CHILD & CHILD

A Practical Approach to Boundary Disputes

In most areas of litigation, it is relatively easy for an experienced solicitor to advise a client at the outset about how a case should be approached. The first step is to identify a range of achievable outcomes, to perform a cost/benefit analysis and to devise a strategy to achieve the desired goals with the minimum expense and risk. It is a purely analytical exercise.

Boundary disputes, however, pose a particular difficulty. The value of land in issue is usually negligible so the cost/benefit analysis would generally dictate that no action be taken or that the client simply capitulates to the demands of the neighbour. From a financial point of view, there is generally no good reason for the client to become involved. It is of no help to the client, however, simply to say that he or she should walk away from the dispute because the matters in issue are not sufficiently worthwhile. Clients are people and people frequently regard their territory as being of very great personal importance to them. It would be wrong for a solicitor to disregard that fundamental human impulse and, as a result, to treat boundary disputes as though they are unimportant. For the clients involved, they can be very important indeed. The skill of the solicitor lies in recognising the importance of the dispute to the client but at the same time containing the dispute so far as possible and minimising its effects on the client and indeed on the neighbour. This will only be achieved if some important points are kept in the forefront of the solicitor's mind.

It is well known that boundary disputes, if not properly handled, can become out of control, a case in point being *Scammell v. Dicker [2005] EWCA 405*, a sad tale of intransigence by the parties and incompetence by their advisers. The case began in 1989 with Mrs. Dicker

seeking a declaration as to the line of her boundary with the neighbouring farm and ended in the Court of Appeal in 2005 by which time Mr. Dicker's litigation was being funded by the Solicitors' Indemnity Fund and Mrs. Dicker was receiving legal aid having spent her savings on the litigation.

This sort of situation can be avoided by remembering that a boundary dispute is no different in essence from any other. Most cases turn on relatively few issues and their outcome depends on a forensic examination of the evidence in respect of those issues. Generally, the most important evidence is the form of documents and, frequently, the documentary evidence will be contradictory and must be examined in a cool-headed and scientific manner.

Clients involved in boundary disputes usually want to raise allegations concerning one another's conduct because of the personal nature of the situation. Very frequently, however, those allegations are of no help to the judge in deciding where the boundary lies. Solicitors should resist the temptation to allow their clients to raise allegations of conduct unless it can be seen that those allegations would have a direct bearing on the outcome of the case. Generally speaking, they will have no bearing whatsoever and will only serve to inflame the situation and divert attention away from the relevant issues.

In boundary disputes, it is not uncommon for there to be no serious issues as to fact and for the case to turn solely on the interpretation of the documents and the features on the ground. Cases such as that are ideal for independent determination, rather than litigation. Parties should therefore give early consideration to the possibility of agreeing jointly to appoint an expert boundary surveyor and to be bound by his opinion as to where the boundary lies. This is no less uncertain than litigation and is very considerably quicker and more economical.

When instructing a single joint expert in boundary disputes (either to determine the issues by agreement or to assist in the litigation) his brief must be strictly defined. In *Childs and anor. v. Vernon [2007] EWCA Civ 305*, the judge commented that the expert should be instructed to: (i) inspect all the relevant plans; (ii) carry out a site examination; (iii) examine any available objective evidence, such as photographs, showing changes to the properties or boundary markers since the properties had been built; and (iv) prepare a report and plan, possibly with photographs. The plan should show the position of the property and any relevant features, such as fences and, so far as possible, should also transpose onto the plan the lines of the boundaries shown on the documents. If that is difficult, the report should explain the reasons. It would be wholly improper for one party to have any discussion about the case with a joint expert in the absence of the other party unless the other party had given fully informed consent.

In cases where the parties reach an agreement to demarcate the boundary, practitioners need not generally be concerned with the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which requires that agreements to transfer land must be in writing and signed by all the parties. In *Joyce v. Rigolli [2004 VWCA Civ 79]* it was held that an agreement as to the demarcation of a boundary does not constitute the disposition of an interest in land for the purposes of the Act and that it will accordingly not be necessary to comply with the formal requirements of section 2. Occasionally, therefore, a dispute can be avoided altogether by pointing to a pre-existing informal agreement between the parties indicating where the boundary should lie. Practitioners should always consider at the outset whether any such pre-existing agreement has arisen.

The Part 36 regime is a well established means of settling disputes and can apply equally to boundary disputes, notwithstanding that the settlement may involve the acceptance of an

offer involving the disposition of an interest in land. In *Orton v. Collins and ors [2007] EWHC H03 (Ch)* it was held that the mischief section 2 of the 1989 Act must have been intended to redress had no relevance to the settlement of existing court proceedings under the machinery provided by Part 36. It was held that the acceptance of the Part 36 offer gave rise to a binding settlement notwithstanding the fact that the settlement involved in the disposition of an interest inland and section 2 of the 1989 Act had not been complied with.

When advising clients involved in boundary disputes, there can be a strong temptation to suggest that it would be better for them to act in person, rather than to incur the costs of legal representation. Such advice, however, will frequently be unhelpful. Boundary disputes are complex and technical and most clients are entirely ill equipped to deal with them without expert help. Moreover, a judge dealing with a boundary dispute where both parties are litigants in person can be faced with an almost impossible task. The statements of case will frequently be rambling and incoherent, the evidence will be voluminous and largely irrelevant and the issues in the case difficult, if not impossible, the judge to identify. Faced with such a situation, judges frequently take refuge in directing that a single joint expert be appointed. Litigants in person, however, do not know how to provide adequate instructions to an expert with the result that the expert's report is unlikely to be helpful. Perhaps more importantly, a litigant in person is unlikely to be equipped to identify a hopeless case. Competent legal representation is of great assistance in weeding out those cases which are entirely without merit and, ultimately, saving court time.

Although it is generally of great assistance to the client and to the court for solicitors to be instructed in boundary disputes, the parties must be under no illusions as to the costs which may be involved if the matter is not swiftly settled. Indeed, in *Ali v. Lane [2006] EWCA Civ 1532* the Court of Appeal went so far as to say that professional advisers should regard

themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind. Mediation and other alternative dispute procedures must of course be strongly recommended at the outset. It is well established that a refusal to mediate may have adverse consequences in costs. This is particularly true in the case of boundary disputes. The judge will be highly critical if not satisfied that a genuine attempt has been made to explore the possibilities of alternative dispute resolution.

Judges can be inclined to criticise the parties, and indeed their representatives, for allowing a boundary dispute to get as far as trial. Such criticism is frequently misplaced. The parties to a boundary dispute have the same rights of access to the courts as anybody else, even though the subject of the dispute will generally have negligible financial value. As mentioned above, the importance of the issues to the client may bear no relationship to the value of the land. The duty of the solicitor is to have proper regard, not only to the costs involved in pursuing the dispute, but also to the wider issues which are frequently of a subjective and psychological nature but which should nonetheless be respected.

An edited version of the above article was published in the Estates Gazette on 21st July 2007.

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