



REF/2016/0194

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

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) ANGEL ANTONIO GONZALEZ

(2) STEPHANIE MARY GONZALES

APPLICANTS

and

(1) STEPHEN JOHN DURR

(2) LESLIE KAREN INGLEDEW

RESPONDENTS

Property Address: Malayka Cottage, Sutcliffe Wood Lane, Halifax HX3 8PS

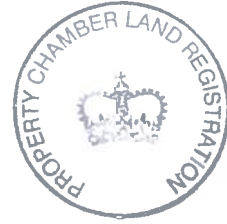
Title Number: WYK49061

**Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier
Tribunal**

The Chief Land Registrar is directed to give effect to the Applicants' original application dated 16 September 2015, as if the objection had not been made.

Dated 21 April 2017

S. M. B. B. B.



**BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST –
TIER TRIBUNAL**



[2017] UKFTT 0368 (PC)

REF/2016/0194

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Title Number: WYK49061

Before: Judge Brilliant

**Sitting at: Bradford Asylum & Immigration Tribunal, Phoenix House, Rushton
Avenue, Thornbury, Bradford BD3 7BH**

On: 4 and 5 January 2017

Site view: 3 January 2017

Applicants' Representation: Mr V Blake Barnard of counsel

Respondents' Representation: Mr J Gale of counsel

DECISION

Application for the determination of the exact line of a boundary – construction of 1935 conveyance of the first property sold - jurisdiction where legal boundary challenged.

Watcham v Attorney General of East Africa Protectorate [1919] AC 533, Ali v Lane [2007] 1 P&CR 26, Pennock v Hodgson [2010] EWCA Civ 873, Murdoch v Amesbury [2016] UKUT 3 (TCC), Bean v Katz [2016] UKUT 168 (TCC)

Introduction

1. This is an application by Mr and Mrs Gonzalez, the applicants, for the determination of the exact line of a boundary of a registered estate, pursuant to section 60(3) of the Land Registration Act 2002.
2. The boundary to be determined is the boundary running between Malayka Cottage, Sutcliffe Wood Lane, Halifax, West Yorkshire HX3 8PS (“Malayka”) and Lindfield, 25 Sutcliffe Wood Lane, Halifax, West Yorkshire HX3 8PS (“Lindfield”), which is situated next door.
3. In order to determine the boundary, I have to construe a conveyance dated 22 May 1935 (“the 1935 conveyance”) by which Malayka was first sold off from the land either side of it, all of which was then in common ownership¹.

¹ In his skeleton argument, Mr Gale advanced alternative cases based on adverse possession and a boundary agreement, but I disallowed these cases as they had not been pleaded in the respondents' statement of case.

4. Facing these houses from Sutcliffe Wood Lane, Lindfield is to the left or west of Malayka. Malayka, previously known as Mon Abri, is semi-detached. It is attached, on its east side, to Wood Lea. Both Malayka and Wood Lea are now houses, but they were built as a pair of symmetrical semi-detached bungalows. Lindfield is a detached house. It was constructed in about 1975 in the grounds of High Croft (formerly Gai-Log-Is), which adjoins Malayka on its west side.
5. The applicants are the freehold proprietors of Malayka, which is registered at HM Land Registry under title number WYK49061. The applicants have lived at Malayka since 1972, and became the registered proprietors in 1975.
6. In 1975 Mr Roden became the first owner of Lindfield. In 1999, he sold it to Mr Durr and Ms Ingledew, the respondents. In 2000, they were registered at the first proprietors at HM Land Registry under title number WYK667446.

The topography

7. Expert evidence as to the location of the boundary between Malayka and Lindfield was given by Mr Andrew Lynch MRCS, who was called by the applicants. The respondents did not call any expert evidence, but Mr Lynch was cross-examined on their behalf.
8. Mr Lynch's report prepared in October 2011 is at [26-31]². He produced a plan on a scale of 1:100 at [41]. He took photographs at [37-40C]. He identified important features, such as walls, posts and steps by capital letters, and I will use the same descriptions in this decision.
9. Sutcliffe Wood Lane runs along what was historically agricultural land set in the Yorkshire countryside outside Halifax. The topography reflects this. The land slopes up steeply from the road. Lindfield, Malayka and Wood Lea all have long front gardens rising from the road, and long rear gardens rising from the respective houses. This can be seen in the aerial photo at [96].

² Page references are to the trial bundle.

10. There is a wide flight of stone stairs at the boundary between Malayka and Wood Lea which leads from the road up to their respective front gardens. Post Y, shown in photo 2 [37], marks the front boundary between Malayka and Wood Lea. Lindfield is accessed by a drive running from the road on its north west side.
11. Lindfield is situated on higher ground than Malayka. When Lindfield was built, the ground had to be excavated. In places, the physical boundary requires retaining walls to protect Malayka.
12. Wall A is a stone wall running along the front of the houses next to the road. It is shown in photos 1 and 2 [37]. The physical boundary between the front gardens begins with another stone wall, Wall B. This wall runs north from Wall A at an angle of approximately 90°, and is shown in photos 1 [37] and 6 [38]. The two walls meet at what has been described as a step in the top of the Wall A, the land on Malayka's side being lower than that on Lindfield's side.
13. Wall B is approximately 5.8m long. There is then a gap of approximately 8.5m until Wall G begins. It is shown in photo 8 [39]. Between Wall B and Wall G the physical boundary is overgrown. The principal feature is as a hedge, Privet F, shown in photo 8 [39]. Privet F is no longer as well kept as it once was: compare photo 2 [106] and photo 4 [115].
14. Walls G, H, I and L constitute the physical boundary between the two houses. Wall G is approximately 4.1m long. Before it ends, Wall H begins immediately to the west of it. The overlap of Wall G and Wall H is shown the photo at [99]. At the end of Wall H, Wall L runs east into Malayka and Wall I runs west into Lindfield. Steps J lead up from Malayka into Lindfield between the end of Wall H and the beginning of Wall L. These steps are shown in photo 9 [39].
15. The physical boundary between the two rear gardens mainly comprises dense bushes, apart from Wall O which runs a short distance between where two sheds

once stood. Photos 10-12 [40] show the rear garden.

The 1935 conveyance

16. In 1935, the semi-detached bungalows Malayka (then known as Mon Abri) and Wood Lea were already built. Malayka was occupied by a tenant, Mr Proud. Both houses, together with the agricultural land to the west (now occupied by Lindfield) were in the common ownership of Mr Baxter and Mr Mellor. The wood to the rear of the bungalows was owned by Mr James Bunce and Mr George Bunce.

17. By the parcels clause in the 1935 conveyance [34C], Mr Baxter and Mr Mellor conveyed to Mr Proud:

ALL THAT plot of land ... bounded on the north by property belonging to the said James Farnell Bunce and George Percy Bunce on the east and west sides thereof by property belonging to the Vendors and on the south by Wood Lane otherwise Woodbottom Lane³ containing an area of five hundred and ninety square yards or thereabouts which plot of land hereby conveyed is by way of identification only and not so as to affect in any way the description hereinbefore contained shewn in the plan drawn on this Conveyance and thereon edged with a red verge line AND ALSO ALL THAT semi-detached dwellinghouse or Bungalow erected thereon and known as "MON Abri" now in the occupation of the Purchaser.

18. The conveyance plan is at [36] and a copy is annexed to this decision. It shows Malayka bounded by a red edged rectangle, with the legend: *Contents 590 Sq Yds.*

19. Clause 3 of the 1935 conveyance provided:

IT is hereby agreed and declared that the walls dividing the property hereby

³ Now Sutcliffe Wood Lane.

conveyed from the adjoining property on the westerly side thereof are mesne and party walls and repairable as such.

The dispute

20. Between 1999 and 2011 there were no difficulties in the relationship between the parties and no disputes over the boundary. In 2011 Mr Durr carried out a number of activities which the applicants regarded as encroaching on onto their land. These included erecting a make- shift fence, installing Post E which lies immediately to the west of Wall G and can be seen in photo 7 at [39], and blocking off the top of Step J which can be seen in the photo at [39A]. This led to a serious deterioration in the relationship between the parties. A full list of the applicants' complaints is set out in their letter dated 12 January 2012 [43-45].

Applying for a determined boundary

21. The procedure for determining a fixed boundary is set out in rules 118 and 119 of the Land Registration Rules 2003 and Part 3 of Land Registry's Practice Guide 40, supplement 4 updated 8 August 2016.
22. Rule 118(2) provides that an application for the exact line of the boundary to be determined must be made in Form DB. It must be accompanied by a plan, or plan and verbal description, identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map, and evidence to establish the exact line of the boundary.
23. Paragraph 7 of supplement 4 sets out the requirements for the plan supporting the application. The plan at [42], which is dated September 2015 and is on a scale of 1:200, has the required measurements. A copy of this plan is annexed to the decision. The larger scale plan at [41] was used during the course of the hearing as it had the lettering identifying the individual walls and other

important features, whilst the lettering on the plan at [42] indicates points from which measurements have been taken.

The original application

24. On 16 September 2015, the applicants applied to Land Registry to have the exact line of the boundary between Malayka and Lindfield determined between points X-Y-Z on the plan at [42] (“the original application”).
25. On 23 October 2015, the respondents objected to the original application. On 22 March 2015, the objection was referred to the Tribunal under section 73(7) of the Land Registration Act 2002.
26. As the respondents have not called any expert evidence, no plan was put in evidence showing the line along which the respondents say the legal boundary lies. In closing, I asked Mr Gale to tell me where he said the legal boundary was.
27. He said that on the plan at [41] the boundary went through the step in Wall A, through the centre of Wall B, along the line of and through Privet F, through the centre of Wall G, then the boundary doglegged to the centre of Wall H and the top of Step J, and finally it went along a line through Wall O in the rear garden to a marker identified by Mr Roden.

Jurisdiction

28. The plans at [41] and [42] do two things. First, they show in black the physical features which existed along the boundary between Malayka and Lindfield in 2011. These features include Walls B, G, H, I, L and O, Steps J and Privet F. I was able to see all of these features at the site view. Secondly, they show marked by a red dash and dotted line the line of the legal boundary according to the professional view of Mr Lynch.

29. It is for me to decide, applying the law set out below to the facts as I find them, as to where the legal boundary is. The applicants are entitled to advance a case based on the professional view of Mr Lynch, but that view is by no means determinative. Mr Lynch was cross-examined carefully, and an important flaw in his methodology was disclosed. That does not necessarily mean, however, that Mr Lynch's conclusion must be rejected.
30. Although Mr Lynch's view as to where the legal boundary lies was challenged by Mr Gale, his surveying abilities were rightly not challenged. As I understand it, it is common ground that the plans at [41] and [42] correctly show the location of the physical features which existed along the boundary between Malayka and Lindfield in 2011. This is despite that fact that Mr Lynch had no access to Lindfield's side of the boundary.
31. Mr Gale submitted at the outset of the hearing that because of his challenge to the methodology by which Mr Lynch reached his professional view as to where the legal boundary was, I had no jurisdiction to deal with the dispute. He relied upon the decision of HH Judge Dight sitting in the Upper Tribunal in Murdoch v Amesbury [2016] UKUT 3 (TCC).
32. I rejected that submission for the reasons given by Judge Elizabeth Cooke sitting in the Upper Tribunal in Bean v Katz [2016] UKUT 168 (TCC), [20]:

Furthermore, I think it is important that I make it clear that the First-tier Tribunal has jurisdiction to dispose of determined boundary references... where the objection is not to the quality of the plan but to what the plan says about the boundary and where therefore it is necessary to look at the title to the properties concerned.

Construction of the 1935 conveyance: the law

33. The red boundary lines shown on the parties' respective title plans are of no weight because they simply show the general boundary.

34. The conveyance plan [32] is for identification only. It is not to be ignored, but it does not take precedence over *the description hereinbefore contained*, namely the measurement of 590 square yards or thereabouts.

35. Physical features are also important. The principles to be followed are set out in Pennock v Hodgson [2010] EWCA Civ 873, where Mummery LJ said at [12]:

Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction.

36. Important physical features in this case are any walls which I find were in existence on the western side of Malayka in 1935.

37. The question arises as to the extent to which I can take into account events subsequent to the 1935 conveyance as an aid to its interpretation.

38. In Ali v Lane [2007] 1 P&CR 26 Carnwarth LJ considered the extent to which the rule in Watcham v Attorney General of East Africa Protectorate [1919] AC 533 still applied, thereby enabling events subsequent to a conveyance to be used as an aid to its interpretation. He concluded:

36. *The conclusion I would be inclined to draw from this review is that Watcham remains good law within the narrow limits of what it decided. In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent*

conduct, subject always to that evidence being of probative value in determining what the parties intended.

37. *The qualification is crucial. When one speaks of “probative value” it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise related, to physical features which were in existence in 1947.*
39. As I have said, Lindfield is on higher ground than Malayka. When the house on Lindfield was built in around 1975 excavation works were carried out and Wall B between the front gardens was reconstructed. The applicants have carried out substantial excavation work at the rear of Malayka when a basketball court was installed. I shall therefore have to decide whether the physical features created since 1935 have any probative value in determining where the legal boundary lies.

The witnesses

40. Mrs Gonzalez and Mr Roden gave oral evidence of fact on behalf of the applicants. Ms Ingledeu gave oral evidence of fact on behalf of the respondents.
41. Mr Lynch put in his expert report prepared in October 2011 [26-31] and gave oral evidence.

Mr Lynch’s evidence

42. Mr Lynch began by setting out where he considered the legal boundary on the east side of Malayka ran. He constructed a line bisecting the party wall between the bungalows originally constructed on Malayka and Wood Lea. At the rear

- of the houses, the line continued in a straight direction. At the front of the houses, the line swings slightly to the west to meet Post Y, shown in photo 2 at [37], in the centre of the front steps leading up to the houses.
43. Mr Lynch then constructed a new line to show the western boundary, which he described as being parallel to the eastern boundary passing through the step in Wall A. This line passes through Wall B and the overgrown area. It deviates slightly to the west near to the beginning of Privet F to mirror the deflection through the front gardens of the houses on the eastern boundary.
44. The boundary then continues in a straight line to the west of Wall G, through Wall H (part of which is unexposed retaining Lindfield), along the western edge of the top of Steps J. It then continues in a straight line through Wall O (part of which is unexposed retaining Lindfield) until it meets Wall V at the rear to the west of Oak Tree R and S, shown in photos 4 and 5 at [38].

Discussion

45. Mr Lynch's report was criticised by Mr Gale on the basis that it simply considered the plan and not the wording of the conveyance. Indeed, the remaining pages of the conveyance [34A-35C] were not disclosed or put in the trial bundle prior to the hearing.
46. There is force in this criticism. However, the boundary suggested by Mr Lynch does give Malayka an area of 593 square yards which is within 0.5% of the intended area of the plot: see paragraph 5.4 of his report [30]. It must be remembered that the land being conveyed was identified principally by its area.
47. It is common ground that the boundary begins at the step in Wall A. The location of Wall B is of no probative value as it was built partly by Mr Gonzalez and partly by Mr Roden in about 1975 when Lindfield was being built. It is not the wall which was in existence in 1935.

48. Mr Roden's evidence was that Privet F was already there before Lindfield was built and so he regarded it as being within the boundary of Malayka. I consider it more likely than not that Privet F was originally planted by the then owners of Malayka within their own land. Mr Roden had a recollection of what he considered to be a boundary marker in the front, but there is no evidence of who placed this, or when or why and I do not attach any weight to it.
49. Wall G was not built as a freestanding wall, and I do not consider it a boundary feature. It was originally the rear wall of a coal bunker. The coal bunker can be seen in the photograph at [91], which was taken in 1974. The coal bunker has since been demolished, apart from Wall G which remains standing. Wall G is to the east of Wall H. Wall H is a retaining wall. Its position was not altered when Lindfield was built and it is likely to have been there in 1935. I have no evidence as to how wide it is on its unexposed side, but the dashed lines on the plan at [41] indicate that its full width is not shown.
50. Both Mr Gonzales and Mr Roden regarded Steps J, which were built by Mr Gonzales, as lying within Malayka. Mr Roden built Wall I, which is "L" shaped contrary to Mr Lynch's plan, marking off what he regarded as the boundary. This coincides with the red line drawn by Mr Lynch on the plan at [41]. The steps were built because the Gonzales children were friendly with the Roden children and a safe access between the houses was required.
51. In the rear garden, Mr Lynch is of the view that Wall O was in existence in 1935. Again, I have no evidence as to how wide it is on its unexposed side, but the dashed lines on the plan at [41] indicate that its full width is not shown. Mr Lynch is also of the view that Wall Q is of no probative value, as it was constructed when part of the rear garden was excavated to make a basketball court.
52. Wall Q meets rear Wall V at a point where Mr Roden considers there to be a boundary marker. However, there is no evidence as to when this marker was placed there or why. Mrs Gonzales gave evidence that the children had always

played in an area around and to the west of Oak Trees R and S, west of where Wall Q now stands, and that this had always been considered part of the garden of Malayka. I accept that evidence.

Conclusion

53. The conclusion which I have reached is that the boundary between Malayka and Lindfield does lie along the line shown the plans at [41] and [42]. Mr Lynch's plan shows the best fit for the area conveyed. I shall therefore direct Land Registry to give effect to the original application.
53. The parties are to send to each other and to the Tribunal written representations about who should pay the costs within 14 days. It is not necessary that this stage to provide any schedules of costs.

Dated this 21st day of April 2017

S. Mr. Bullhat



**BY ORDER OF THE LAND REGISTRATION DIVISION OF THE
PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL**

REGISTRY BUILDINGS CENTRE, SOUTH
BRIDGE ROAD, SINGAPORE, 069571
TEL: 6733 6666 FAX: 6733 6667
Email: enquiries@2jleklinsurveys.com Website: www.2jleklinsurveys.com

EX 11

NOTES

THE DESIGN AND DIMENSIONS OF THE SURVEY ARE THOSE OF THE SURVEYOR.

THE PURPOSE OF THIS PLAN IS TO SET THE BOUNDARY LINE BETWEEN MALAYKA COTTAGE AND LINDFIELD.

DEFINITIONS & DIMENSIONS

FOR A FULL LIST OF DEFINITIONS, REFER TO THE REVISIONS.

- AX = 12.50m
- PX = 25.10m
- QX = 14.17m
- AY = 2.21m
- DY = 8.72m
- BY = 2.56m
- OX = 15.07m
- EX = 28.31m
- CZ = 19.50m

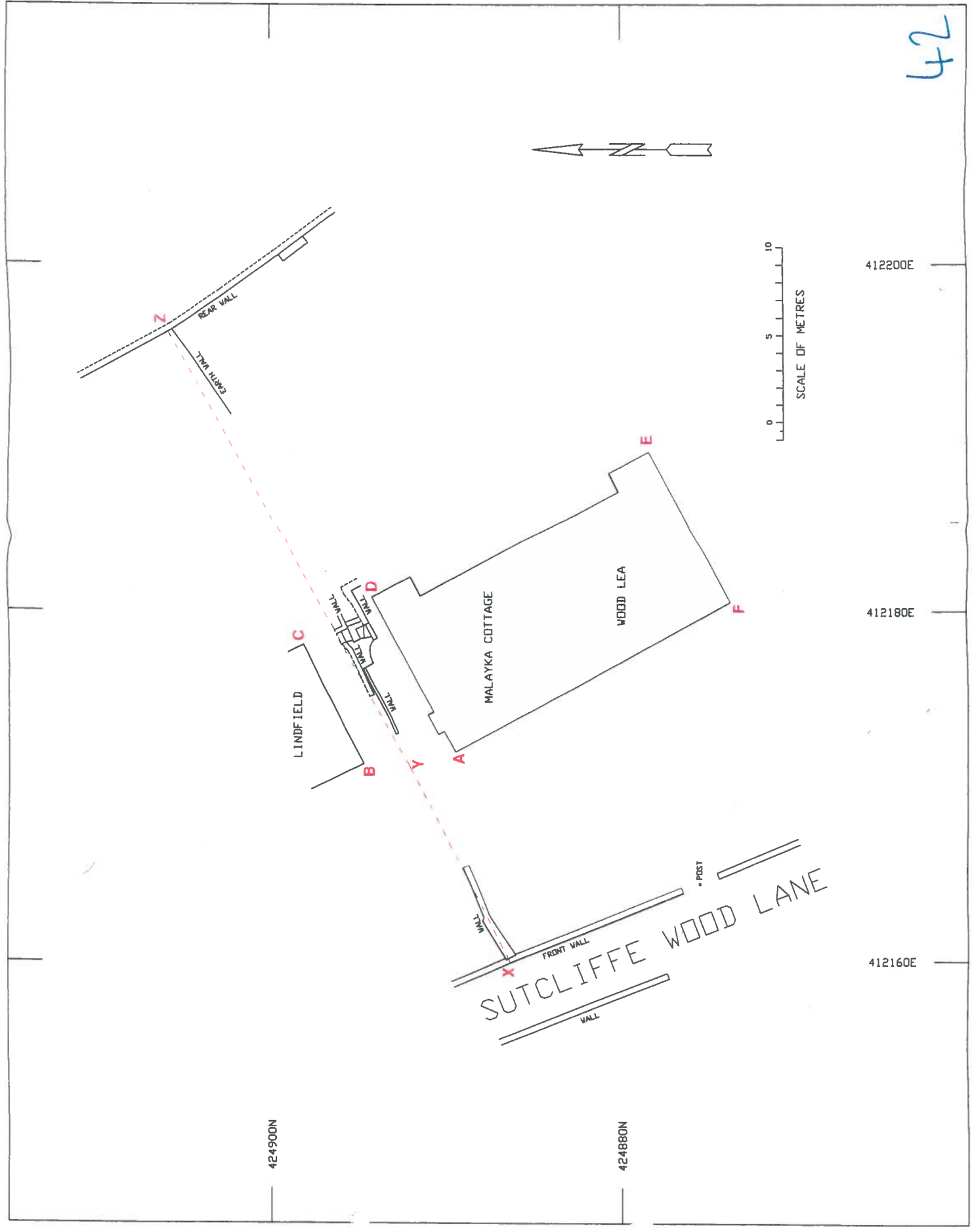
REV	DATE	BY	APP'D	REVISION/DETAIL

MR & MRS GONZALE
MALAYKA COTTAGE
SUTCLIFFE WOOD LA
HIPPERHOLME
HX3 8PS

BOUNDARY BETWEEN
MALAYKA COTTAGE
AND LINDFIELD

DRAWING TITLE
BOUNDARY PLAN

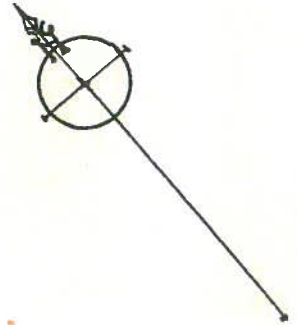
SCALE	1/200	DATE	BY	APP'D	AL
SHEET SIZE	A3	SEP 2015	AL	AL	AL
AS COMPLETED					



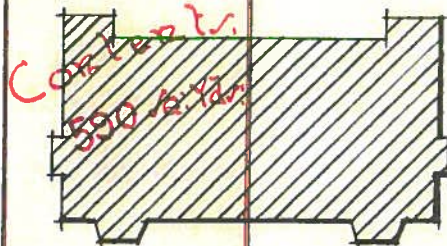
42

Plan referred to

PROPERTY OF J.F. BUNCE & G.P. BUNCE.



PROPERTY OF
VENDOR.



"COLLATON"

PROPERTY OF
VENDOR TO BE
SOLD TO BRIAN
HOPE WKE AND
IRENE BERTHA WKE.

from Hipperholme. WOOD LANE.

ENTRANCE TO SUNNY
VALE PLEASURE PARK.

SCALE of FEET.



