below the bank. This is consistent with stock proofing being performed by those features. Although I accept Mr Maynard's evidence that the OS could have mapped a fence along the line of the bank and continuing to the bottom of the field in the same way, this possibility does not prove itself absent other evidence. In particular, in circumstances where the bank was there throughout the period. Whether or not there was a fence at the time of any particular OS survey from 1890 onwards as well as the bank is speculation.
  - (c) The 1940 photograph, and to a lesser extent the 1935 enquiry letter to Mr Worth from his solicitor, provide some limited evidence which is inconsistent with a fence running alongside the bank. I don't give much weight to either of these elements but my impression of both is that they make it slightly more difficult for the Claimant to meet her burden of proof.
  - (d) The 1940 photograph analysed as I have done above provides potential support for part of the bank being stock proof in 1940. I consider that if a substantial part of it was stock proof in 1940 then the material whole is also likely to have been stock proof or capable of being maintained as stock proof – to the extent required for the farmer's purposes – in 1928. The more likely there was a materially stock proof bank then the less likely it is that there was a stock proof fence along the full length of the boundary.
54. I conclude that there was no stock-proof fence along the full line of the bank at the time of the Operative Conveyance.
- ...
56. I have made no finding as to what [the feature to the south of the bank] was although I think it was most likely to be a fence limited to closing that gap. ...”

33. Although it is not apparent from the judgment, the judge clarified during the hearing when the judgment was handed down that he thought that the fence in the gap would have been aligned with the centre line of the Bank or its eastern edge, rather than its western edge.
34. I will consider the judge's interpretation of the Operative Conveyance below.

The appeal court's approach where there is a challenge to a finding of fact

35. The crux of the appeal is Ms Pollock's challenge to the judge's finding of fact that there was no stock-proof fence to the west of the bank at the time of the Operative Conveyance. There was no direct evidence from any witness of fact on this question. Accordingly, the judge's decision was based in part on the undisputed matters set out in paragraph 4 above, in part on the evidence I have summarised in paragraphs 12-27 above and in part on inferences drawn from the foregoing.
36. Counsel for Ms Pollock submitted that, in those circumstances, the appeal court was in as good a position to resolve the disputed issue of fact as the trial judge. I do not accept this. The judge had the advantage of seeing and hearing two expert witnesses on this issue, namely Jon Maynard FRICS for Ms Pollock and Michael Rocks FRICS for the Oldfields. Both experts had expertise in (among other things) the interpretation of OS maps and aerial photographs. On the other hand, the advantage which the judge enjoyed as a result of seeing and hearing the experts was a somewhat limited one, because he held that key parts of their evidence were of no weight since the experts (and Mr Maynard in particular) had exceeded the bounds of their expertise. Moreover, the judge did not base his decision upon an assessment of the relative expertise, credibility or persuasiveness of the two experts. For completeness, I should add that I do not consider that the site visit gave the judge an advantage over the appeal court on this issue.
37. Counsel for the Oldfields submitted that the judge's conclusion amounted to a multi-factorial evaluation which should be approached in a similar way to an exercise of discretion. I do not accept this either. Although it depended on the assessment of a number of pieces of evidence, the judge's conclusion that there was no stock-proof fence was a finding of primary fact, not an evaluation of a legal standard such as negligence or obviousness.
38. Accordingly, the appeal court should be cautious about differing from the judge's conclusion, but it is not necessary to be as cautious as where a trial judge's finding of fact is based upon an assessment of the credibility of witnesses or where it amounts to an evaluation of a legal standard.

The appeal against the judge's finding of fact as to the existence of a stock-proof fence

39. Ms Pollock does not take issue with the first and second steps in the judge's reasoning, but contends that he fell into error at the third stage.

*Burden of proof*

40. Counsel for Ms Pollock submitted that, although the judge was correct to say that the burden of proving her factual case lay on Ms Pollock, he was wrong to regard that

burden as being determinative of the factual issue in this case for two reasons. First, because the judge had infringed the principle that a court was only entitled to resort to the burden of proof to resolve a disputed issue where, notwithstanding that it had striven to do so, it could not reasonably make a finding in relation to that issue: see *Stephens v Cannon* [20015] EWCA Civ 222, [2005] CP 31 at [46]. Secondly, because the judge had posed the wrong question: given the judge's conclusions at stages one and two, the question was not simply whether Ms Pollock had proved that there was a stock-proof fence, it was whether the boundary consisted, in addition to the bank, of either a long fence running along the line of the bank and filling the gap or a short fence just filling the gap. Given that the court was required to select between the two identified factual alternatives, the burden of proof could not supply the answer. Put another way, a short fence could not be said to be more probable than a long fence because of the burden of proof.

41. Although counsel for the Oldfields did not take the point, I realised after the hearing that these submissions were not open to counsel for Ms Pollock, because Snowden J refused permission to appeal on the ground that the judge erred in determining the factual dispute by reference to the burden of proof. Accordingly, the judge's conclusion cannot be disturbed on this basis.
42. On the other hand, Snowden J did grant permission on the ground that the judge was wrong to conclude on the balance of probabilities that the boundary in 1928 consisted of the bank plus a short fence in the gap and should have concluded that it consisted of the bank plus a long fence alongside the bank and filling the gap. This requires consideration of what evidence there was to support the former possibility and what evidence there was to support the latter possibility.

*Evidence for a short fence*

43. The judge only identified two pieces of evidence as positively supporting the proposition that the boundary consisted of the bank plus a short fence in the gap, namely the 1935 letter ([53(c)]) and the 1940 photograph ([53(c) and (d)]). Counsel for Ms Pollock acknowledged that the reference to the "1935" letter was probably a typographical error, and that the intended reference was to the 1936 letter. Counsel for Ms Pollock submitted that the judge misinterpreted these documents and that they did not provide any support for the proposition that the boundary consisted of the bank plus a short fence in the gap.
44. *The 1936 letter.* Counsel for Ms Pollock submitted that the judge was wrong to conclude that the 1936 letter provided any support for the existence of a short fence as opposed to a long fence. That letter merely relayed Mrs O'Donnell's solicitors' question as to whether the easterly hedge was owned by Mr Worth. Mrs O'Donnell's solicitors might have asked the question even if there had been a fence running alongside the bank at the time. I agree with this. Thus the 1936 letter is neutral.
45. *The 1940 photograph.* The judge's analysis of the 1940 photograph was as follows:
  - "36. The earliest photograph the parties have found which provides any relevant evidence is dated 18 August 1940. It is part of an RAF photographic survey, Mr Maynard was asked about this photograph in cross-examination and stated his opinion that

there was a hedge running south from the end of the bank. It was also his view that the hedge might have been self-seeding as a result of there being a fence in that location which provided an impediment to allow plants to grow. In re-examination, Mr Maynard said that the presumed hedge that can be seen in the 1940 photograph appeared quite young. I agree with that conclusion.

37. Mr Maynard considered that it was apparent that the feature was coming off the west side of the bank. He was questioned about this and I do not consider that his conclusion is supported by the photograph. I do not think it possible to be determinative as to where the feature lies relative to the sides of the bank because the sides and end of the bank are obscured by tree canopies, Mr Maynard accepted that because of this he could not be certain. The qualification to the opinion was appropriate and means that I do not give that opinion any weight. I am not in a position on the evidence to make any reliable assumptions about the agricultural management of the end of the bank and the end of the fence - plainly something would need to be done to ensure a gap was not left but beyond that I cannot safely go.
38. In summary the 1940 photograph shows a feature between the end of the bank and the end of the field division. There is no evidence of a fence along the field line separate from the bank and the presumed hedge but this does not mean that such a fence was not there since it was common ground between the experts that the nature of the photograph would not necessarily show fences. There are obvious fence / hedge lines dividing the residential land carved out since 1928 from the agricultural land (e.g. the triangle of Field 170 that had been acquired by the predecessor of Rivendell in 1936 and the domestic property built into the north-west corner of Field 170). The most that can be concluded is that if there was a post and barbed wire type fence (or equivalent) running close to the west side of the bank then the photo would not necessarily show it.
39. However, I consider the presence of the presumed hedge between the bank and the field end is inconsistent with the existence of another fence in 1940 which ran the whole length of the boundary and had done for many years. This is because of the combination of two factors: (a) I can see no practical purpose in plugging the gap (by a fence) if there was a fence that was already doing that job; and (b) if Mr Maynard was correct about the self-seeded hedge then the youth of that hedge indicates that the presence of the fence which caused it was also recent.
40. So I can infer from the 1940 photograph that it is more consistent with there not being an established fence along the

full length of the boundary. This inference would survive my being wrong to reject Mr Maynard's assertion about the line of the fence which is apparent coming from the west face of the bank because the inference depends on Mr Maynard's assertion about the relative youth of the hedge more than the position of the fence in the gap relative to the southern terminus of the bank.

41. This tentative conclusion about the 1940 photograph also allows me to conclude on the balance of probabilities that at least in 1940 the bank plus the hedging growing on it was capable of providing a stock proof barrier. I bear in mind that this was less of the bank than would have been required to perform the same function in 1928 because the north eastern part of Field 170 had become domestic in 1936.”
46. Counsel for Ms Pollock submitted that the judge had made a number of errors here.
47. First, he submitted that the judge had mischaracterised Mr Maynard's evidence since Mr Maynard had not opined that the hedge in the gap was self-seeded. In paragraph 3.24.1 of his report Mr Maynard said he had only seen a poor-quality photocopy of the 1940 photograph, but it did not appear to show anything different in the relevant area to the 1946 photograph. In paragraph 3.25.3(g) he interpreted the feature in the gap that can be seen in the 1946 photograph as a lonicera hedge that was aligned to the western side of the hedge on the bank. In paragraph 7.5.20 he said that lonicera was associated with residential rather than agricultural use. When he was cross-examined about the 1940 photograph, however, Mr Maynard volunteered that the hedge might have been self-seeded and grown up through a fence, although it could also have been deliberately planted on the eastern side of a fence. He was not prepared to say that the former was likely, but he said that it was possible. Accordingly, I consider that the judge's summary of Mr Maynard's evidence at [36] was accurate so far as it went, but it omitted Mr Maynard's point that the hedge could also have been deliberately planted on the eastern side of a fence.
48. Secondly, counsel submitted that the judge's conclusion that the hedge and any fence within it were aligned, not with the western edge of the bank, but its centre line or eastern edge was self-contradictory and wrong. The judge concluded at [37] that the 1940 photograph did not support Mr Maynard's opinion that the hedge was aligned with the western edge of the bank. But in that case it is difficult to see on what basis the judge concluded, as he said he did during the handing down hearing, that the fence was aligned with the centre line or eastern edge. I would add that, as I have pointed out above, in his report Mr Maynard's opinion as to the alignment of the hedge was in fact based on the 1946 photograph, which is clearer than the 1940 photograph in this respect and in my view does provide support for Mr Maynard's opinion. The judge does not refer to the 1946 photograph in his judgment. As the judge correctly noted at [40], however, this error does not affect his conclusion with regard to the nature of the fence.
49. Thirdly, counsel pointed out that the judge had correctly recorded at [38] that it was common ground between the experts that, although the 1940 photograph did not show a fence separate from the bank, that did not mean that such a fence was not there since

the photograph would not necessarily show a fence. Counsel submitted that that ought to have been the end of the point so far as the 1940 photograph was concerned.

50. This submission requires consideration of the reasons which the judge gave at [39] for concluding otherwise. His first reason was that there would be no practical purpose in filling the gap with a short fence if there was already a long fence there. In my view this reason is flawed because it was not Ms Pollock's case that there was both a long fence and a short fence. Her case was that there was just a long fence in 1928 and that a lonicera hedge had been planted alongside it in the gap subsequently after the construction of Kaduna. Moreover, Mr Maynard's evidence was supportive of that case although he acknowledged the possibility that the hedge had self-seeded and grown through a fence in the gap.
51. The judge's second reason depends upon the supposition that the hedge was self-seeded and had grown through a fence in the gap. As I have already noted, however, Mr Maynard merely acknowledged that this was a possibility.
52. In my judgment, therefore, the 1940 photograph is neutral with regard to the question of whether there was a long fence or a short fence (as is the 1946 photograph).
53. *The bank and hedge as a stock-proof barrier.* It can be seen from his judgment at [53(a) and (d)] that an important part of the judge's reasoning was his finding that "a properly maintained bank with hedge on top could have provided a stock proof barrier ... sufficient for the purposes of Mr Hallett's dairy farming". The judge considered that this made it less likely that there was a stock-proof fence along the full length of the boundary.
54. Counsel for Ms Pollock pointed out that, at [47(a) and (b)] and at [53(a)], the judge had considered whether what he variously referred to as a "suitably managed hedge", "maintained hedge" and "properly maintained bank with hedge" would have been stock proof. It was neither party's case that there was a suitably managed or maintained hedge on top of the bank, however, nor did either expert suggest this. In any event, the judge did not make any finding that there was a suitably managed or maintained hedge on top of the bank, and at the handing down hearing he expressly disavowed having done so.
55. Counsel for Ms Pollock submitted that, applying the judge's own logic, the bank by itself was not a stock-proof barrier in 1928. Far from being a point which militated against Ms Pollock's case, this was a point which supported her case that something else was required to make the bank stock proof. I agree with this analysis.

*Evidence for a long fence*

56. Counsel for Ms Pollock identified six pieces of evidence as supporting the proposition that the boundary consisted of a full-length fence in addition to the bank. I will consider them in turn.
57. *The size and shape of the bank.* The judge found at [27] that the height of the bank was about 65-85 cm from the Rivendell side and about 140-155 cm from the Kaduna side and that the slope facing Rivendell was vertical and the slope facing Kaduna was steep and concave. Moreover, the plans drawn up by the experts show that it tapers



down to nothing at the southern end. Accordingly, counsel submitted that the judge was right to conclude, as discussed in paragraphs 54-55 above, that the bank itself could not have been stock proof. Something more was required, and the obvious candidate was a fence. Moreover, a fence would fill the gap at the southern end, making that stock proof as well.

58. *The 1936 Conveyance.* Counsel submitted that the likely explanation for the covenant extracted from Mrs O'Donnell was that there were already stock-proof fences running along the northern and eastern boundaries of Field 170 and that Mrs O'Donnell was required to connect the new fence to the existing fences at either end. If there was no existing fence, Mrs O'Donnell would at least have had to secure the new fence to the flank of the bank, and if the legal boundary was on the eastern side of the bank, to run the new fence over the bank to that side. That was highly improbable. The judge did not address this point in the judgment. I agree that it supports Ms Pollock's case.
59. *Keeping animals off the bank.* Counsel for Ms Pollock relied upon the evidence of Mr Rocks in a joint statement by the experts that stock-proof fences "are normally erected where a boundary feature in place is not sufficient or to prevent stock grazing on poisonous shrubs on a boundary". Counsel told me that Mr Maynard agreed with this, although he did not show me any passage in his evidence on the point. The judge held (at [50(f)]) that this was a matter which was outside the expertise of the experts. I am unclear as to why, however. Both experts were experts on boundaries, and both had worked for OS. I would have thought that the general reasons why fences were erected was a matter within their expertise.
60. The judge also said that Mr Rocks had been talking generally, and not saying that any particular boundary would be a danger to livestock. As I understand it, the point the judge was making was that there was no evidence (whether from Mr Rocks or anyone else) that the bank had poisonous shrubs on it at any relevant time. Counsel for Ms Pollock submitted that this missed the point: a farmer would not necessarily know what plants were present and therefore would be likely to take the precaution of erecting a fence. I accept this argument, but in my view it adds little to the point that the bank on its own would not have been stock proof.
61. *Alignment to the western edge of the bank.* Counsel for Ms Pollock submitted that only a full-length fence aligned to the western edge of the bank would prevent animals from walking up and onto the bank from its southern tapered slope and causing themselves injury or escaping. In my view this is simply a repetition of the point that the bank on its own was not stock proof.
62. *1890 and 1909 photographs and auction particulars.* Counsel for Ms Pollock submitted that the 1890 and 1909 photographs showed pasture fields bounded by stock-proof fences even where hedges lay behind. As I read the judgment, the judge accepted that stock-proof fences were in use in the area at the time. As he held, however, the question is whether there was a stock-proof fence in the relevant location. Similarly, counsel for Ms Pollock relied upon the auction particulars as showing that some of the lots had boundary fences, but the answer is the same.
63. *More recent farming practice.* Counsel for Ms Pollock relied upon the evidence summarised in paragraph 27 above and submitted that it was to be inferred that Mr Hallett would also have maintained a stock-proof fence alongside the bank. The judge

held at [50(e)] that this evidence was too remote in time; that the evidence suggested that the problem was the lower end where there was no bank; and that, most significantly, he could not draw any useful comparison between sheep and dairy cattle.

64. Counsel for Ms Pollock criticised this reasoning firstly on the ground that the judge gave no reason for finding that only cattle had been farmed in 1928. This is not correct: it is clear from what the judge said at [44] that his finding was based on the reference to a cowstall with 17 tyings in the auction particulars. Counsel submitted secondly that, if that was the basis, it was insufficient. Counsel accepted that the auction particulars made it probable that cattle had been kept in one or more of the surrounding fields, but submitted that they did not show that cattle had been kept in Field 170. That is a valid point so far as it goes, but nevertheless there is no evidence that Mr Hallett kept sheep in Field 170 (or anywhere else).
65. The real point is counsel's third one, namely that there is no reason to suppose that the bank would have been more effective as a barrier to cattle than to sheep. Thus in my view the recent practice does lend some modest support to the proposition that there was a stock-proof fence in 1928.

### *Conclusion*

66. In my judgment the evidence establishes that it is more probable than not that there was a stock-proof fence running the length of the bank and the gap in 1928. I therefore respectfully disagree with the conclusion reached by the judge.

### Interpretation of the Operative Conveyance

67. The judge's interpretation of the Operative Conveyance was based on his finding that there was no stock-proof fence along the line of the bank and the gap in 1928. Counsel for Ms Pollock submitted that, if there was a full-length fence in place in 1928 as I have concluded, it must mark the legal boundary for the following reasons.
68. First, the reasonable reader of the Operative Conveyance standing in Field 170, plan in hand, would see a stock-proof fence running the full length of the boundary and a bank behind it running along part only of that boundary. The fence would therefore be the only candidate to be the feature represented by the continuous line shown on plan. The conclusion that the fence is the legal boundary is the obvious one to draw. Moreover, both experts agreed that, if there was a stock-proof fence, the fence was the boundary.
69. Secondly, the reasonable man would be fortified in that conclusion by the auction particulars, which state that what was being purchased was a "pasture field". The fence marks the limits of the land used for pasture purposes and it is therefore entirely unsurprising that the fence should be constituted as the dividing line. The reasonable man would also be mindful that the bank was of no practical use to the purchaser of a pasture field (on the contrary it would be little more than a maintenance burden), and therefore there was no reason why the bank should not be intended to go to the new owner of Field 174.

70. I accept these submissions. The judge said at [58]-[59] that he was not sure that he would have accepted that the stock-proof fence formed the boundary even if one was there in 1928 because it depended on the nature of the fence. I do not see what difference this would have made, however. Whatever the precise nature of the stock-proof fence, it would have been the only topographical feature that corresponded to the line on the plan.
71. Accordingly, I conclude that the stock-proof fence marked the legal boundary in 1928. It follows that the boundary now lies to the west of bank, as Ms Pollock contends, and not to the east of the bank, as the Oldfields contend.

### Conclusion

72. For the reasons given above, the appeal is allowed. There will be judgment for Ms Pollock for damages in the sum of £22,500. I will hear counsel as to consequential matters if they cannot be agreed.