

X marks the spot

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Certainty of land tenure is a prerequisite of land economy. However the extent of the land is not always defined with an adequate degree of certainty. What follows here is a look at the similarities and differences in both requirements and actualities of land title mapping in England & Wales and France.

A good definition of land usually begins with the use of a topographical map. In the British Isles there are the Ordnance Surveys (OSGB, OSNI and OSI) while in France there is the *Institut Géographique National* (IGN). The French “cadastre” is at a larger scale but its objective is for taxation purposes and not to define legal extents of ownership.

The OS provide mapping at 1:25000 (the same as the *carte IGN*) but importantly the OS provide mapping at 1:1250 in urban areas, 1:2500 in rural areas and 1:10000 in mountain and moorland areas. The Land Registry in England and Wales (LR) use these large scale OS topographical maps as a basis for the LR Title Plans.

The IGN map is not used for defining extent of legal ownership for three reasons: a) it is insufficiently accurate; b) has no legal value, just like the cadastral plan in that respect; and c) it is a topographical map.

In France the *Géometre-expert* can provide a plan giving details of the boundary and also the textual description (*process-verbal de bornage*). However, this process when a boundary point (borne) is determined on the ground must be done in the presence of the two adjacent owners.

The advantage of the French system is that there is no need for the owners to try and interpret either a map alone or words alone whereas in England and Wales a determined boundary plan is more prescriptive in accuracy and precision and requires only a signature and not the presence on the ground of the parties.

Boundaries

The accuracy and precision of a “determined boundary” is undefined in the Land Registration Act 2002 (LRA 2002) and the Land Registration Rules 2003 (LRA 2003) pt 10 adds little more. In fact the only matter which relates to the survey specification is in s 118 where the “plan, or a plan and a verbal description, identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map”. It is LR themselves who recommend the survey specifications in Practice Guide 40. The “fixed boundary” of the Land Registration Act 1925 was introduced to give more certainty than the “general boundary” provided. The “general boundary” is defined in r278 of the Land Registration Rules 1925 (LRR 1925) as “the exact line of the boundary will be left undetermined...” Unfortunately the costs of “fixing the boundary” was such that very few boundaries were fixed and the introduction of “determined boundaries” in s 60 of the Land Registration Rules 2003 with the interpretation of Land Registry Practice Guide 40 are in danger of falling into the same trap; that of cost.

In *Horn v Phillips* [2003] EWCA Civ 1877 Lord Justice Jacobs stated that: “This document [transfer deed] is intended to transfer title to land. It gives a precise measurement...so relevantly, this map is not ambiguous. True it is that other parts of the map may be not very satisfactory because the Ordnance Survey is not very satisfactory, but in its relevant respect one can see exactly where the beginning and the end of the line is, and if you go to the land you can see exactly where they are.”

So it seems that maps which have errors or limited by the scale of survey are adequate provided more information is available to locate the boundary exactly. This is, I believe, the principle behind the general boundary rule. The determined boundary relies on both accurate and precise measurements and mapping.

Ambiguously defined

There are often ambiguities and difficulties in this process and the cases below are examples of some of these problems.

The first case is that of *Willsher v Scott & Ors* [2007] EWCA Civ 195 it which Laws LJ stated that: “In all [these] circumstances the Ordnance Survey maps offer, in my judgment, an uncertain guide as to the precise boundary line. It was submitted to Arden and Dyson LJJ that while (as I have said) the Ordnance Survey maps do not purport to fix private boundaries, yet if parties to a conveyance choose to use such a map to mark the boundary they will be held to what the map shows.”

Laws LJ then quoted Sir Wilfrid Greene MR: “Of course, the fact that the boundary is shown in a particular place on an ordnance map is in itself no evidence of what the true boundary is as between the parties, but where the party’s title is derived from a document which refers to the ordnance map, it is necessary to look at the ordnance map and ascertain where the boundary shown on that map is truly positioned.” So it seems that the construction of a transfer deed is a word and pictures job. In *Sefton v Halliwell* [2007] EWCA Civ 473 the Appeal Judge, Lady Justice Hallett, said of the parcels clause of the transfer from the appellant to the respondent. “This clause may have identified the property conveyed with reference to the 1982 plan, but even the appellant was forced to concede that the 1982 plan was of poor quality.” The point is quite clear here; a poorly drawn map is of little use and is a time bomb waiting to engulf the unwitting purchaser in the haze and murk of such legal wrangling as could have been avoided. The solution would be to produce the title plan with such information available from metadata to determine what was surveyed, when it was surveyed and to what accuracy.

“Subject to survey”

Derbyshire County Council (DCC) v Fallon & Fallon [2007] EWCH 1326 (Ch) is an appeal to the High Court from the adjudicator to Her Majesty’s Land Registry (the adjudicator).

The facts were these; DCC owned unregistered land next to the Fallons and the title plan for the Fallons showed the boundary between DCC's land and the Fallons' land in the "wrong place" so as to include land owned by DCC. The position of the boundary issue was but one of many issues. At the hearing before the adjudicator, it was held that DCC had won save for "a comparatively minor point on the paper title issue" but the adjudicator declined to amend the register and DCC appealed the adjudicator refusal to amend the title plan.

The case seems to be that there are physical features on the ground which were mapped by OS and used by LR in their title plan. The boundary on the title plan was shown as a dotted line with the rubric that such lines have been plotted from the deed plans and the title plan may be updated from later survey information so the question of map and ground disagreeing is not an issue. It is the claim that the map does not show the legal boundary which is DCC's problem. On the face of it this does not seem a problem as the General Boundaries Rule applies.

The High Court held, following *Lee v Barrey* [1957] Ch 251, that the dotted line on the original title plan created when the Fallons bought the land could not be relied upon to indicate the precise extent of their land "that could therefore only be determined by looking at where the boundary lay by reference to the pre-registration documents" (at para 17).

The adjudicator had ruled that altering the title plan would not affect the paper title but would produce "another general boundary in a more accurate position than the current general boundary".

So a general boundary is a general boundary, however accurate, unless it is a determined boundary. Paper title depends on the pre-registration deed plan and not the title plan and that a more accurate general boundary may not add anything to the matter if it does not accord with what is on the ground and reflect the parties' rights which exist at that time on the ground. Or, put another way, just making a more accurate map or plan may not lead to more precise determination of rights in the land.

And now?

The LRA 2002, LRR 2003 and also the continuing dialogue between OS and LR is leading to more consistency in the interpretation of mapping as well as a greater requirement for conveyancers to get the “picture people”—the Chartered Land Surveyors involved. In some of the cases I have dealt with the best description of the deed plan was a “toffee paper”.

In France the two national databases, IGN’s and that of the cadastre are unsuitable for a land registration system and GeoFoncier is a project designed and promoted by the *Ordre des Géometres-Experts* (OGE) in partnership with IGN and the cadastral administration in order to create and then maintain the correspondence between the mapping systems. This will be the first and unique initiative in France towards the mapping of legal boundaries of land.

It is quite clear in the words of Lord Hoffmann in *Alan Wiberly Building Ltd v Insley* [1999] 1 WLR 894: “Boundary Disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are presented with the zeal of Fortinbras’s army.”

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Maps, land & land title—are they synonymous? asks Carl Calvert