

An Englishman's home is not his castle

“There is a common misunderstanding that an Englishman's home is his castle in the sense that he can build walls, put up gates and do other acts on his land whenever he chooses, without regard for his neighbours”

(Lady Justice Arden in Waterman v. Boyle [2009] EWCA Civ 115).

The practitioner, when faced with a client involved in a (usually acrimonious) boundary dispute often has to grapple with difficult issues involving the construction of title documentation, imprecise topographical and physical evidence as to boundary features, infringed express (or implied) rights of way and rights to park. The source of these disputes often lies in high-handed, or oppressive, behaviour by one, or both, parties usually reflecting an underlying deep antipathy between the parties. The genesis of the dispute could be a crossed word over a garden fence, or, in one case, a private class struggle, or an surreptitious intent by one party to extend his fiefdom by creeping “accretion” of his land. These disputes are also often marked by the parties battling with a overtly enthusiastic vigour and zeal, and incurring legal costs out of all proportion to the value of the assets or rights in issue.

How should these issues be unravelled?

In most cases, the first, and paramount, task is to identify the legal position of the boundary in dispute. The legal boundary is an invisible line dividing one person's land from another's and denotes the separation of ownership of land. It does not have thickness, or width, and usually, but not always, falls somewhere in, or along, a physical boundary feature such as a wall, fence or hedge.

The starting point is always to look at the conveyance or deeds as boundaries may, and generally should, be fixed by the deed or deeds conveying one or both of the properties concerned. This involves properly construing, or interpreting, the clause whose words convey what land or rights have been transferred. This clause is known as “the parcels clause”. The recent case of *Strachey v Ramage* [2008] EWCA Civ 384 concerned a poorly drawn conveyance which left in doubt a patch of ground a fraction of an acre in size. The Court of Appeal held that the task of identifying the parcels of land conveyed would require an interpretation of the particular conveyance against the background circumstances in which it was made. The function of the court would be to use all “admissible material” in order to arrive at the correct answer. It was also fundamental that the parcels clause in a conveyance should not be construed in isolation from the remainder of the document. On the facts in *Strachey*, the court had to deal with a conveyance of part that described the land sold by reference to a plan that was for “identification only”. Unfortunately, the red edging on the plan did not coincide with the boundary features on the ground, or with the line of a new fence that was erected a few weeks before the conveyance. The Court of Appeal relied upon a clause in the conveyance that proclaimed the ownership of the fence and included covenants for its maintenance and repair. The court ruled that the clause took precedence over the plan because it would have been absurd for the sellers to retain ownership of fencing that fell

within an area of land that was being sold. In addition, it would have been impossible for the sellers to comply with their covenants to repair the fence without the access that would enable them to do so.

Thus, in cases where the parcels clause is ambiguous, regard should be had to other “admissible evidence” as to the position of the boundary. Such evidence can be found not only in other clauses of the conveyance but (provided the same is reliable) in old survey photographs, property sellers’ information forms prepared for the purpose of a sale, plans submitted for planning applications, recollections of nearby long term residents (or prior owners of the land in question), and established patterns along a street e.g. often each owner in a street will own one side only of their rear fence boundary with their neighbour (the fence owned being the same for each house in the street).

The title (or property) register and title plan held by the Land Registry should always be examined. The title register contains details (amongst other things) of express covenants, easements and rights of way affecting the property. The title register will also contain a physical description of the property, which may include detail relating to boundaries and will also refer to the title plan and describe any markings or colouring that it contains. There may be reference to one or more documents such as transfers, agreements, boundary structure notices, conveyances which may indicate the position of the legal boundary. However, the registered title rarely, if ever, shows ownership of individual boundary structures such as walls, fences and hedges.

The title plan is plainly important, but not conclusive of the boundary position. Perhaps counter-intuitively, the red edging on a title plan is not definitive as to the precise position of the boundaries. The title plan will contain an outline only of the property showing its location in relation to the surrounding properties. It is based on the Ordnance Survey maps, which are increasingly used as the basis of conveyance plans, but do not purport to fix private boundaries. Thus, when most owners of registered land assume that their boundaries are conclusively defined by the Land Registry title plan, they are wrong. The Land Registry can only record their interpretation of the boundaries descriptions that they find in the pre-registration conveyance deeds. This is known as “the general boundaries rule”. Thus, the title plan is meant as a “rough guide” only as to boundary positions. In *Derbyshire County Council v Fallon* [2007] EWHC 1326 (Ch), the High Court confirmed this, holding that the title plan did not indicate the precise extent of the land in question. Consequently, the court looked at the pre-registration documents to determine where the boundary lay. However, the title plan may be helpful because it often contains coloured areas and markings which may denote rights of way, sold off areas, easements, parts of the property affected by covenants, or boundary ownership. “T” marks and “H” marks along a boundary show ownership or maintenance responsibility. The land containing the bar of the “T” is the land having complete ownership or responsibility for the boundary feature (wall, hedge, fence). Where there are “H” marks these represent joint ownership or responsibility, viz. that the wall, hedge or fence is a party wall or structure.

If the title register or the title plans are not sufficient to identify the boundary, the next step is to see if there are any of the well established legal presumptions that assist. The presumptions are only applicable if the deeds are unclear and admissible evidence does not answer any ambiguities. The most well known is the "hedge and ditch" presumption: this is that the law presumes, in the absence of contrary agreement, that the boundary is on the far side of the ditch from the hedge. This is because no man making a ditch may cut into his neighbour's soil, but usually he makes it at the very extremity of his own land, forming a bank on his own side with the soil which he excavates from the ditch, on the top of which bank a hedge is usually planted. In the case of wooden fences, it is likely to be inferred that the owner of land will use his land to the fullest extent so that the fence will be deemed to belong to the person on whose side the rails and posts are placed, the palings being placed on his neighbour's side. Where land is bounded by a highway, or a private right of way, there is a presumption that the boundary is, as a general rule, a line drawn along the middle of the highway, or private right of way. This arises because the owners of land adjoining the highway or way are presumed to own the subsoil as far as the middle of the road and the airspace above the soil subject only to the right of passage over the surface and the rights of the highway authority. In relation to the seashore, and foreshore, the boundary line between the seashore and the adjoining land is the line of the median high tide between the ordinary spring and neap tides. Where land is said to be bounded by a river, a distinction must be made between tidal rivers and non-tidal rivers. In those parts of rivers where the tide flows and reflows, the soil between the medium high water mark and medium low water mark prima facie belongs to the Crown, and therefore the boundary between the bed of a tidal river and the adjoining land is, as a general rule, the line of medium high water mark. A tidal river is one where the water is subject to the ebb and flow of the tide whether the movement is lateral or vertical. The right of the Crown ceases at that point in the river where the tide ceases to ebb and flow. In the case of non-tidal rivers or streams, whether navigable or not, the boundary is in general the line of mid-stream, because the bed of such rivers and streams is presumed to belong to the riparian (ie. riverside) owners as far as the middle of the stream. Similarly, a conveyance of a property bounded by a stream normally includes the bed of the stream to the median line. It should be appreciated that the above are merely "presumptions" capable of being rebutted on clear evidence to the contrary.

As a matter of practice, in many contested boundary disputes, a chartered land surveyor will have to be employed to visit the site and accurately measure, or "map", the legal boundary by reference to boundary features, deeds, and other extraneous evidence that may exist. Judges themselves will often conduct a "site visit" early on in any trial to see for himself/herself the material topographical features.

Boundary disputes will also often involve related issues of ancillary rights of way, or rights to park. The recent case of *Waterman v Boyle* [2009] EWCA Civ 115 concerned a right of way over a driveway granted in conjunction with rights to park two private motor vehicles in an area designated for parking. One of the issues in the case was did the right of way include additional implied rights for visitors to park vehicles on the driveway? The judge at first instance held that, in a residential context, a right to park would be

implied on the right of way, otherwise (as he held) how would the visiting grandparents stay for the weekend? The Court of Appeal disagreed, holding that no such rights could be implied. The parties had specifically considered parking rights in the conveyance. They had made adequate provision for parking (2 spaces at the front of the property) and the landowner did not need additional rights to park to make effective use of the right of way.

No discussion of the law relating to boundaries could be complete without brief mention of the Party Wall Act 1996. Development works by neighbours on or near a party wall are often restrained by Injunction by the courts where a neighbour has unlawfully carried out works on or near a party wall without serving the requisite party wall notice. Most of these disputes are resolved by the appointed surveyors agreeing a “party wall award” which sets out the rights and obligations of the neighbours in relation to the works.

The Court of Appeal in almost every boundary dispute that comes before it ventilates its despair at the willingness of parties to litigate rather than settle their disputes in an amicable way. It perhaps should be said that where one party has acted in a wholly deceptive, oppressive, high-handed, or even violent manner, such disputes are often not amenable to ready settlement. It is not easy to shake hands with a person who you firmly believe has stolen a part of your land. However, in the usual case, an active attempt should be made to seek to resolve such disputes amicably before deploying the above law and practice.

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