

Boundary Dispute Resolution in England & Wales – Surveyors and Lawyers Working Together to Resolve Problems

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1. INTRODUCTION

This article will describe the stages and the factors that affect boundary dispute resolution in England & Wales:

- General introduction
- The “people” factor
- Paper-title
- Measurements
- Report preparation
- Liaison with the legal profession
- Meetings of Experts and the Single Joint Expert
- The Courts
- After the dispute is resolved

This article is intended to give an insight into a fascinating aspect of surveying (usually involving land surveyors) that is, to a large extent, unique to England & Wales.

2. GENERAL INTRODUCTION

There are approximately 21,000,000 separate properties in England & Wales ranging from small suburban houses with tiny gardens to large rural estates covering thousands of hectares. In statistical terms, the number of boundary disputes is very small, perhaps less than 0.01% over a ten year period, but in terms of financial loss and anguish for those involved these disputes can be extremely painful. Some of these disputes are over less than 25mm and others involve several metres of land, the average, in my experience, being 100mm which is only slightly larger than the width of a fence post. The cost for a dispute that goes to Court is usually in the region of £25,000 for each party. The causes of these disputes fall into several categories but perhaps the biggest aspect, by far, is the “people” factor.

3. THE “PEOPLE” FACTOR

It is my experience of 3,561 boundary disputes in the past 16 years that the factor that causes boundary disputes to occur in the first place and then to develop into almost warlike situations is the “people” factor. What I mean by this is that the personalities of the parties often lies at the root of the problem.

It is possible that many people live side by side with indistinct and ill-defined boundaries but have no problems with their neighbours whatsoever because they actually get on amicably

with those neighbours. Where completely different types of people live side by side though, problems can easily flare-up.

It is my experience that there is no difference between racial groups, sexual genders or class whatsoever; the type of person that is likely to have a boundary dispute crosses all such categories. For example, the most common cause of a dispute is where a very tidy and pedantically keen gardening couple of, say, retired professionals, live next door to a young working family with noisy teenagers, several cars and a hectic lifestyle. Alternatively I have known cases where two very similar types, for example, two retired bank managers, who were almost identical and yet loathed each other to an amazing degree. Such people may have many low-level disputes regarding noise, smoke, garden waste, car parking, etc., but a boundary dispute is the one tangible course of action whereby they can take their neighbour to Court.

It is important that the surveyors and lawyers who specialise in this field are aware of the underlying “people” factor because the conduct of the dispute and the professional’s part in it will be under very close scrutiny in a Court.

Surveyors, in particular, should learn to remain calm and relaxed when dealing with the parties in boundary disputes and acquire the skill of nodding their heads in understanding rather than necessarily in agreement. It is only by listening to parties, who are often highly aggravated and even abusive, that the surveyor will get to hear about “*the old iron post in the hedge*” or “*the remains of the base of the brick wall*” so vital to finding a solution to the dispute.

4. PAPER-TITLE

In England & Wales there are two systems of land ownership records that sit side by side. The first is the rather old-fashioned “deed” system which involves conveyances, indentures, deeds of gift, etc. these are the bits of paper that describe one’s legal ownership of a property. Every property in England & Wales has such a document and those documents often include measurements (usually in imperial units) and detailed descriptions. The measurements are usually qualified somewhat by phrases such as “*a little more, a little less*”, “*or thereabouts*” or “*approximately*”. All of which throw another form of vagueness into the problem.

Of the 21,000,000 properties in England & Wales, about 17,000,000 (81%) are also registered with Her Majesty’s Land Registry. However, if a boundary dispute goes to Court, the LR data is not usually considered by the Judge. The reason for this are that LR Title Plans are based on OS (Ordnance Survey) maps and are therefore approximate only. Such maps are not intended to be scaled from and measurements taken from them can only be considered to be accurate to 1 metre at best. As most boundary disputes involve just a few centimetres, it can be seen that the LR Title Plans are no more useful than a location plan, which is exactly what they are. The object of LR in England & Wales is to create and maintain a “register” and the plan or map that comes with it is for general identification purposes only. This is underlined by the General Boundaries Rule of LR which describes how a line on a LR Title Plan can represent a hedge, a ditch, a wall or a fence or any part thereof or be parallel to the legal boundary.

It is the legal boundary (not the extent of registered title) that the boundary surveyor must look for.

An interpretation of the text of a deed is one for a lawyer to make but it is quite in order for a surveyor to flag-up various parts of the text for a lawyer to add an interpretation to. The deed plan, however, is in the realm of the surveyor and it is this plan that must first be compared with what exists on the ground. There may well be “T” marks against some of the boundaries on the deed plan and this usually (but not always) indicates that the person with the “T” facing inwards has the responsibility of erecting and thereafter maintaining a boundary feature within their own property.

5. MEASUREMENTS

Surveyors should acquaint themselves with the level of detail required for boundary dispute resolution or demarcation. There are major differences between carrying out a normal land/topographic survey and a survey for use in a boundary dispute. For example, a boundary-type survey does not usually require any level (height) information. On the other hand, an extremely high degree of detail will be required, including, the shape and size of all fence posts (every individual post is required), the size and type of all walls, descriptions of the brickwork and construction methods, locations of buttresses, size and location of overhanging eaves, branches of overhanging trees, details of hedges (trunklines and canopy extents) widths and depths of streams and ditches, details of footings (where visible), changes (even minor) of surface materials and all other features that may have an influence on the boundary location or will demonstrate errors or confirm facts in witness statements made by the parties and witnesses-of-fact.

Measurements should be shown in metric and imperial values. Most deed plans still have dimensions in feet and inches and whilst surveyors should work within the metric system at all times, it is helpful to a Court to show a distance on a plan as being, for example, “66feet 2inches” as well as 20.168m because the deeds may say “66ft” only and it is therefore easier for a Judge to see that the distance is 2 inches larger (rather than having to convert it to the metric system and back again).

Deeds may contain measurements in other units and it is useful to know, for example, that 1 rood = 0.25 acre and 1 perch = 0.00625 acre. There are 2.471 acres to a Hectare.

Modern electronic methods of measurement should always be used, for reason of speed and economy but it can be dangerous to rely on GPS when critical points are often buried within a thick hedge or under an overhanging roof. When neighbours are arguing over less than 25mm (which they frequently are!) then the steel measuring tape is often the best instrument to use in confined or congested areas.

Computerised plans are essential as it may be necessary to produce plots at differing scales at very short notice for the Court and the information shown must be identical in every respect except for the change of scale. The most common scales that I use are 1:50 and 1:100. I have even prepared detailed plans of critical areas at 1:20.

6. REPORT PREPARATION

Surveyors should always remember who they are preparing their boundary reports for. The reports are not prepared for their clients (i.e. the parties or their lawyers) but for the Court. Even if a boundary dispute is at a very low level of animosity the report should be prepared in a completely independent manner as if it was going before a Court. Payment will usually be made by one of the parties or by a party's lawyer but the duty of the surveyor in preparing the report remains the same, being to give independent opinion and evidence.

Professional bodies have recommended layouts for such reports that have been agreed with the legal profession and the most widespread is that recommended by the Academy of Experts (Academy of Experts, 3 Gray's Inn Square, London, WC1R 5AH. www.academy-experts.org).

7. LIAISON WITH THE LEGAL PROFESSION

Boundary dispute resolution is one of the few areas where surveyors and lawyers work together on a regular basis as a team. The lawyer relies upon good independent expert from a specialist surveyor and the surveyor relies upon the lawyer to provide the deeds and other documents that may help the surveyor's investigations.

It is important that surveyors realise and understand their place in the team that may well also include other experts (perhaps a soil-surveyor, an arboriculturalist or a structural engineer).

The usual stages of liaison with lawyers is as follows:-

1. The solicitor meets and formally instructs the surveyor.
2. The surveyor carries out measurements and investigations and writes a report.
3. The solicitor meets the surveyor to discuss the report.
4. The report is exchanged with the "opposing" solicitor's surveyor.
5. Counsel (a barrister) is instructed by the solicitor and a conference is held at which Counsel, the solicitor, the surveyor and the client(s) attend. The merits of the dispute will be discussed, together with likely costs, in great detail. This conference is crucial in deciding what happens next. It is usually at this stage that legal proceedings are issued.
6. If the matter continues (i.e. is not settled between the parties immediately after that stage) then there will be a meeting of experts and then a Court Hearing at which a Judge will determine the line of the disputed boundary.
7. A great deal of liaison and communication between Counsel, the solicitor and the surveyor will take place in the run-up to a Court Hearing.
8. It is my experience that it typically takes 18 months for a case to come to Court after proceeding have been issued.

During a Court Hearing the surveyor (expert) will be expected to sit immediately behind Counsel and help with cross-examination of witnesses by passing notes forward and suggesting subjects to be raised in questioning.

8. MEETINGS OF EXPERTS AND THE SINGLE JOINT EXPERT

Where there are two experts (one instructed by each party) they are usually ordered to meet, by the Court, to prepare a schedule of agreed and disagreed points, together with an agreed plan upon which they can show their respective lines (in different colours). The surveyors should not adopt adversarial poses but should try and solve the matter in the way that two people might try to solve a jigsaw puzzle... a jigsaw puzzle that has no picture on the lid of the box, some pieces missing and other pieces which don't even belong to that puzzle! It is not an easy or exact science.

It is more frequent since the advent of the Civil Procedure Rules in 1998 that a SJE (Single Joint Expert) is appointed by the Court to provide one all-encompassing report instead of having two experts, each instructed by one of the parties.

I have acted as SJE on many occasions and it is a very interesting position to be in. The surveyor has to visit and interview each party, then carry out comprehensive measurements of both properties and write a "joint" report for the Court. Each party, normally through their solicitor and Counsel, is then allowed to ask one set of written questions. The questions themselves and the surveyor's answers then form an addition to the original report. The idea behind the SJE method was to eradicate the cost of experts going to Court, because it was envisaged that the SJE report together with the written questions and answers would obviate the need for oral examination. In practice that has not been the case and the parties have invariably required me (as SJE) to attend Court and be cross-examined to try and influence the result of the hearing!

9. THE COURTS

Boundary disputes go before the County Court or the High Court in England & Wales depending upon the value of the properties involved. Thus a dispute involving a few centimetres in the City of London may go to the High Court and a dispute over exactly the same dimension in a rural part of Cornwall may go to the local County Court.

From a surveyor's aspect, there is no real difference between the County and the High Courts. In the County Court the Judge must be addressed as "Your Honour" whereas in the High Court the Judge must be addressed as "My Lord" and woe betide the surveyor who gets that wrong!

The sequence of giving evidence is always the same...

1. Examination in Chief (Counsel for the party you have been instructed by).
2. Cross-examination (Counsel for the other party).
3. Re-examination (Counsel for the party you have been instructed by).
4. Questions from the Judge.

Giving evidence is a solemn and serious business and can be very stressful (particularly so with cross-examination). Those of a nervous disposition are advised to avoid working in the field of boundary demarcation if they feel that they cannot stand the strain of cross-

examination. I have known several superb land surveyors who have been physically sick after appearing in the witness box. I encountered another surveyor recently who said (and I quote) *“I would rather have my teeth pulled out without anaesthetic than be cross-examined ever again!”*.

10. AFTER THE DISPUTE IS RESOLVED

The surveyor will normally liaise with the lawyers and the Court to ensure that a new fence or wall is constructed in the correct position (i.e. in accordance with the Court’s Judgement). Many disputes have flared up all over again because the line ordered by the Court has not been marked out accurately on the ground or has been misunderstood by a fencing contractor.

Finally the surveyor will need to draw-up a plan showing the new boundary location and forward it to his instructing solicitor for notification to LR (i.e. for record purposes).

11. MY ASSESSMENT

I have worked in the field of boundary dispute resolution for the past 16 years and have been instructed in 3,561 such matters. I have given evidence under cross-examination on 78 occasions in the County Court and 7 occasions in the High Court. I enjoy working in a legal environment where the surveyor’s opinion is valued and sought after. The work is highly stressful and can involve the last-minute cancellation of holidays (to suit a Court Hearing) as well as much working on Sundays and national holidays when everyone else is relaxing. Virtually every aspect of one’s work will be open to harsh criticism.

However, I have met some wonderfully eccentric people; I have eaten hundreds of home-made cakes and drunk thousands of cups of tea in people’s kitchens; I have had police escorts and have been physically threatened on several occasions but on the other hand I have had many lovely letters of “thanks” from delighted clients.

It is a demanding but highly rewarding aspect of surveying that I wouldn’t swap for any other career.

12. CONCLUSION WITH REFERENCE TO SURVEYOR’S WORLDWIDE

1. The sort of work that is described in this article may well be unique, in terms of quantity, frequency and intensity, to England and Wales.
2. There is no doubt in my mind that the introduction of a cadastral system of boundary records in England and Wales would eliminate a large proportion of these boundary disputes.
3. The main problem that prevents the installation of a blanket cadastral system over all 21,000,000 properties in England and Wales is the cost. It is estimated, by lawyers and myself, that it would cost something like £2,000 per property to get a system into place. After the initial installation, of course, operation of a cadastral system would be simpler and it would be cheap to update as the years go by. The initial cost (21,000,000 X £2,000)

which would, presumably, have to be met by the UK taxpayer, is such that no politician is likely to campaign for the installation of a cadastral system in England and Wales!

4. It is my opinion that a better way of introducing a cadastral system into England and Wales would be to make it mandatory on new housing estates. This would involve a cost that I estimate as being £200 per property. As the average cost of a house on a new housing estate is c£180,000, this amounts to 0.1% which is, in my opinion, a price that could be “hidden” within the cost of the new home.
5. I am aware, from my travels to mainland Europe and to the Caribbean, that boundary disputes occur even where a full and efficient cadastral system exists. However, it seems, from what I have seen and heard, that those disputes are infrequent and do not involve the cost and intensity of those in England and Wales.

BIOGRAPHICAL NOTES

David Powell qualified as a Land Surveyor in the Royal Engineers in 1967. Since then he has travelled to many parts of the World carrying out land surveying and mapping, including, Italy, Germany, France, Mallorca, Gran Canaria, Iraq, Antigua, Barbados and Trinidad & Tobago.

Since 1989, David has concentrated on Boundary Dispute matters and has been instructed in over 3,500 such cases, appearing in the County and High Courts 84 times. He has re-written the current edition of *Anstey's Boundary Disputes* (2004 RICS Books), was a contributor to *Nuisances*, (1998 Sweet & Maxwell) and the author of *Guide to Boundary Demarcation in England & Wales* (1993 RICS Books). He is a contributor to Radio and TV programmes and has appeared regularly on BBC TV's *Neighbours at War*, GMTV and the ill-fated *Kilroy*. David is the current Chairman of the Geomatics (Land Surveying) Faculty Board of the R.I.C.S., a member of council of the Academy of Experts and a member of the Land Registration Act Rule Committee.

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