

FORTINBRAS' ARMY:

BOUNDARY DISPUTES

Scene: Fortinbras, Prince of Norway, seeks access to a piece of land in the middle of Denmark, land that is worth nothing but a few coins. Hamlet and a Captain discuss the issue.

Captain: Truly to speak, and with no addition,
We go to gain a little patch of ground,
That hath in it no profit but the name.
To pay five ducats, five, I would not farm it;
Nor will it yield to Norway or the Pole
A ranker rate, should it be sold in fee.

...

Hamlet: Two thousand souls and twenty thousand ducats
Will not debate the question of this straw.
This is the imposthume of much wealth and peace,
That inwardly breaks, and shows no cause without
Why the man dies. I humbly thank you, sir.¹

¹ Hamlet, Act IV, scene IV

Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras' army. It is therefore important that the law on boundaries should be as clear as possible.

Lord Hoffman²

...It is sadly a commonplace that boundary disputes can be fought with a passion which seems out of all proportion to the importance of what is involved in practical terms. In such cases, professional advisers should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind and of the possibilities of alternative dispute procedures.

Carnwath LJ³

As HHJ Hamilton QC said, this case arises out of an extremely minor boundary dispute, on which nothing turns and the existence of which would make the sale of property fraught with difficulty. The exact position of the boundary makes no real difference to either neighbour's enjoyment of their land.

Lawrence Collins LJ⁴

² *Alan Wibberley Building Ltd v Insley* [1999] UKHL 15; [1999] 1 WLR 894: Lord Browne-Wilkinson, Lord Lloyd of Berwick, Lord Hope of Craighead and Lord Clyde all agreed

³ *Ali v Lane* [2006] EWCA Civ 1532; [2006] 1 P&CR 438: Waller and Maurice Kay LJ in agreement

⁴ *Haycocks v Neville* [2007] EWCA Civ 78: Waller LJ and Charles J in agreement

Boundary disputes between neighbours are wretched affairs: they cause misery and stress; they lead to costs which are often grossly disproportionate to the value being fought over; and as Mummery LJ pointed out during the argument, they put a blight on the properties, because no sane person would want to buy a property affected by a boundary squabble, except perhaps at a significantly discounted price.

Toulson LJ⁵

Crikey, loonies, this is where I shoot!

Evelyn Waugh⁶

You will gather from the quotations that this paper is not about boundary disputes where a matter of commercial importance is at stake or where there will be a significant enhancement to the value of the property such as will justify any outlay of costs and the risk that the client may end up having to pay the other sides costs. It is about situations other than those although there will still be aspects of what is to come which are applicable to those situations.

You quite often get the situation where a party has seen the estate agents particulars, has visited the property, put in their SPIF, received the replies, carried out their searches, been happy with the results, paid their money and

⁵ *Childs v Vernon* [2007] EWCA Civ 305: Mummery LJ and Lady Justice Smith in agreement

⁶ Decline and Fall

purchased their property. At the time of purchase they are content with what they think are the boundaries: the hedge on the western side, the fence on the southern side, the hedge on the eastern side and the wall on the northern side. They then receive from their solicitor all the documents relating to the property and they include lots of handwritten old conveyances which the purchasers now choose to study and behold they believe they are entitled to another two feet on the western side of the property and that the hedge isn't the boundary and that their next door neighbour has put his northern wall across the northern part of that strip to give the impression it's part of his land when it is not. And so it starts...

Managing Expectations

1. The client invariably believes that right is on their side and that the matter only has to be discussed for that to be obvious and that the other side are scoundrels for denying it, and it is your job to make that obvious to the Judge so that justice will prevail. The management of expectations is one crucial aspect of satisfactorily running a boundary dispute, both for the purposes of achieving a satisfactory outcome for your client and retaining your own sanity.
2. It is also crucial to remain above the fray. It is always the case that you represent your client but do not allow yourself to become partisan even if the solicitor on the other side appears to have done in relation to his client. Therefore one expectation that has to be managed from the outset is the idea,

which clients frequently harbour, that you should support them by being uncritical of their claim and always being assertive about its merits.

3. They are there to obtain your advice; they do not have to like it or agree with it, and on many occasions they do not have to follow it, but it has to be proffered nonetheless as you have an obligation to safeguard their interests. They (usually) do not know the law, they (usually) do not know how the facts as they believe them to be apply to the law, they (usually) are unable to anticipate what further facts may emerge and how those facts may affect the case, they will not know what is admissible as evidence, they will not know what a court is likely to make of that which is put before it.
4. They will not know, or if they know, will not always appreciate the risks that attach to litigation. Neither will they appreciate the cost or how costs escalate and how you can become tied into the litigation by the inability to resolve costs with the other side. You do, that is why they should listen to what you have to say, which therefore may have to include pointing out to them what they do not know.
5. What you have to say should always be reinforced in writing⁷ and wherever possible any decision about steps that will be taken in pursuance of a claim

⁷ Formerly included in The Guide to Professional Conduct of Solicitors, 8th Edition, para 13.04: 1. It is in the interest of both the solicitor and the client that advice on the risks should be in writing, and that the advice is repeated at appropriate times throughout the transaction. [my underlining]

This advice is not repeated in the Code of Conduct 2008.

Under the Solicitor's Costs Information and Client Care Code appeared: (k) The solicitor should discuss with the client whether the likely outcome in a matter will justify the expense or risk involved including, if relevant, the risk of having to bear an opponent's costs.

should not be taken until after a period of reflection: do nothing in haste unless it is absolutely necessary. And remember to factor in the Court of Appeal; you may win first time out, but the other side may succeed on appeal.

6. Focus on the practicalities and realities of most boundary disputes: the land in issue is not worth much; possession of the land will not affect the enjoyment of the remainder; the parties will spend a disproportionate sum fighting over it; they will succeed in blighting a possible re-sale. Put to your clients the following for their consideration:
 - i. Is the absence of the land detrimental to the value of the property?
 - ii. Will possession of the land enhance the value of the property?
 - iii. Is the enjoyment of their property detrimentally affected by the absence of the disputed land?
 - iv. Will the enjoyment of their property be enhanced by the possession of the land in dispute?
 - v. Would you buy a property affected by a boundary dispute?
 - vi. How do you propose to finance litigation?

This is repeated in The Code of Conduct 2008 at para 2.03 (b), however instead of “should discuss” it is now “must discuss”.

7. With the evident uncertainties that usually exist with a claim and with the need to remain outwardly confident in handling the client but realistic about how matters may proceed an advice from Counsel about the merits as they currently stand, the prospects for success as matters currently stand, a risk-costs appreciation, the steps that should be taken and the possible pitfalls ahead should be taken at an early stage. Counsel can be used as a tempering device on the expectations of the client and a safety valve in relation to the solicitor-client relationship.
8. Then brace yourself and inform them of the mediation or alternative dispute resolution approach to their dispute. In this you at least have the advantage that you are able to say that the court will expect that the parties will have considered one or other or both of these approaches.
9. In this you will also have the advantage that there are potential adverse costs consequences in not exploring these options. Adverse in two ways: that the chance to resolve the claim and terminate further expenditure will have been lost; and that the court who determines the issues may take into account one or both parties' lack of willingness, whether they were successful or unsuccessful with the litigation.⁸
10. As regards the costs themselves, they are likely to be disproportionate in many cases. There is the inevitable minimum cost of just bringing the claim or responding to it. A Defendant or Claimant facing a counterclaiming Defendant

⁸ *Halsey v Milton Keynes NHS Trust and Steel and Joy* [2004] EWCA Civ 576

may well have no control over costs which may lie with the other party who may wish to run up a substantial costs bill in a process of intimidation, litigation frenzy or because the solicitor on the other side has no control over the client. And the client may be relying on an insurer who will have their own say on how matters proceed.

11. Although the normal rule for the court is that costs follow the event, there is scope for arguing that where the costs in relation to an issue can be separated out that cost should not necessarily follow the overall event but follow who succeeded on that issue. Offers of settlement, pre-action and by way of Part 36 will also affect the outcome on costs, and a client should be cautioned accordingly so as to engender a willingness (if appropriate) to make such an offer and to consider any offer made by the other side. And Part 36 offers do not have to be offers of money, the offer might be to treat the boundary as a party wall for instance.⁹

12. When informing the client on how the proving of a claim in a boundary dispute is dealt with the opportunity is there to demonstrate how things do not always seem to be as they appear and the variety of forms of evidence that may have to be gathered or may have to be dealt with if put forward by the other side. This will also give the client an idea of just how much work may have to go into preparing a claim and where all those costs that you have indicated are likely to be incurred are coming from.

⁹ *Palfrey v Wilson* [2007] EWCA Civ 94

13. Preparation, as in all types of litigation, is the key. Even where the case is won by triumphant cross-examination, that cross-examination usually rests on thorough preparation. Dispel the idea that the ‘magic’ of Counsel has any real part to play, or if you or a colleague are to present matters that there is to be some Perry Mason moment (besides which if there is to be, the other side’s advocate may be just as likely to draw it out of your clients). Counsel is an advisable consultative and advocacy resource, but you can’t pull a rabbit out of a hat unless the rabbit is already in there.

14. The departure point for any claim is that it is for the party who does not have possession to establish a better title than the party in possession. The party in possession does not need to establish their title at all as such. The party in possession may also have recourse to the rules relating to adverse possession.

What would the reasonable layman think he was buying?¹⁰

15. The general rule is that it is the conveyance alone from which the property conveyed is to be deduced so that extrinsic evidence is not admissible as an aid to its construction unless the relevant provisions of the deed are uncertain, contradictory or ambiguous (*Scarfe v Adams*)¹¹, and a court will not be astute to go out of its way to find uncertainty, contradiction or ambiguity where there

¹⁰ *Topliss v Green* [1992] EGCS 20: “It is always relevant in construing a conveyance to look at the language of the contract and it may be relevant, depending on the issue, to look at the content of the plan and in context the facts relating to the locus in quo including photographic evidence and the responses to preliminary enquiries; the question to be answered from all the relevant information is: what would the reasonable layman think he was in fact buying?”

¹¹ [1981] 1 All ER 843

is none; prima facie they are to be relied upon unless there is something fairly obviously wrong with them (*Horn v Phillips*).¹²

16. The construction of the conveyance is though not simply a matter of having regard to the document alone; it is the document and the surrounding circumstances in conjunction with it that amount to the process of construction though it is possible that the words of the conveyance may be so unambiguous that the surrounding circumstances will not affect the construction (*St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)*).¹³

17. A conveyance is in respect of interpretation like any other agreement: what was the objective intention of the parties as can be deduced from the words they used against the background circumstances in which those words were used.¹⁴ The rules of construction will not prevail if the result would be a manifest absurdity, and perhaps conveyances present the most frequently encountered situation where that flexibility has to be applied.

18. The overriding point to bear in mind is that the court will be aiming to achieve a result, it is not there for any other purpose. A piece of land is either conveyed by a conveyance or it is not and therefore to know what it is that has

¹² [2003] EWCA Civ 1877

¹³ [1975] 1 WLR 468

¹⁴ *ICS v West Bromwich BS* [1998] 1 WLR 896, 912: “Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which could reasonably have been available to the parties in the situation in which they were at the time of the contract.”

The use of “reasonable person” or “reasonable layman” appears to soften the “objective construction of the parties’ intentions” aspect of contract construction.

been conveyed and what has not it is necessary to “proclaim” the boundaries (*Neilson v Poole*).¹⁵

19. It is hard to know how often unambiguous phraseology is used, it is frequent enough for the law reports to be peppered with boundary disputes, so that there are plenty of situations where the general rule has been incapable of application and resort has had to be made to other resources.
20. Start with the original or earliest conveyance, the title plans registered at HM Land Registry.¹⁶ Start with the extent of the property at the time of the conveyance: “dwelling house” is any form of residence; “House” is just that; conveyances of “land” normally include all buildings on it; other typical terms, “messuage”, “curtilage”, “garden”, “building”, “appurtenances”.
21. Typical phraseology for a description of a property will be “all that property known as” or a variant of the same such as “formerly in the occupation of...” a named individual or family. It will be necessary to provide extrinsic evidence in order to elucidate such a comment and no parol evidence rule will stand in the way (*Freeguard v Rogers*).¹⁷

¹⁵ [1969] 20 P&CR 909, Megarry J

¹⁶ *Alan Wibberley Building Ltd v Insley* supra, 895h

¹⁷ [1999] 1 WLR 357, per Peter Gibson LJ: “In my judgment, when a property, the subject matter of a conveyancing document, is described as “the property known as...” it is permissible, indeed inevitable, that recourse will be had to extrinsic evidence to identify the property so known.”

22. The most common extrinsic element resorted to will be the plan that is almost invariably attached to the conveyance (in this sense the plan is extrinsic to the description in the conveyance and assists in elucidating the meaning of the description). Use original documents wherever possible, particularly plans. Photocopies can distort and if the original plan was coloured there may be error in the transposition of the colouring.
23. The plan, however inadequate, provided it does not conflict with the parcels of land described under the conveyance can be used as an aid to construction (*Wigginton and Milner Ltd v Winster Engineering Ltd*).¹⁸ A plan that is introduced in the conveyance “as shown on the plan annexed hereto” will have equal weight to other aspects of the conveyance. If the plan is introduced as “for the purpose of identification only” then the plan is relegated to a subordinate position but it is still to be used to assist with understanding the description of the land in the conveyance and is only to be put to one side where it conflicts with that description.¹⁹
24. The plan not untypically whether referred to in the conveyance as being for “identification purposes only” or some other way will be of a scale so small and the lines marking the boundaries so thick as to be unsuitable for anything other than general identification of the boundaries.

¹⁸ [1978] 1 WLR 1463

¹⁹ *Wigginton & Milner Ltd v Winster Engineering Ltd* supra.

Features to take account of on plans attached to the conveyance

Natural features²⁰

General proximity of buildings to boundaries

Dimensions and measurements

Ownership marks

Features to take account of not on plans attached to the conveyance

Other Deeds and documents relating to conveyances

Answers to requisitions

Statutory declarations

Other documents

Maps

Local Authority definitive plan

Photographs

²⁰ “Topography plays an important part in my expose”, A Canterbury Tale, 1944, Michael Powell and Emeric Pressburger

Publications

Topography

Practical use of the respective parcels of land

Origin & maintenance of boundary feature

Survey

25. The conveyance (or conveyances) can be supplemented by inferences that may be drawn from topographical features which existed or might be supposed to have existed when the conveyances were executed (*Alan Wibberley Building Ltd v Insley*).²¹

26. In relation to any existing boundary feature a presumption will apply. A hedge will normally be planted on the land of the person who does the planting and likewise a fence, wall or building will be built on their land. Fence posts will be taken to indicate which property is likely to have erected the fence, the property on whose side the fence posts stand. The historic hedge and ditch rule still applies, and boundary features are erected up to the edge of the property. The presumptions are not irrebuttable.

²¹ [1999] 1 WLR 894

27. Other deeds may assist in construing the original conveyance but will not trump it unless it amounts to a boundary agreement or an estoppel. Abstracts of title may also prove useful. Contracts and particulars that were made before the conveyance may provide further valuable material.
28. Measurements are useful, but are not definitive (particularly when dealing with dimensions)²² on their own unless expressed to be in relation to fixed marks which remain in existence and include boundary lines. Most farmland is conveyed by reference to Ordnance Survey numbers for which you need to know the edition that was in use. The edition if unstated can sometimes be deduced from the plan if that is a copy of an Ordnance Survey plan or is based on such a plan.
29. A party on whose land a 'T' mark appears next to the boundary owns the boundary. An 'H' mark denotes a party boundary. 'T' marks and 'H' marks on the plans may prove determinative of matters.²³
30. With the Ordnance Survey plan it is important to remember the plans do not purport to fix legal boundaries between adjoining plots of land. They may contain features which reflect the legal boundary (e.g. ditches) but the plan will draw a line down the middle of the feature whether the boundary is in the middle or not. And being on a scale of 1:2500 the lines that are drawn may be out of true by +/- 2.3 metres. Again the Land Registry provides a standard

²² *Gillon v Baxter* [2003] EWCA Civ 1591 is a case where dimensions would have been considered sound, the CA was of the opinion that in relation to a farm, total acreages following a survey, if necessary, would have been good conveyancing practice.

²³ *Seeckts v Derwent* [2004] EWCA Civ 393, where 'T' marks were.

disclaimer in relation to the plans lodged with it (which are frequently ordnance survey plans or are ordnance survey based) that the plan is for identification purposes only and does not purport to fix the boundaries.

31. Nevertheless, if parties to a conveyance choose to use a map to mark their boundary then that is what they will be held to (*Fisher v Winch*)²⁴ although it may be difficult in practice to ascertain on the land what boundary the plan is demonstrating, hence the advisability in most cases of either producing a highly detailed plan to a larger scale²⁵ than the ordnance survey or treating the plan as being for “identification purposes only” and explicating matters in a proper and detailed description in the conveyance.
32. There are various maps that may assist in interpreting the conveyance and in particular the plan. Tithe maps, turnpike maps (for land adjoining the highway), enclosure maps (although resort to these will be rare) and the local authority plan will provide records of fixed features and topography that may either confirm a feature on a plan, explain a feature or demonstrate a feature is in error.
33. The Land Registry utilises maps based on Ordnance Survey, but the boundaries depicted are general boundaries unless they have been determined and are shown as having been determined under section 60 of the Land Registration Act 2002. Therefore, contrary perhaps to the ordinary litigant’s

²⁴ [1939] 1 KB 666

²⁵ Not as in *Gillon v Baxter* supra which utilised a conveyance stated to be “the land shown and edged with red on the plan”, a plan scaled down to 1:3,650 with thick red pen marking the boundaries.

expectation, the Land Registry plan will probably not provide a definitive answer.²⁶

34. If it will often be essential at trial that there should be a view of the disputed area, and it often is (though note, the Judge can go on a view of his own if he is willing and able to do so, so the opportunity may not arise at the trial itself for a collective view). A party may apply for inspection of the property before the commencement of proceedings.
35. The importance of a view before commencing any proceedings, or even writing a letter to the other side, cannot be understated as the trial Judge may go on a view and that view (though any opinion the Judge may form cannot be used to override the evidence given in court) may have a significant influence on his view of the evidence. As an alternative to a site visit a video or camcorder recording of the site can be used with the court's permission.
36. These days there is far more photographic material available or potentially in existence than in the past. The advent of mobile phone photography and the downloading of such images onto computers has increased the likelihood of both direct images ("Hi, Mum, here's a picture of the new house") and indirect images ("Hi, Mum, here's a picture of me and the baby" in the garden) being preserved by the parties and by third parties from whom they can be obtained.

There has also been an explosion in publishing photographic histories of cities,

²⁶ *Alan Wibberley Building Ltd v Insley* supra: "...the effect of the general boundaries rule is that the owner of a field shown on the filed plan only by reference to the Ordnance Survey map does not necessarily own it up to the middle line of the hedge. The precise boundary must, if the question arises, be established by topographical and other evidence."

towns and occasionally villages. These too can contain photographs of direct and an indirect nature.

37. In preparing a trial bundle, it has to be remembered that whilst the parties are familiar with the topography as they have been dealing with matters off and on for months and probably years, the Judge who has to try the case will not have been. Whilst the majority of Judges may pick matters up pretty quickly from their consultation of good quality copies of maps, plans, photographs and diagrams that have been included in the trial bundle, some will not and there will be occasions where the majority may struggle, the Court of Appeal are getting particularly upset in this regard.²⁷
38. It is advisable to agree with the other side at least one plan, map, diagram or photograph that sets out the location of all the relevant features. The evidential material can then be related to that plan or diagram and a key provided on the plan referring to the relevant document or photograph in the bundle.
39. In addition it is often useful to include a compass and essential to provide the scale. The clearer the Judge is on the topography before the evidence is called the swifter the evidence is likely to go as the Judge will not require a great deal to be explained. The saving of time will often lead to the saving of costs; likewise, loss of time will often lead to the incurring of costs.

²⁷ *Hunte v E Bottomley and Sons Ltd* [2007] EWCA Civ 1168

40. Frequently expert evidence will be used on both sides. An expert should start by providing a plan of the site as it is. Following that, the expert should be provided with details of conveyances, the history of the property and the relevant contentions being put forward. Following that, the expert should carry out the measurement of the property. Whilst the expert may draw inferences which he can support with reasons and can draw conclusions from the evidence that he has seen and which fall within his field of expertise, it is not his job or field of expertise to answer the questions that the Judge has to answer.
41. Witness evidence may provide corroboration of what appears elsewhere, evidence of how things on the ground were in fact different, explicate what the substance of a word in the conveyance may amount to (e.g. “garden”; what constituted the garden at the time of the conveyance in issue may be proved by the grandson of the vendor who was used to playing in the garden) or provide evidence to support adverse possession or proprietary estoppel.
42. In addition, in the context of a conveyance where the information in the conveyance is unclear or ambiguous it is permissible to have regard to the subsequent conduct of the parties in assisting the determination of what they intended (*Ali v Lane*).²⁸ When drafting the statement, try to use the words the witness themselves would use, identify any hearsay and identify any source for the hearsay.

²⁸ [2006] EWCA Civ 1532; *Haycocks v Neville* [2007] EWCA 78

43. Amongst other matters that of course can mess up the best laid plans of campaign based on conveyances, plans, maps, photographs and surveys is a defence of adverse possession or proprietary estoppel or an oral boundary agreement (which may or may not give rise to a constructive trust). A boundary agreement which identifies a boundary rather than conveying the land is not required to be in writing so that section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 does not apply (*Joyce v Rigolli*).²⁹
44. It will only be an agreement that constitutes the resolution of a dispute that is binding and not a concession by one owner to the other in circumstances where the owner making the concession has not disputed anything (*Joyce supra*). An oral agreement will be accepted where proved even if it did involve the exchange of some land, as long as what changed hands was minimal (the policy of the 1989 Act was not to prevent such settlements where an exchange of land was incidental to agreement; in many situations such an exchange of land will be de minimis for legal purposes in any event).³⁰

²⁹ [2004] EWCA 79; *Haycocks v Neville supra*

Joyce v Rigolli affirmed *Neilson v Poole* generally including Megarry J's view that there was a rebuttable presumption that where there was an informal boundary agreement then the parties were making a "demarcation" agreement not an "exchange for land" agreement.

Joyce v Rigolli added its own rebuttable presumption that any transfer of land effected by a boundary agreement of the demarcating kind is trivial for this purpose.

³⁰ *Joyce v Rigolli supra* upheld the policy adumbrated by Megarry J in *Neilson v Poole supra*: "I must, too, bear in mind that a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in the law."

How does *Joyce v Rigolli* square in its treatment of s.2(1) Law of Property (Misc. Prov.) Act 1989 with *Tootal Clothing Ltd v Guinea Properties Management Ltd* [1992] 2 EGLR 80 where Scott LJ held that s.2 was limited to executory rather than executed contracts, so that you could have an oral land contract. Once the contract is completed and acted upon it becomes irrelevant that it did not comply with s.2(1).

Conveyancers beware!

45. Too many boundary disputes are given legs because the conveyances relating to the properties in issue, or at least in relation to one of them, are too imprecise or ambiguous or inaccurate to allow the conveyances to be immediately decisive of matters. It is also the case that ill-worded or ill-defined conveyances can give rise to the boundary dispute in the first place.

Broadsides have been fired by the Court of Appeal, as long ago as 1981:

...but I hope that this judgment will be understood by every conveyancing solicitor in the land as giving them warning, loud and clear, that a conveyancing technique which may have been effective in the old days to convey large property from one vendor to one purchaser will lead to nothing but trouble, disputes and expensive litigation if applied to the sale to separate purchasers of a single house and its curtilage divided into separate parts. For such purposes it is absolutely essential that each parcel conveyed shall be described in the conveyance or transfer deed with such particularity and precision that there is no room for doubt about the boundaries of each, and for such purposes if a plan is intended to control the description, an Ordnance map on a scale of 1:2500 is worse than useless. The plan or other drawing bound up with the deed must be on such a large scale that it is clearly shown with precision where each boundary runs. In my view the parties to this appeal are the victims of sloppy conveyancing for which the professional advisers of the vendors and purchasers appear to bear responsibility. We are not concerned in this appeal with determining or apportioning that responsibility. This court has to try to reduce to order the confusion created by the conveyancers.

Cumming-Bruce LJ³¹

The trial Judge in *Joyce v Rigolli* held: "I find that the boundary was agreed, and that the agreement having been acted on is binding on both claimant and defendant." Estoppel or contract? If estoppel, s.2(1) has no application in any event.

46. And just to show that the matter has not been forgotten by those who sit in judgment:

In this case, the judge was rightly critical of what he also termed “sloppy conveyancing”. I agree with this comment that this case illustrates the time and trouble which can be caused by sloppy conveyancing... Boundary disputes are costly in terms of the money, court resources, and the strain they impose on the parties individually and in their relations as neighbours. It is in the interests of consumers of legal services and the public generally that conveyancers should take careful note of the warnings about imprecise boundaries given and now repeated by this court in several cases.

Lady Justice Arden³²

47. Part of the role of the solicitor is to safeguard the client from claims (even where those claims may arise from the client’s own irascible nature).³³ Naturally, a solicitor cannot be expected to anticipate every possible circumstance that could arise, the character of every neighbour that may be encountered or the changes in landscaping or use of a property over the years, but it is possible to anticipate some of them e.g. that any given neighbour may dispute where the client is putting the new fence.

³¹ *Scarfe v Adams* [1981] 1 All ER 843

³² *Joyce v Rigolli* [2004] EWCA Civ 79, para [23]

³³ *Gillon v Baxter* supra, para 5: “The dispute would never have arisen if the 1985 transfer had contained an accurate description of the land intended to be transferred.”

48. It is not too difficult to aim for defined boundaries utilising fixed features as markers and fixed measurements from fixed features.³⁴ If the features change over time this is more likely to be the subject of record given the frequency with which people use various types of camera.
49. It would be sensible to encourage a householder if they are changing a feature that is on their property to record that fact and choose another feature to measure from. The feature may not be part of the property e.g. it is the neighbour's tree at the southwest corner of the property but standing in a position where if the client's boundary fence were to be continued the tree would be on the client's side of the boundary. In that situation, a photograph incorporating the new ground (if the neighbour will let the client take the photo from their side so much the better) could be taken.
50. If the house itself is used as the fixed point then alterations that might affect measurements can be evidentially provided for: the conveyance includes a plan in which the footprint of the house at the time of the conveyance is included. Care may have to be taken with measurements from the house so as to make clear whether a specific architectural feature, the bay of a bay window, is being used as the fixed point or the flat of the wall.
51. In general, it seems a sensible practice in an age of digital cameras that incorporate the date and CD's and computers onto which photographs can be recorded in addition to encourage the client when they acquire the property (if

³⁴ *Seeckts v Derwent* [2004] EWCA 393, para [26]: "...it is difficult to see any fundamental objection to using such fixed features as reference points in the absence of other more suitable features."

not before) to take pictures of the boundaries as they then appear and keep them with the conveyancing documents. If anything changes, particularly a major alteration such as grubbing up a hedge and replacing it with a fence, it would be useful if they made a formal attestation of that event to be kept with the conveyance for the future benefit primarily of anyone they may sell to, though it may be useful for themselves as well.

Epilogue

This is an extremely unfortunate dispute between neighbours over a trivial area of land. It has led to a very substantial expenditure of costs. Its' only practical importance is that, if the appellants are correct, the respondent is unable to build an extension, for which she has planning permission, quite in accordance with the presently approved plans... There were no sensible discussions between the parties before the litigation began and the significance of that will need to be considered in more detail when the issue of costs is determined.

Pill LJ³⁵

We did not accept these bold submissions, made even bolder by the fact that they were made in this case upon which everyone concerned has already spent a disproportionate amount of time and money. Judicial time is also something which has to be taken into account. Almost every day of the week divisions of this court take a course such as we have in the interest of saving expense and dealing with cases proportionately and expeditiously. This is a condign case for such treatment. If

³⁵ *Kupfer v Dunne* [2003] EWCA Civ 1549, para [3]: Clarke and Rix LJJ in agreement. Clarke LJ is now Lord Clarke MR.

an appellant has to succeed on two grounds in order to upset the order under appeal he takes the risk that this court will uphold the decision on one of those grounds and decline to consider the other. That is what the CPR permits and encourages.

Tuckey LJ³⁶

- (1) Make clear to the client that the law on boundaries may be as clear as possible, but it is the law's application to the facts and the variety of evidence that different parties may rely on that causes the problems, particularly where, as often it will be, there is an irrational attachment to a scrap of land.
- (2) Make clients aware of the potentially catastrophic consequences of litigation of this kind.
- (3) Make clients aware of the genuine possibility of resolution through mediation or ADR and the court's expectation that it will be genuinely considered/explored and the possible costs consequences of not doing so.
- (4) Make the clients aware of the blight that can occur to properties that are the subject of a boundary dispute.
- (5) Make clients aware of the possible misery and stress of such a dispute.

³⁶ *Palfrey v Wilson* [2007] EWCA Civ 94: Lady Justice Arden and Lawrence Collins LJ in agreement

- (6) Get clients to reflect on whether the enjoyment of the land is affected by the land in dispute. Even though subjectively they will often have spoiled it for themselves by an irrational attachment to the disputed land, objectively it still may be land that makes no difference and they should try viewing it from that perspective.
- (7) Get clients to reflect on the value of the land in dispute and whether possession of it or lack of possession of it makes any difference to the value of the land retained.
- (8) Get clients to reflect on whether the money that they would spend fighting a case might be of more use and enjoyment spent by them on something else.
- (9) Try to get them to set aside emotion and approach matters as if they were a juror assessing matters for a verdict.
- (10) Do not let the litigation get you down!³⁷

15th January 2008

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³⁷ In the unreported case of *Richardson v Macnab*, 20th April 1999, the boundary area in dispute was never more than 2 ½ feet wide and in some places less; the dispute apparently engendered “in the outside observer feelings bordering on despair.”, an aspect with which the court in *Haycocks v Neville* supra concurred (para. 28).