Admissible evidence in boundary disputes

Boundary disputes can often spiral into complex and costly litigation for all parties. Kevin Lee offers some insights from the recent judgment in Norman v Sparling, which may help reduce the number of disputes in future.

In January 2015, the Court of Appeal delivered judgment in the case of *Gilks v Hodgson*, a boundary dispute.

The members of the court were not impressed. Sir Stanley Burnton said, "This is a depressingly unfortunate dispute between neighbours. The costs so far approach half a million pounds, far more than the value of the rights involved. It is a dispute that could and should have been compromised on terms that both parties could live with. The trial took 10 days, and even then some issues, referred to by the judge in paragraph 2 of his judgment, were left undecided."

Judge Bean L J added, "I only add how dismayed I have been by this Dickensian litigation. The disputed strip of land and right of way do not constitute the sole means of access to anyone's home… Yet, at a time when the courts are under great pressure, the battle between these two couples took up 10 days of court time – more than some murder trials – before Judge Armitage, and a further three days in this court; and about half a million pounds has been spent in costs. It is almost as though Lord Woolf and other civil procedure reformers over the years have laboured in vain."

The truth is that boundary disputes are bad news for everyone involved, lawyers included because there is never a real winner. Any victory will be pyrrhic and fortunes will be spent.

It is for this reason that these disputes have to be taken by the scruff of the neck and settled – and it is the responsibility of solicitors to do this. Clients must be stood up to and challenged, and more than anything else *advised.*

But before you can advise, you must know the rules. The rules of what are admissible evidence in boundary disputes is, therefore, fundamental.

In *Norman and another v Sparling [2014]* the Court of Appeal considered the use of extrinsic evidence to establish a boundary between properties. Lord Justice Elias concisely marshalled the relevant authorities and started with *Pennock v Hodgson [2010].*

In this case, obviously concerning a boundary dispute, the claimants had argued that the judge ought not to have looked outside a conveyance in order to ascertain the boundary.

Mummery L J, who gave the leading judgement, began his judgment under the helpful heading: "How to construe a conveyance". He referred to the opinion of Lord Hoffmann in *Alan Wibberley Building Limited v. Insley [1999] 1 WLR 894,* which he described as the leading modern authority on the construction of the parcels in a conveyance. That case had concerned the status of an Ordnance Survey plan attached to a conveyance "for the purposes of identification" and the inferences that may

properly be drawn from physical features of the land existing and known at the date of the conveyance.

Lord Hoffman in *Wibberley* had pronounced the following:

1. The construction process starts with the conveyance which contains the parcels clause describing the relevant land.

2. An attached plan stated to be "for the purposes of identification" does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land.

3. Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.

4. There is no reason to prefer a line drawn on a plan based on the Ordnance Survey as evidence of the boundary, to other relevant evidence that may lead the court to reject the plan as evidence of the boundary.

So, where the parcels clause in a conveyance or transfer does not describe the property with sufficient clarity, extrinsic evidence may be used to establish an exact boundary and it may be necessary to draw inferences from topographical features that existed when the deed was executed.

But must this extrinsic evidence have been around at the date of the conveyance? According *to Liaquat Ali v Robert Lane [2006]* the answer is no. It may include later conduct, but all extrinsic evidence "must be of probative value in determining what the original parties to the deed intended."

The facts of *Norman v Sparling (2014)* illustrate this. Mr and Mrs Birch owned a farm and an adjacent plot of land. In 1988, they gifted this plot of land to Mr Birch's mother under a deed that described the land by reference to the length of its frontage and other boundaries, shown "for identification purposes only" edged red on a plan. Mrs Birch senior built a property on the land. Mr and Mrs Birch then constructed a bank between the property and the farm.

The country court judge, therefore, relied on extrinsic evidence to determine the boundary, as the parcels clause was not specific and the relevant plan had unclear measurements and a very small scale. From the conduct of the parties, it appeared that Mrs Birch senior had intended to convey the side of the bank up to its top. The bank was very steep, so it was unlikely that the original parties had intended both sides of the bank to be on the farm. The boundary was the top of the bank.

Mr Sparling appealed on the basis that, as the bank did not exist when Mr and Mrs Birch had gifted the land in 1988, it should not have any proper bearing on the construction of the parcel of land gifted by Mr and Mrs Birch to his mother.

The court dismissed the appeal.

Applying *Liaquat Ali v Robert Lane (2006)*, it was the later conduct of Mr Birch, not his mother, that was relevant. On the evidence, Mr Birch tried to mark the boundary by building a bank, without any objection from his mother. Mr Birch also allowed the Normans to plant bushes on the property side of the bank. At the time that Mrs Birch senior sold the property to the Normans, Mr Birch had put posts along the top of the bank to mark the boundary line.

This evidence showed that the top of the bank marked the boundary. Taking the boundary to be the top of the bank was within the limits of tolerance permitted by the description in the 1988 deed.
So, here boundary law is a bit different. Remember, the general rule in contract law is that extrinsic evidence is not admissible for the construction of a written contract. The parties' intentions must be ascertained, on legal principles of construction, from the words they have used.

The rule is, therefore, that if the position of a property boundary line is clear from the title deeds, but the boundary line is disputed, extrinsic evidence will not be admissible and none of the presumptions relating to boundaries can be used to contradict the title deeds, except in a claim for rectification of the conveyance.

Whether the position of boundaries is sufficiently clear to preclude, the admission of extrinsic evidence will be a matter to be judged on the facts of each case.

Where a precise boundary cannot be identified from the title documents, they will almost always have to be supplemented by other evidence, including inferences drawn from the physical features of the land at the time the deeds were executed. As *Norman v Sparling* shows, later evidence of conduct may also be admissible.

The amount of case law that has built up around the determination of boundaries shows what a difficult area of law this can be. Often, the parties become involved in costly litigation over relatively small areas of land. Lawyers should be aware of the law on determining boundaries when preparing transfers of land and draft parcel clauses in a clear and unambiguous manner.

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