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LEGAL HANDBOOKS

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Boundary Disputes

Practice and Precedents

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SECOND EDITION

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Foreword

I hate boundary disputes. I well remember my maiden appearance in the Court of Appeal, during my first year at the Bar. I was appearing for the appellant in a boundary dispute. I will never forget the traumatising mauling I received at the hands of three ferocious Chancery Lord Justices. I remember that my opponent was not called on, but why I lost this hum-dinging certain winner is now blanked from my memory. But then I did not have William Hanbury's excellent guide to show me where I went wrong.

Perhaps I suffer permanent post-traumatic shock, but when my turn came to preside in the Court of Appeal, I hated boundary disputes with renewed passion. Behaving very badly, I once told the owners of posh Surrey suburban estates that they must be 'completely potty' to have spent £150,000 each arguing about a few inches when their boundary ran through a 30 foot thicket of rhododendron bushes into which no one ever entered. Is this sort of battle really worth the money and the emotional energy? That is often the difficulty with boundary disputes. We are all hardwired to believe an Englishman's home is his castle, and when the castle is under attack we defend and counter-attack with our very lives. All too often the emotions choke logic and a sense of proportion is lost. These parties and their advisers will benefit hugely from this handbook.

The court, however impatient, must always be vigilant to ensure that one party is not ruthlessly bullying his neighbour into submission. All parties and their advisers, and the court for that matter, need to know the law. As the author correctly points out, this requires 'careful analysis in order to get the answer right."

That is where this handbook is invaluable. Here you will be instructed to consider the importance of the parcels clause and plan to any conveyance or transfer, and when and how to have regard to the conveyancing background as well as the physical evidence on site. You will discover the 'strange concept in English law' of extinction of title, and you will be given help on the procedure for rejecting squatters in urgent cases. There are useful chapters on party structures and practical advice on establishing the boundary in particular cases. If you need to know it, you can also learn how to establish ownership of the sub-soil including mineral rights. Importantly for the practitioner, you will be given invaluable advice on the remedies available from injunctions to damages and advice generally on how to go about resolving your boundary dispute – with

some reminders about the importance of engaging in mediation wherever possible. If I have any difference with the author it is that I, unashamedly wearing my hat as chairman of the Civil Mediation Council, would promote mediation a little more enthusiastically.

Boundary Disputes is written clearly and concisely; it is comprehensive and instructive and it contains everything one needs to know to plot a safe course through what is sometimes arcane territory. With its appendices of statutory material and precedents it very amply justifies the author's intention to serve 'as a practical guide rather than as an authoritative analysis of the law'. It fully deserves to find its place on the bookshelves of all practitioners' libraries. I commend it unreservedly.

The Right Honourable Sir Alan Ward
February 2017

Preface

Although protracted litigation about minor incursions over the boundary line of a particular property is now rare, and certainly rarer than when the first edition of this work was published in 2003, the complexity of the law has, if anything, increased.

The decline in the number of such disputes reaching court, particularly the county court, may be attributed in part to the increased use of alternative dispute resolution (ADR) and the continuing funding squeeze; but another significant factor is that an increasing number of such disputes are resolved either directly by the Land Registry or, more commonly, by the Adjudicator. The Adjudicator's Office was established under the Land Registration Act (LRA) 2002 and – since 2013 – given the catchy title 'Judge of the First-tier Property Chamber, Land Registration Division'!

At the time of the first edition of this book, the Land Registration Rules (LRR) 2003 had not yet been published and the important changes introduced by LRA 2002, particularly in relation to squatters, had not yet been implemented. As well as the complex new rules as to registered land, and the rectification of title thereto (which are especially important when dealing with squatters' claims) there are important changes which affect the law relating to boundaries. Interpretation of the conveyance or transfer, at the heart of the resolution of most boundary disputes, may now be embarked on with greater reference to the physical characteristics of the site. Whereas the old rule was that extrinsic evidence could only be considered if the conveyance or transfer was unclear, the modern authorities have emphasised that the circumstances surrounding the execution of the instrument may be considered where this is necessary in order to understand what the parties intended to be conveyed or transferred (for example, see *Pennock* v. *Hodgson* [2010] EWCA Civ 873 at paragraph 12).

The court will always strive for an interpretation that gives effect to the perceived intentions of the parties. That intention is judged objectively. This may include looking at the relevant background facts, as opposed to the subjective intentions of the parties. It is a short step from actually looking at the physical characteristics of the site that the conveyance or transfer purports to convey to looking at extrinsic evidence, by which is usually meant strictly any evidence other than the deed itself. It is clear from cases such as *Pennock* v. *Hodgson* that the consideration of the physical features of the site, by reference to comparing it to the conveyance plan, is permitted under the modern approach to construction (i.e. considering the objective facts with the background knowledge of the contracting parties, whether or not it is

technically 'extrinsic' evidence). It will be clear from this discussion that the modern authorities adopt a more relaxed approach to the construction of deeds generally, and conveyances and transfers in particular. This may include later conveyances and transfers to determine what was intended to be conveyed or transferred by the original instrument.

Since the first edition of this work there have been considerable changes in the litigation 'landscape' with increased use of ADR; these trends are likely to intensify following the introduction of the Jackson reforms and a very substantial increase in court fees in 2015. The Jackson recommendations and implementation have had a broadly negative impact on the profession and those it represents. In particular, there is a front-loading of costs, with significant attendant expenditure by litigants on costs budgets and costs draftsmen. This has led to pressure on litigants and their advisers in an environment in which civil litigation is seen as an easy target for government reductions in public expenditure. The underlying policy behind the recent court fee increases seems to be a move towards a costs neutral court system, with major implications for litigants and their advisers.

Other methods of dispute resolution will include, in an appropriate case, arbitration and the various forms of ADR. One example of where arbitration will arise is in the relatively rare case of a dispute over boundaries between leasehold lands. The parties' lease may stipulate that arbitration is to be used to resolve any dispute. Even if they have not agreed a particular method of dispute resolution in advance, they may well wish to consider arbitration as a more controllable means of dispute resolution than relying on the uncertainties of the courts. Although arbitration is expensive, it has many supporters as an efficient means of achieving a long-term solution.

Alternatively, the client who is serious about a long-term solution to a boundary problem may consider ADR, especially mediation, whether voluntarily or as a consequence of a direction by the court at the case management stage. Since the last edition of this book, the use of mediation has increased to the extent that it would be rare for this type of ADR not to be explored at some stage. Early neutral evaluation (ENE) has also been introduced in the courts, although not to a significant level – so far. ENE is a system for identifying and resolving the issues at less cost and stress to the parties. So far it has been used in proceedings before the Technology and Construction Court and the Mercantile Court, but there is no reason why it should not be extended to other types of proceedings.

A further development at the time of writing is the Property Boundaries (Resolution of Disputes) Bill 2015 which was introduced before the House of Lords in the 2015–16 session and was at the committee stage in the House of Lords at the time of going to print. This was introduced by the Earl of Lytton, a chartered surveyor whose profession stands greatly to benefit from the introduction of a similar dispute resolution procedure that currently applies in relation to party walls in cases to which the Party Wall etc. Act (PWA) 1996 applies. It is not the first attempt to rein in a perceived increase in boundary disputes. There are more titles every year and the smaller the title the more the boundary matters. The intention to reduce reliance on

litigation as a means of dispute resolution, while laudable, is misplaced. Litigation is in fact relatively rarely resorted to; the perception is that there are fewer rather than more disputes being tried in the courts – although it is possible that a large number of parties are issuing such claims without the assistance of lawyers. However, there do not appear to be any clear statistics on the number of people who, to quote Lord Hoffmann, press 'with the zeal of Fortinbras's army' their dispute to its expensive conclusion by this means.

One thing everyone in practice should agree about is that the error of cheap conveyancing has not helped the peace of mind or the bank balances of many a suburban neighbour!

William Hanbury
February 2017

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William Hanbury
February 2017

Introduction

A boundary is an artificial line which divides two contiguous pieces of land. A physical feature such as a wall may mark that line or it may have no marking. Boundaries may be natural or artificial, depending on whether or not the physical objects marking the boundary are man-made (*Mackenzie* v. *Banks* [1878] 3 App Cas 1324). Boundaries may be horizontal or vertical and may be fixed by the agreement of the parties, by statute or statutory instrument, or, in the absence of these, by legal presumption.

Every law student on his first day at college learns that the only estates capable of being conveyed or created at law after 1925 are the freehold absolute in possession and the term of years absolute (s.1(1) of the Law of Property Act (LPA) 1925). However, the complexities of the subject may be better understood if it is remembered that in unregistered conveyancing there is no such thing as 'absolute' title in the sense that title is relative. This is particularly relevant when the law of adverse possession in relation to unregistered land is considered. In such cases it is possible to have several layers of potential title in relation to the same parcel of land. Boundary disputes where the land is unregistered depend strictly on one person showing that he has a better title to land than anyone else. The concept of 'title' is in reality a bundle of rights which flow from actual possession of the land in question. To that extent no title may be said to be 'absolute'.

Where the land is registered with title absolute this too may be subject to interruption, for example, by those whose interests override a registered disposition. But 'ownership' depends on registration, not on the degree of factual possession of the land. Hence confusion may arise for the layman in relation to registered land when absolute title is registered. Such title is liable to interruption by those who can, for example, apply to rectify the register. This commonly happens where there has been some mistake in the registration process or because there is a prior owner who can show a better title, for example, because title was subsequently registered as a result of fraud. In the law of boundaries, a common form of potential interruption occurs where the registered proprietor is subject to an application by a squatter to alter the register so as to show him as being the owner of the whole or part of the registered estate. This also often occurs where a neighbour complains that there has been a mistake in relation to the position of the boundary between two registered titles and that the title plan ought to be altered to show that he is the proprietor of part of the estate in place of the registered proprietor. This creates additional issues in that the title plan only purports to show a general boundary and

it is rare for the parties to apply for the boundaries to be fixed. **Chapter 4** considers the power to alter the register and one particular form of alteration which prejudicially affects a registered proprietor's estate known as 'rectification', set out in Schedule 4 to the Land Registration Act (LRA) 2002, as well as the state's indemnity to the loser in Schedule 8 to that Act. The power to register squatters under Schedule 6 to that Act will also be considered in **Chapter 4**.

Despite the uncertainties created by possible interruption to registered title, freehold title provides a relatively secure form of ownership. The government recognised this and built on the legal and psychological advantages of freehold ownership by introducing a new form of ownership, known as 'commonhold' (introduced by the Commonhold and Leasehold Reform Act 2002). Commonhold ownership makes provision for owners of flats and other interdependent units, including the common parts of the buildings of which those units form part, to manage the estate of which their flats or units form part, collectively. However, commonhold is still relatively rare in practice and has limited impact on the resolution of boundary disputes.

The greatest change to the law of property in recent years came in the form of LRA 2002, which for the most part came into force on 13 October 2003 and, as a result of transitional arrangements, by increments thereafter until 13 October 2013. It contained important changes to the law of adverse possession as well as the law relating to the registration of cautions and protection of interests on the register generally. LRA 2002 also established the framework for the introduction of electronic conveyancing, or 'e-conveyancing', which has had significant impact on the conveyancing process for landowners, consumers and professionals. Although e-conveyancing may have affected the way conveyancing is carried out with many benefits in terms of speed and cost savings, boundaries (and the somewhat arcane rules by which they are sometimes determined) have not changed significantly as a consequence of e-conveyancing.

As well as changes in the substantive law, which appear to be significant, there continues to be a shift away from court-based methods of dispute resolution towards alternative dispute resolution (ADR). The courts now encourage ADR to the extent that a litigant who fails to refer a dispute capable of resolution to, for example, mediation, may be penalised in costs. As mentioned in the preface to this book, there are significant challenges in litigating through the courts at the present time, particularly after a very substantial increase in court fees without any commensurate improvement in standards or customer satisfaction. This forces many boundary disputes to settle at an early stage. For those whose cases go the full course there are important 'dos and don'ts' which are set out in **Chapter 9**.

The perception of most judges appears to be that both sides are equally to blame for boundary disputes when they arise. They are rarely regarded by the judiciary, especially the county court judiciary, as a priority for the use of their judicial time. It is unfortunate that disputes that are frequently regarded by judges to be a matter of knocking heads together are in fact often disputes that require careful analysis in order to get the answer right. It has been said that the manner in which such disputes

are determined by the courts is as much a test of a legal system as the manner in which the courts determine high-profile human rights or commercial cases (by Mummery LJ in *Wilkinson* v. *Farmer* [2010] EWCA Civ 1148). That analysis is better carried out with at least a background knowledge of conveyancing and Land Registry practice. Where possible therefore I set the relevant law against that background.

The trend is to simplify and modernise conveyancing and it is to be hoped that this trend will continue. But although conveyancing is now essentially governed by statute and is dominated by the principles pertaining to registered land, it is also necessary to have some understanding of the estates and interests which existed at law and in equity before the 1925 property legislation and for these the reader is referred to the principal works on the subject (see *The Law of Real Property* (Megarry and Wade, 8th edn, Sweet & Maxwell, 2012) and *Elements of Land Law* (Gray and Gray, 5th edn, Oxford University Press, 2009)).

The chapters that follow therefore consider the common law and equity, the cases and statutes, which make up a diverse but practically important subject. They are intended as a practical guide rather than as an authoritative analysis of the law, particularly for the litigation or conveyancing practitioner who wishes to find most of what is required in one place. The law is accurate as of 20 December 2016.

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