

**“ALL THESE FENCES AND THEIR WHOLE ARRAY”**

**A GUIDE TO PREPARATION FOR BOUNDARY DISPUTES**

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## THE CLIENT'S MISCONCEPTIONS

The typical boundary dispute client arrives at his or her solicitors' offices confident of his rights and certain that his neighbour has taken or is planning to take land which is clearly his.

There will often be an assertion along the lines of "I've looked at my deeds and these show clearly where the boundary is". This can be coupled with the information that the client has been out and measured the position so that he or she can say to the last inch or centimetre where the boundary is.

The first task of the solicitor is to explain that the position is nowhere near as simple as the client thinks. He must point out that the "deeds" might not be a reliable guide. He must explain that the document headed H.M. Land Registry is probably not be conclusive as to whether the boundary between numbers 10 and 12 Acacia Avenue is 6" or 1' to the west of the client's garage wall. By so doing the solicitor is likely to destroy the client's faith in lawyers, probably in the legal system as a whole, and possibly even in the monarchy but the deed must be done.

Having explained that the dispute will not be resolved by a simple matter of measurements from the client's deeds the solicitor needs to give a warning in strong terms of the frustrations, costs, and uncertainties involved in litigation about boundaries. The client may well not take this on board but it can be the foundation for compromise at a later stage.

## **THE OBJECTIVE OF THE PREPARATION**

The objective of the preparation in almost all boundary dispute cases must be to win a factual victory.

The particular case is highly unlikely to depend on recondite arguments of Land Law nor in all but the most exceptional cases will it really be a matter of abstract interpretation of the conveyancing documents. The aim should be to show that the area in dispute has been incorporated in and used with the client's property in the past preferably since the time when it and the opponent's property were divided from common ownership or at least for more than twelve years before October 2003.

At all times attention must be focussed on this objective. The quest is to find evidence and/or arguments which will convince the judge that the disputed area has always been part of Whiteacre, Rose Cottage or 10 Acacia Avenue as the case might be.

## **THE FACTORS RELEVANT TO THE COURT'S CONSIDERATION**

Coupled with attention to the objective of the preparation there must be an awareness of the matters which will and those which will not influence the court.

### **Earlier Deeds and Plans**

These will very often be regarded as sacrosanct and conclusive by the client but in practice they will not be seen as either by the court. They will often (but not always) be helpful starting points but only rarely will they be conclusive as to the final outcome. The paperwork and conveyancing history must be considered at an early stage but more in hope than expectation of assistance.

A number of factors will operate to prevent the court and the parties from being able to rely on the deeds or plans.

- a) Transfers and plans dating from a time after the original division from common ownership will be of limited value. If the boundary of Whiteacre is the line A – B then a transfer by the owner of Whiteacre purporting to give as part of Whiteacre land beyond that line and forming part of Blackacre is of no effect (unless the transferor also owns Blackacre). Similarly even if Whiteacre and Blackacre were originally in common ownership a transfer by that owner of Whiteacre cannot affect Blackacre unless it still remains in common ownership. The search must always be for the first transfer out of common ownership.
- b) In the majority of cases plans annexed to conveyances or transfers will be described as being “*for the purpose of identification only*”. This will beg the question of the precise boundaries of the property being identified.
- c) Hopes can rise where the conveyance seems to say that the plan is to govern using words such as “*more particularly delineated in the plan annexed hereto*” or “*described in the plan annexed hereto*”. Such hopes are almost always dashed. There will be an absence of fixed points

relating to the current features on the ground or the scale will be such that it cannot assist in the particular dispute about a strip 6" wide. Perhaps most cruelly of all there could be the mocking phrase "*for the purposes of identification only more particularly delineated on the plan annexed hereto*".

- d) Even where the deeds or plans seem to indicate a clear boundary referable to physical features which still exist the court will tend to follow the evidence of long-standing actual use and occupation in preference to the documents. The view will be taken that the boundary on the deeds was overtaken by an agreement of the **Penn v Baltimore** (1750) 1 Ves Sen 444 or **Neilson v Poole** (1969) 20 P & CR 909 kind or that there has been long-standing adverse possession.

Nonetheless some assistance can be derived from earlier deeds or the plans attached to them. They should be considered with a view to information as to:

- i) the angle or route of the boundary: the plan is unlikely to be conclusive as to the position of the boundary but it will be potent evidence as to its shape. If the plans show a straight boundary running north-west then explanation is called for from a party who says that it runs in a curved line north-eastwards.
- ii) The deeds or plans might contain reference to fixed features which are still present on the ground (or whose position can be discovered).
- iii) The way in which the property is described can sometimes be an indication of the type of property and the general area being transferred.
- iv) Repairing or erection obligations relating to fences or walls or descriptions of the same as party structures. Unfortunately in practice the wording of the deed as to who is to erect or maintain a wall or fence is of limited help in deciding whether it was put in the right place.

### **The Land Certificate and Filed Plan**

The Client frequently regards these official documents as conclusive in his favour (never, of course, as conclusive against him) but they will rarely assist the court in determining the position of a disputed boundary.

- a) Unless the procedure for obtaining a fixed boundary has been used (done on only 9 occasions between 1937 and 1972) the filed plan indicates a “*general boundary*” which “*does not determine the exact line of the boundary*” (Section 60 of the Land Registration Act 2002). The former Land Registration Rules made the point more starkly (at Rule 278) helpfully stating that “*in such cases the exact line of the boundary will be left undetermined – as, for example, whether it includes a hedge or wall and ditch, or runs along the centre of a wall or fence or its inner or outer face or how far it runs within or beyond it ...*”.
- b) The scale of the filed plan is invariably such that scaling up from it does not assist in determining a dispute about a narrow strip on the ground.

### **Ordnance Survey Maps**

The O.S. practice is to show as the boundary between different properties or plots the centre of the feature physically dividing them. So OS maps provide no assistance at all on the typical question of whether the boundary is on one or other side of a wall, fence or hedge.

However, OS maps can assist in showing the features which were present on the land at a particular time and the line which they took. This can be of real benefit when it is of relevance to know the position in relation to current features of buildings, walls, fences or hedges which existed formerly but which are no longer present.

In addition OS maps (with the consequent effect of the boundary being the centre of a particular feature) can be determinative of the boundary if property was conveyed by reference to areas defined on a particular OS map. This depends on the conveyance by reference to the OS map having been made by the original transferor out of joint ownership and subsequent use of that method will not alter the normal approach (see **Fisher v Winch** [1939] 2 KB 144 and **Alan Wibberley Building v Insley** [1999] 1 WLR 894).

## Presumptions

It is easy to believe that boundary disputes will turn on the application of rarefied presumptions deriving from mediaeval land law and involving concepts such as “freeboard” and “deerleap”. In practice the general presumptions have only very limited relevance to modern urban/suburban boundary disputes and even in the context of rural properties their application is limited.

### A. The Hedge and Ditch Rule

Perhaps the best known boundary presumption. Shortly put the rule provides that where land was not in common ownership at the time of construction of the hedge and ditch then the boundary is taken to have been the outer edge of the ditch.

The rule only applies if the hedge and ditch can be shown to have been artificial and constructed at a time when the land on either side was not in common ownership. It does not apply to a hedge between ditches nor to hedges or ditches standing alone nor to a ditch between hedges or banks.

In considering the rôle of hedges as boundary markers care must be taken to avoid two common mistakes namely:

- a) to regard one or other face of a hedge as being a boundary – given that hedges grow this can almost never be the true boundary line. Where a hedge is a boundary marker the actual boundary line will run either through the middle of the line of the growers (the trunks of the bushes forming the hedge) or along one or other side of that line. As the trunks themselves expand outwards over time it would seem illogical to say that the boundary can be one or other face of the line of growers. However, that particular illogicality has been sanctioned by the House of Lords (see **Collis v Amplett** [1920] AC 271).
- b) To regard the cutting of one or other side of a hedge as evidence of adverse possession – although a matter of fact in each case it will be rare that the mere cutting of a hedge can give rise to a claim based on adverse possession.

## B. The Presumption as to Fencing.

The presumption here is that the posts and rails were erected on the land of the person erecting the fence so that the boundary is the outer face of the palings/boards. This is of more relevance in urban/suburban disputes but again depends for its effect on the land being in separate ownership at the time of erection of the fence. Of course, even when land was not in separate ownership when a fence was erected the line of an old fence and information as to which was its outer face can be of assistance when deciding what boundary was intended when the property was divided from common ownership.

## **Usage and Occupation of the Land.**

This is the ultimate key in the vast majority of boundary disputes.

On being persuaded that the disputed land has been used and occupied with one or other of the properties over the years the court will strive to find for the party whose property has enjoyed the land. This will be done by means of interpretation of the deeds or finding that there was a Penn v Baltimore agreement or by a finding of adverse possession.

We return accordingly to the objective of the preparation which is relating that past usage and occupation to the features on the ground so as to show that the disputed land has historically been regarded as part of our client's land.

## **STEPS IN THE PREPARATION OF THE CLAIM OR DEFENCE**

### **A Site Visit**

This is an essential step which should be taken at as early a stage as possible.

On the site visit the opportunity should be taken to:

- a) see the area which is actually in dispute.
- b) consider the client's real objectives – why is the strip so important to him ? why does his neighbour want it ? What are their intentions or plans for future use of the land ?
- c) look for features on the ground indicative of past usage or of potential boundary lines: lines of trees, hedges, the remnants of former fences, brickwork of differing types, old outhouses or other structures.
- d) impress upon the client the objective at any hearing (namely showing factual use and occupation of the land over time) and the kind of evidence which will be needed.

### **Photographs of the Current Situation on the Ground**

At an early stage (the site visit is a good opportunity) photographs should be taken showing the general lie of the land and the area in dispute. These will operate as an aide memoire for those conducting the case and as a reference point when obtaining lay evidence.

### **The Gathering of Lay Evidence**

The evidence to be obtained should be:

- a) directed to the questions of usage and occupation over the years
- b) related as precisely as possible to existing features on the ground
- c) if possible related to pre-dispute photographs – these can be significant evidence of usage and can throw unexpected light on the physical features in relation to the boundary. Asking for such photographs should be a matter of course
- d) as precise as possible. A simple assertion that a particular witness believes that the boundary was in a particular position at a particular time is of little value unless he or she can explain why they are able to recall

this and the reasoning behind their view. The evidence should explain their belief in the context of the events which led them to have that belief.

Who are to be the witnesses?

It is inevitable that the witnesses with the best knowledge of the use and occupation of the land over the years will be the friends and family members of the client. Such evidence cannot be disregarded (and these witnesses may well be the source of useful photographic support) but it is doubly important for these witnesses to provide detailed information and not bare assertion.

Attempts should be made to obtain assistance from former occupiers or their employees and occupiers of adjoining properties.

Statutory declarations made in the past can be of assistance but in practice are unlikely to have been directed to the matters currently in issue.

### **Surveying Evidence**

Surveying evidence can have real benefits but can also be an expensive distraction.

It is vital that any surveyor instructed is briefed in clear (and firm) terms as to his rôle which is:

- a) to provide a large scale plan showing the physical condition of the land as it currently is and plotting the existing features and the parties' competing contentions. The plan should be accompanied by photographs if these have not been obtained earlier. This plan with photographs will be a tool for the parties and for the court.
- b) Extrapolating from features currently on the ground to form an opinion of the physical boundaries which existed formerly.

In a few cases it will be appropriate for the surveyor to seek to extrapolate from the deeds or plans but this will only be so where the deeds or plans show features which can still be identified on the ground.

There is a widespread temptation for surveyors to seek to come to conclusions based on scaling up from deeds plans. This needs to be guarded against. It is almost invariably an expensive waste of time and energy. It appeals to surveyors because it enables an exercise of their skills and seems to provide a definitive answer to the dispute. It runs the danger of reinforcing the client in his initial (but mistaken) belief that the answer lies in simply measuring up from his documents.

### **Aerial Photography Evidence**

This is readily available and is potentially useful evidence showing:

- features formerly existing on the ground
- the usage and occupation of the land in the past
- the routes formerly taken by the boundaries.

It can provide confirmation of the anecdotal evidence from friends, relatives, or former occupiers.

Expert evidence can be obtained interpreting the photographs but caution should be exercised in applying such evidence. These experts can explain what a particular feature shown on a photograph is likely to have been and can interpret the images shown on an aerial photograph. However, it will then be a matter of deciding what inferences can be drawn from the presence of such a feature or object. Again it is necessary to guard against the temptation of surveyors to say that this enables them to determine where the legal boundary was.

### **The Involvement of Counsel**

This is clearly desirable at an early stage!

Once the decision to involve counsel has been taken there should be a conference on site.

### **Mediation or Round Table Meetings**

These can be surprisingly effective.

There is much to be said for holding them on site though this can be less practicable in the case of mediations.