

A case study from England & Wales

A ransom strip may be defined with insufficient particularity so money is at stake; an old hedge is grubbed out and a fence erected – in a slightly different place; Land Registry plans and the boundaries shown on them are misunderstood: these are not unusual instances of boundary disputes in the making. Boundary disputes can strike bewilderment or disappointment into many a court. They may be the outward sign of belligerence or greed or in the alternative, ignorance.

In a common dispute scenario, hostile letters may be exchanged and lawyers may become involved. There is usually a stalemate period often between three months and three years during which legal costs may accumulate and both sides may well have become convinced of their unsubstantiated claim and counter claim by dint of frequent repetition. The land in dispute may be less than a square metre but may stop a car gaining access to a garage or prevent access to a house wall. However facile the dispute seems to an observer, it is important to the protagonists in the dispute.

Importance of a chartered surveyor

The role of a chartered surveyor is to examine the problem objectively regardless of the client's preferred solution; to collect evidence upon which a reasoned opinion can be given and results displayed, usually in map form, to those involved; and/or to provide a court with the necessary expert opinion.

The chartered surveyor is invariably the first person on the scene who can actually measure up the land with sufficient accuracy to enable comparison of the deed plans, maps and photographs so that evidence of any encroachment can be reliably presented.

Under the Civil Procedure Rules 1998 of England & Wales ('CPR'), the chartered surveyor may be either appointed as a Single Joint Expert (SJE) pursuant to an order of court, or appointed solely by one of the parties as a party expert witness. Regardless, the overriding duty of the surveyor is always to the court.

The chartered surveyor (when acting solely as a party expert witness) is not an advocate for one side or the other and must consider the range of opinion and where his or her opinion lies within those bounds. To be an expert requires professional competence in the particular subject matter on which an expert opinion is required.

Specialist skills required by a chartered surveyor

To ensure that an impartial technical examination is carried out, the chartered surveyor will need a number of specialist skills:

- Knowledge of the history and accuracy of the Ordnance Survey (OS) maps
- Knowledge of the workings of Land Registry (LR)
- The ability to read deeds and interpret the plans attached to those deeds

- The ability to measure up a property with sufficient accuracy of both content and position using the appropriate equipment
- Be able to transfer the results of the survey to a suitable medium for analysis and comparison with deeds, aerial photographs, plan and maps
- Knowledge of the mandatory requirements and guidance of RICS for surveyors acting as an expert witnesses, which includes both knowledge and ability to prepare an expert witness report in accordance with those requirements, and with the CPR and related Practice Directions where relevant
- Knowledge of Boundaries: Procedures for Boundary Identification, Demarcation and Dispute Resolution in England and Wales (RICS guidance note, 2nd edition)
- A temperament that is able to deal with the emotions raised in clients when strongly held opinions are thought to be wrong by the chartered surveyor
- An ability to adapt and be prepared to examine new evidence objectively – even if it appears to overturn a previously held opinion.



Typical procedure for a boundary dispute examination

In a practical sense, the stages that a chartered surveyor may need to go through are as follows:

1. Obtaining a contract either with reference to the RICS Terms and Conditions of Contract from Land Surveying Services or a suitable sub-set. Reading and thoroughly examining the supplied papers and if more information is required the surveyor should ask for it. Such additional papers may be in the form of aerial photographs, contemporaneous maps, deeds and documents other than just Land Registry entries and deed plans.
2. Visiting those instructing the surveyor, and the site. It may seem obvious but site visits are crucial to a comprehensive understanding of what is or was represented on the map and plans. A ditch may have been filled in and the hedge replaced by a fence or the OS may have shown a stream which is now a ditch. It is the skill of the surveyor to be able to represent to the court what the lines on the maps and plans most probably represent or represented.
3. Make a measured survey of the land in question and its surrounds to an accuracy appropriate to the circumstances. This survey could be carried out by a chartered surveyor experienced in the preparation of large scale measured surveys using EDM (Electronic Distance Measurement) equipment. This is usually (but not exclusively) the province of the chartered land surveyor. Survey observations should be examined and an assessment made of the accuracy of the survey which should be quoted in any report or opinion.
4. LR plans are usually at 1:1250 which is either the OS' survey scale or an enlargement of the OS 1:2500. For comparisons any convenient scale may be used bearing in mind that any plan larger than A3 may be difficult to place on the judge's bench or examine in the witness box. Often an A4 plot of a particular part of the survey at 1:100 or 1:200 may be useful.
5. Prepare either a full expert witness report in accordance with the RICS practice statement and guidance note entitled Surveyors acting as expert witnesses or an advisory opinion, the purpose of which is to alert the client to the evidence and gives them the opportunity to decide either to stop litigation or to go for a full report. The report should contain a mini-CV, instructions received, an index, a brief description of the surveying methodology used, a detailed analysis and a conclusion. The conclusion must include a summing up of all ranges of opinion with regard to the disputed boundary so that 'no stone is left unturned'. Maps, plans, deeds, photographs etc, should all be included at the end of the report.
6. Where there is no SJE, a surveyor may then be required to meet the surveyor acting for the other party and try to prepare a schedule of 'agreed' and 'disagreed' points together with a 'joint plan'. These schedules and plan will help the court to narrow down the matters being contested.
7. The chartered surveyor will normally attend a conference with counsel in advance of being cross-examined on his or her evidence under oath.

Once the court has defined a boundary line and an order has been written, or if the matter has been settled prior to the court, the chartered surveyor may be ordered to mark out the boundary line on the ground and supervise any fencing contractors or builders so that a second dispute does not arise because of poor interpretation of the result. A plan of what has been set out should be prepared and sufficient copies given to LR for the titles concerned.

Summary

A chartered surveyor is probably the one professional who is present from start to finish in an independent and objective role. The chartered surveyor will meet one or both parties and their lawyers, measure up the land, analyse the deeds, give evidence in court and then mark out and record the final boundary.

Further reference

Civil Procedure Rules 1998 England & Wales – www.justice.gov.uk/civil/procrules_fin/

Surveyors acting as expert witnesses (RICS practice statement and guidance note, UK)

Boundaries: Procedures for Boundary Identification, Demarcation and Dispute Resolution in England and Wales (RICS guidance note, 2nd edition)

RICS practice standards – www.rics.org/guidance (downloads accessible electronically to RICS members only)

RICS Dispute Resolution Service (DRS)

Surveyor Court
Westwood Way
Coventry CV4 8JE, UK
t + 44 (0) 207 334 3806
f + 44 (0) 020 7334 3802
e drs@rics.org
w rics.org/drs

The DRS offer a complete range of methods for resolving disputes including arbitration, expert determination, mediation, adjudication, enabling people to resolve property disputes quickly and effectively, without going to court. They also make appointments of Single Joint Experts. Application forms for a range of services are available via the RICS website.

In particular, DRS offer the RICS Neighbour Disputes Service ('NDS'), a referral service to surveyors, solicitors, the public and the wider legal profession who may require expert third party assistance with neighbour disputes. The service uses a fixed price, structured, non-adversarial approach. Application is made to RICS DRS who make an impartial appointment. Applicants or their representatives can then use one or more of the following options:

Stage 1: Neutral on site evaluation to clarify the facts
Stage 2: Negotiation and encouragement of the parties to compromise
Stage 3: if required, the surveyor prepares an expert evaluation report.

RICS Scotland Dispute Resolution Service (DRS Scotland)

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EH3 7DN
t + 44 (0) 131 240 0832
f + 44 (0) 131 240 0830
e drsscotland@rics.org
w www.rics.org/site/scripts/documents_info.aspx?categoryID=253&documentID=439

The DRS Scotland offers a range of methods for resolving disputes enabling people to resolve property disputes quickly and effectively in Scotland, without going to court. Application forms for a range of services are available via the RICS website.

RICS Oceania Dispute Resolution Service (DRS Oceania)

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t + 61 07 3360 0256
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e contact@ricsdrs.com.au
w www.ricsdrs.com.au/index.php

The DRS Oceania offers a range of dispute resolution training and appointment services. Application forms for a range of services are available via the website. For more information, please contact the office.

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