Boundary disputes and the interpretation of conveyances

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1. Many boundary disputes start when a neighbour discovers a discrepancy between the filed plans at HM Land Registry and the location of a fence or some other boundary feature on the ground. The neighbour concludes that the fence or other boundary features must be in the wrong place. That belief may seem to receive some support when he is told that HM Land Registry entries are conclusive. The neighbour attempts to (or threatens to) move the boundary. The neighbour on the other side of the fence objects. The result is litigation.

2. In this example, the cause of the litigation is, of course, a failure to appreciate "the general boundaries rule"[1], which means that filed plans at HM Land Registry are, at least usually, irrelevant for the purposes of ascertaining the location of a legal boundary.

3. Instead, the correct approach to ascertaining the location of a legal boundary is, of course, to: (i) identify the conveyance which separated the two neighbouring parcels of land; and then (ii) interpret that conveyance.

[1] Section 60 of the Land Registration Act 2002 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."

4. However, even if a neighbour has not been misled by HM Land Registry entries, he will attempt to establish that a legal boundary is situated in a location that is different from the location of fences or other existing boundary features at his peril. That is because (as this paper will show): (i) evidence about the location of fences and other boundary features is always admissible for the purposes of interpreting a conveyance; and (ii) evidence about the location of fences and other boundary features will frequently play a decisive role in the interpretation of a conveyance (and the ascertainment of legal boundaries).

Evidence about the location of boundary features is always admissible

5. Evidence about the location of fences and other boundary features is always admissible for the purposes of interpreting a conveyance.

6. That was not always the case. Until recently, extrinsic evidence (i.e. evidence of the circumstances surrounding the execution of a conveyance) was treated as inadmissible when interpreting a conveyance, unless the conveyance was, in some sense, ambiguous (for example, where there was a lack of clarity in a verbal description of the land conveyed or an inconsistency between the verbal description and a plan).

7. That rule of interpretation applied, not only to conveyances, but also to contracts and other types of legal document.

8. In Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 (the landmark case on the interpretation of notices), Lord Hoffmann said that, in its pure form, the rule was that "if the words of the document were capable of referring unambiguously to a person or thing, no extrinsic evidence was admissible to show that the author was using them to refer to something or someone else". In Mannai, Lord Hoffmann subjected this rule to a sustained attack. He said that it was an "extraordinary rule of construction", that was "capricious"; "highly artificial"; "capable of producing results which offend against common sense"; "incoherent";

and "based on the ancient fallacy which assumes that descriptions and proper names can somehow inherently refer to people and things". The learned judge said that, when interpreting a notice (and, by implication, other types of legal document), extrinsic evidence should always be admissible.

9. Lord Hoffmann favoured the rejection of this rule because the drafting of legal documents often contains mistakes. A rule which requires a Court to ignore the factual and other circumstances in which a document was created risks forcing the Court to disregard the facts that would reveal a mistake and thereby prevent the Court from correcting the mistake through the process of interpretation.

10. Notwithstanding the rejection of this "extraordinary rule of construction" by the House of Lords, until recently - in the context of conveyances - it has appeared alive and well[2].

11. For example, in Freeguard v Rogers [1999] 1 WLR 375, a case about the subject matter of an option agreement, the Court of Appeal proceeded on the basis that "extrinsic evidence is not admissible to vary or contradict a description which is clear or unambiguous". In Ali v Lane [2007] 1 EGLR 71, which related to a boundary dispute over an area of land a few metres wide, Carnwath LJ said that: "In the modern law, the conveyance...is undoubtedly the starting point. It is only to the extent that it is unclear that extrinsic evidence may have a place." Again, in Bradford v James [2008] BLR 538, which concerned a dispute over the ownership of a cobbled area of courtyard, the trial judge held that his finding that the conveyance was unambiguous "renders inadmissible extrinsic evidence to ascertain the vendors' intention". In the Court of Appeal, Mummery LJ said that, if the trial judge was correct in saying that the conveyance was "clear", the conveyance should indeed "be construed in isolation from the surrounding circumstances existing at that date rather than in light of them."

[2] In Sammut v Manzi [2008] UKPC 58, [2009] 1 WLR 1834 the Privy Council proceeded on the basis that the rule continued to apply to the interpretation of wills (see Lord Phillips at page 1838).

12. Nevertheless, the rule that extrinsic evidence is inadmissible when interpreting a conveyance does finally appear to be in the process of being put to rest.

13. In Adam v Shrewsbury [2005] EWCA Civ 1006, [2006] 1 P&CR 27, Neuberger LJ said that the proper interpretation of a conveyance:

> "...turns on the proper analysis of the common intention of the parties, as gathered from the terms of the conveyance, the position on the ground, and the communications passing between the parties before the execution of the conveyance, which would include the provisions of the contract. Although this court excluded as legally irrelevant any communications between the parties outside the conveyance (unless, of course, there is a claim for rectification) in *Scarfe v Adams* [1981] 1 All ER 843 at 851, it seems to me that such a conclusion is inconsistent with the general principle that when construing a document (whether or not it relates to land) all the surrounding circumstances should be taken into account. That this aspect of *Scafe's case* is not the law was decided by this court in *Partridge v Lawrence* [2004] 1 P&CR 176 at p.187)" (see also Chadwick v Abbotswood Properties Limited [2004] EWCH 1058, per Lewison J at paragraph 43).

14. Included in the admissible evidence about "the position on the ground", will be evidence about the location of fences and other boundary features at the date of the conveyance.

15. Indeed, when interpreting a conveyance, it is not only fences and other boundary features existing at the date of the conveyance that can be taken into account. The Court can also have regard to the location of fences and other boundary features that were erected at some time after the conveyance. That is because of the rule that, when interpreting a conveyance, evidence about subsequent conduct is admissible.

16. The leading case is Watcham v East Africa Protectorate [1919] AC 533. This was an appeal to the Privy Council from the Court of Appeal of East Africa. It concerned land on the banks of the Nairobi River. That land was owned by the Watcham family. It

had been conveyed to the Watcham family by the Crown by a certificate under the East African Land Regulations. The certificate gave the area transferred as "66¾ acres, or thereabouts". But the certificate included a description by reference to physical features on the ground which would have resulted in an area of 160 acres. In interpreting the certificate the Privy Council had regard to the fact that the Watcham family had never occupied the more extensive area was held support an interpretation of the certificate which led to a finding that only the smaller area had been conveyed. That fact was held to support a finding that the conveyance was properly interpreted as having conveyed the smaller area of land.

17. Over the years, Watcham has been heavily criticized. That is perhaps understandable. Watcham seems inconsistent with the fact that the interpretation of documents should be an objective exercise. What is supposed to matter is how the document would have been interpreted by "a reasonable person". Not how the document might have been subjectively interpreted by the parties. Yet the only obvious purpose in adducing evidence about subsequent conduct of the parties would seem to be to tell you what the parties subjectively thought. In Schuler AG v Wickham Machine Tool Sales Ltd [1974] AC 235, Lord Wilberforce said that Watcham was nothing more than a "refuge of the desperate"[3].

18. Nevertheless, whilst Watcham has been rejected as an authority setting out a general rule about the interpretation of legal documents, as a rule about the interpretation of conveyances Watcham has been held to be good law: see Ali v Lane (supra), Haycocks v Neville [2007] 1 EGLR 78, and Piper v Wakeford [2008] EWCA Civ 1378.

Evidence about the location of fences and other boundary features will often of decisive importance

[3] Lord Nicholls has, however, (extra-judicially) supported admitting extrinsic evidence when interpreting contracts (see My Kingdom for a Horse: the meaning of words [2005] LQR 577).

19. Evidence about the location of fences and other boundary features will, not only always be admissible for the purposes of interpreting a conveyance, but it will often be of decisive importance (and lead to the conclusion that the legal boundary coincides with the location of the boundary features).

20. First, very often there will be little else to go on. Parcels clauses are often hopelessly imprecise. Plans are very often of a totally inadequate scale. In Neilson v Poole (1969) 20 P&CR 909, Megarry J said that:

> "...in the construction of the parcels clause of a conveyance and the ascertainment of a boundary the court is under strong pressure to produce a decisive result. The prime function of a conveyance is to convey. As to any particular parcel of land, either the conveyance conveys it, or it does not; the boundary between what is conveyed and what is not conveyed must therefore be proclaimed. The court cannot simply say that the boundaries are uncertain, and leave the plot conveyed fuzzy at the edges, as it were. Yet modern conveyances are all too often indefinite or contradictory in their parcels. In such circumstances, to reject any evidence afforded by what the common vendor has done in subsequent conveyances seems to me to require justification by some convincing ground of judicial policy; and I have heard none."

21. Secondly, the proper approach to interpretation of documents no longer focuses on the niceties of language. Cannons of construction are also now of little importance. Rather, the modern approach to the interpretation of conveyances recognizes that the meaning of words is highly dependent on the context in which they have been used. And that, read in context, the correct interpretation of words will often depart from their literal or dictionary meaning. The tendency is against literalism. In Sirius International Insurance Co v FAI General Insurance Ltd [2004] UKHL 54, [2004] 1 WLR 3251, Lord Steyn said:

> "What is literalism? It will depend upon the context. But an example is given in the works of William Paley (1838), vol III, p.60. The moral philosophy of Paley influenced thinking on contract in the 19th century. The example is as follows: the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He

> buried them all alive. This is literalism. If possible it should be resisted in the interpretative process...".

22. When adopting this more flexible approach to interpretation of conveyances, it is easy to see how the location of fences and other boundary features might have a decisive role to play in the interpretation of a conveyance (and the ascertainment of the location of a legal boundary).

23. In Chadwick v Abbotswood Properties Ltd [2004] EWCH 1058, Lewison J said that when interpreting a conveyance: "The question is...what would the reasonable layman think he was buying?" If a parcel of land is physically demarcated by boundary features, the reasonable layman in the position of the purchaser of land is likely to think that he is buying the parcel of land as it appears on the ground demarcated by those boundary features. To the extent that the wording of the parcels clause, or the plans attached to a conveyance, suggest otherwise he is likely to view that as being the result of a mistake in the drafting. The modern approach to interpretation may well enable the Court to adopt an interpretation of the conveyance that accords with the reasonable man's view, even if that involves a departure from the literal or dictionary interpretation of the conveyance.

24. Thirdly, judges, with good reason, dislike boundary disputes[4] and prefer to find against that start them. And a finding the legal boundary is situated where everyone always thought it was (i.e. at the location of fences or other boundary features) is likely to be the result that the judge wants to reach.

[4] In Ali v Lane (supra), Carnwarth LJ said that "…it is [not] easy to understand why the parties are…continuing to litigate over the boundary. It was disturbing that neither of the experienced leading counsel before us was able to give a clear indication of the practical significance of the strip to their respective clients, nor to inform the court what if any attempts have been made at mediation. It is sadly a commonplace that boundary disputes can be fought with a passion which seems out of all proportion to the importance of what is involved in practical terms. In such cases, professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind and of the possibilities of alternative dispute procedures."