

THE INVISIBLE THREAD: *boundaries law and practice*

***Presented at
The Property Litigation Association Annual Conference
at Keble College, Oxford on Friday, 22 March 2019***

by

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Kerry is “*highly rated*” by the Legal 500 2019 for her work in Agriculture and Property Litigation. With substantial experience in the Supreme Court and Court of Appeal, Kerry is known for her appellant work and has been described as “*ferociously tenacious, she has incredible judgement and is willing to take on difficult cases and battle on where others would give up*” (Chambers & Partners). Kerry has an interest in property law cases with a public law element as well as more mainstream property work.

Her cases include: *McDonald v McDonald* [2016] UKSC 28; [2016] 3 W.L.R. 45 (mortgage possession); *Haile v Waltham Forest LBC* [(UKSC) 2015] A.C. 1471 (Housing Act 1996); *MacLeod & Others v Gold Harp Properties Ltd & Others* [2014] EWCA Civ 1084; [2015] 1 W.L.R. 1249 (land registration); *London & Quadrant Housing Trust v Prestige Properties Ltd* [2013] EWCA Civ 130 (forfeiture and costs against shadow directors); *Places for People Homes Ltd v Sharples* [2012] Ch. 382) (insolvency and possession); *Mexfield Housing Co-operative v Berrisford* [2011] UKSC 52; [2012] 1 A.C. 955 (certainty of term). *Camelot Garden Management Ltd v Khoo* [2018] EWHC 2296 (QB) (Property Guardians); *West London Commercial Properties Ltd v Trade Sale Ltd* Chancery Division, 11 May 2018: [2018] EWHC 1131 (Ch) (VAT in property transactions)

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Introduction

1. This talk will focus upon the practical elements of boundary disputes. I propose to use a case study to provide some examples of the issues which can arise and the way to deal with them. These notes are background to the talk, designed to complement it. They are not a written version of the talk. So if you are frantically turning the pages trying to find where I am reading from please stop! I have left spaces for any further notes you wish to take.

The first rule of boundary disputes

2. Boundary disputes are expensive. They are very expensive. In addition to the actual cost, there are also the less easily ascertainable costs: the dispute is very likely to impact on the value of the property and upon the prospects of sale and this is without calculating the personal cost; such disputes can become obsessions.
3. The opening advice to clients about to launch litigation (or to provoke it) is to think again. Once launched the litigation is likely to have a life of its own-is it really worth it? Can the client afford it? Assuming that these questions are answered in the affirmative it is important to be aware of the approach of the Courts to such cases. In *Waterman v Boyle* [2009] EWCA Civ 115; [2009] EGLR 7 Arden LJ gave a warning to those who litigate in this area:

“39 I would add this. 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, and without regard for his neighbours. In this case, Mr Boyle and Ms Gwilt, in an effort to stop parking on the northern drive, had even engaged a clamping firm and put up warning notices about the risk of clamping (which never in fact occurred). In related proceedings brought by the Watermans against their solicitors, in which Mr Boyle gave evidence, HHJ Dean QC had described such a step between close neighbours as verging “on the edge of rationality”.

40 While it is often true that a person can do what he wants on his own land, it is not always so. The law expects neighbours to show some give and take towards each other. The parties to this litigation should keep that point in mind for the future and now draw a line under the past. Parties to other boundary disputes and their advisers should also, at all times, have this point firmly at the forefront of their minds, and seek to resolve their disputes accordingly, and without resort to complex and expensive litigation.”

4. In *Cameron v Boggiano* [2012] EWCA Civ 157 Mummery J warned:

“5 Suing and being sued by neighbours is a stressful and unpleasant experience. Bad feelings all round do not finish with the final judgment. The lawsuit could have unwanted long-term consequences that a sensible compromise might have avoided. One side “wins” at trial, and/or on appeal, but, in the long run, both sides lose if, for instance, litigation blight has damaged the prospects of selling up and moving elsewhere.

6 ...The court's rulings may be unwelcome to both sides. That is the case here. Both sides appeal against different parts of the judgment of the trial judge, HHJ Hazel Marshall QC.

7 The court would be failing in its duty if it did not draw on the extensive experience, which it has acquired impartially, to warn others that the only certainty in this kind of case is that the financial outlay is almost always more than the disputed property is worth. Financial factors do not seem to count for much when the parties are protecting what they believe belongs to them. The territorial imperative is the driver in boundary litigation. If the court's warnings are ignored, there will one day be a final reckoning of the total expenditure and immeasurable human misery, and the hoary maxim “he that goes to law holds a wolf by the ears” will strike a chord.”

5. At the very least, if the client is determined to proceed it is sensible to ensure that the client can demonstrate efforts to resolve the matter in pre-action correspondence and, at least, to consider ADR at the earliest stage. Once the parties have incurred substantial costs there is a real danger that the litigation can take on a life of its own and that those costs become the real bar to settlement.

What preliminary steps can be taken to ensure that the risks of litigation are reduced (as far as possible) prior to proceedings?

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The conveyance and plans

6. The starting point is the description of the parcels in the conveyance. The objective, in common with construction of all contracts, is to ascertain the meaning of the parties to the transaction, see the well-known principles of construction set out in the famous speech of Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL(E) at 912 to 913 and those cases which followed are now to be read in light of the decision of the Supreme Court in *Arnold v Brittan* [2015] UKSC 36; [2015] A.C. 1519, per Lord Neuberger, PSC at paragraphs 15 to 22.
7. If it is clear what the parties intended to convey then it does not matter if part of the description was incorrect. However, if there is a conveyance in general terms followed by a specific restriction then the latter description or plan restricts the general description.
8. Where parcels are described by reference to the plan the inference is that the plan would enable the person reading the conveyance to see what land has passed. Where the plan is described as “*for identification purposes only*” the description of the parcel will prevail *Hopgood v Brown* [1955] 1 WLR 213; *Neilson v Poole* (1969) 20 P&CR 909. However, if the plan is described as “*more particularly described on the plan*” then the plan will prevail, see *Eastwood v Ashton* [1915] AC 900.
9. Land Registry plans will not show where the boundary is, see the general boundaries rule, which is now incorporated into s60 of the Land Registration Act 2002. It provides that

“(1) *The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as determined under this section.*
(2) *A general boundary does not determine the exact line of the boundary.*”

Admissible evidence

10. In the talk I will focus upon the types of issues that arise in relation to evidence. But, the starting point is a reminder of the principles which apply in concluding

what evidence is admissible.

Topographical features

11. Lord Hoffman in *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894, at 896, confirmed that topographical features present at the time the conveyance was executed can be relied upon as admissible and relevant evidence. Mummery LJ in *Pennock v Hodgson* [2010] EWCA Civ 873 said at para 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. The rejection of extrinsic evidence which contradicts the clear terms of a conveyance is consistent with this approach: Partridge v. Lawrence [2003] EWCA Civ 1121; [2004] 1 P. & C.R. 176 at 187; cf Beale v. Harvey [2003] EWCA Civ 1883; [2004] 2P. & C.R. 318 where the court related the conveyance plan to the features on the ground and concluded that, on the facts of that case, the dominant description of the boundary of the property conveyed was red edging in a single straight line on the plan; and Horn v. Phillips [2003] EWCA Civ 1877 at paragraphs 9 to 13 where extrinsic evidence was not admissible to contradict the transfer with an annexed plan, which clearly showed the boundary as a straight line and even contained a precise measurement of distance. Neilson v. Poole (1969) 20 P. & C.R 909 ; Wigginton & Milner v. Winster Engineering Ltd [1978] 1WLR 1462 ; Scarfe v. Adams [1981] 1 All ER 843 ; Woolls v. Powling [1999] All ER (D) 125 ; Chadwick v. Abbotswood Properties [2004] All ER (D) 213 and Ali v. Lane [2006] EWCA Civ 1532 were also cited on the construction points.”

The Watchman principle

12. The relevance of subsequent conduct is more difficult. It may be admissible, see *Scarfe v Adams* [1981] 1 All ER 843 and *Ali v Lane* [2006] EWCA Civ 15332 at paragraphs 21-38 per Carnwath L.J. (as he then was) who considered that *Watchman v A-G of East Africa Protectorate* [1919] AC 533 remained good law, at paragraph 36, and see also Lloyd L.J. at paragraphs 30-38 in *Piper v Wakeford* [2008] EWCA Civ 1378 in which he emphasised that the principle applied to the intention of the original owners and *Norman v Sparling* [2014] EWCA Civ 1152 per Elias L.J. at paragraphs 18-24. Subsequent conduct may assist in demonstrating the intention of the parties, see *Boundaries and Easements* Colin Sara 6th Edition Sweet & Maxwell at 2-006.

(1) The hedge and ditch rule

15. Everyone is aware of this presumption, which is one of the most common to arise in boundary cases. It applies when properties are divided by a hedge or bank and an artificial ditch. The boundary is presumed to run along the edge of the ditch furthest from the hedge or bank. This is based on the principle that an owner, standing on his boundary looking inward, dug his drainage ditch within his boundary, threw up the soil on his home side, and then planted a hedge on the mound. This presumption only applies to man-made ditches and does not apply if it can be shown that the ditch is natural or if it can be established that the boundary feature was made while the lands on both sides were in common ownership (Land Registry guidance).

(2) Ownership of fences

16. Where a fence is built on the boundary it can be argued that there is a presumption that the fence itself is owned by the landowner on whose side of the paling the fence post stands, *Hawkes v Howe* [2002] EWCA Civ 1136 at paragraphs 30 to 46. This is because it is assumed that the landowner will foot the post on his own land and then attach the paling on the far side to have maximum use of his own land (*Boundaries and Easements* by Colin Sara 2-021). Equally it can be assumed that a person who plants a hedge does so on his own land.

17. The HM Land Registry guidance notes:

“There are various notions that the way a wall or fence is constructed indicates ownership, for example that the posts and rails of a fence are on the owner’s side. There is, however, no legal foundation for such beliefs. Deeds may contain covenants to maintain a wall or fence but on their own, such covenants do not confer ownership. Where the ownership or responsibility for maintenance of a boundary cannot be determined, that boundary feature is generally best regarded as a party boundary. Any alterations or replacement of the boundary should only be done with the agreement of the adjoining owners.”

(3) H and T marks

18. Common devices used to indicate ownership are T marks and H marks on plans. T marks drawn on plans will indicate individual ownership. H marks (a double T) will indicate joint ownership.

(4) Projections

19. There is a presumption that on the conveyance or transfer of a property the entirety of the property passes (including projecting eaves, rainwater goods etc but not anything which overhangs that boundary line, *Truckell v Stock* [1957] 1 W.L.R. 161, nor the air space between them), unless there is evidence to the contrary.

(5) Roads

20. Where land abuts a public highway there is a presumption that the owner owns land to the centre of that highway. This is subject to the rights of the highways authority who will usually have adopted the surface. Ordnance Survey maps and the index maps held at the Land Registry tend to show boundaries to the road. This does not override the legal presumption of ownership.

21. The position is different where the road has a fence or hedge on both sides in which case the presumption is that that barrier marks the boundary. But, this is only the position if it can be shown that the fences or hedges were erected to separate the adjoining land from the road.

(6) Non-tidal rivers and streams

22. Where properties are separated by a natural non-tidal river or a stream, the presumption is that the boundary follows the centre line of the water (*ad medium filum aquae*) so that each owner has half of the bed. If the course of the stream changes gradually over time the boundary will change providing that the change is natural. But the boundary will not change if the stream moves as a result of human intervention or rapid permanent changes in the course of the stream.

(7) Foreshore and tidal rivers

23. If there is no evidence to the contrary foreshore is owned by the Crown. Further, the boundary of land adjoining the sea lies at the top of the foreshore (the land lying between the high and low water-marks of a mean average tide between spring and neap tides).

26. The duties of the expert were considered by Cresswell J. in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1993] 2 Lloyd's Rep. 68 which is cited with approval by the learned authors of the White Book 2018 at paragraph 35.3.3. His Lordship said (at paragraphs 81–82) that they included the following:

- (1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 W.L.R. 246, HL, at 256, per Lord Wilberforce).
- (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise (see *Pollivitte Ltd v Commercial Union Assurance Company Plc* [1987] 1 Lloyd's Rep. 379 at 386, per Garland J., and *Re J* (1990) F.C.R. 193, per Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
- (3) An expert witness should state the facts or assumption on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion (*Re J.*, above).
- (4) An expert witness should make it clear when a particular question or issue falls outside their expertise.
- (5) If an expert's opinion is not properly researched because they consider that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one (*Re J.*, above). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report (*Derby & Co Ltd v Weldon (No.9)*, *The Times*, November 9, 1990, CA, per Staughton L.J.
- (6) If, after exchange of reports, an expert witness changes their view on the material having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court.
- (7) Where expert evidence refers to photographs, plans, calculations, analyses, measurements survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

