



Determining a boundary using the hedge and ditch rule

In this e-bulletin, **Michael Selway** looks at the Court of Appeal decision in *Parmar v Upton* [2015] EWCA Civ 795, [2015] 2 P&CR 379 from July of this year, in which the court followed *Alan Wibberley Building Ltd v Insley* [1998] 2 All ER 82, [1998] 1 WLR 881 and used the hedge and ditch rule to determine the position of a disputed boundary, holding that the presumptions which make up the so-called rule were not rebutted in the circumstances of the case.

Certain well-established legal presumptions may be used to determine the position of a boundary between two neighbouring parcels of land where that boundary is not fixed by the title deeds alone, properly construed with such extrinsic evidence as is admissible, or by a boundary agreement, proprietary estoppel or adverse possession, or even by statute or order.

One of the best known of these presumptions is the hedge and ditch rule, which, more accurately, is a pair of rebuttable presumptions. The leading modern authority on the so-called rule is the House of Lords decision in *Alan Wibberley Building Ltd v Insley* [1998] 2 All ER 82, [1998] 1 WLR 881, in which Lord Hoffmann, at p.897, explained the rule as follows:

"There are certain presumptions which assist the inferences which may be drawn from the topographical features. Perhaps the best known is the one which is drawn from the existence along the boundary of a hedge and a ditch. In such a case, it is presumed that the boundary lies along the edge of the ditch on the far side from the hedge. The basis of this presumption was explained by Laurence J in Vowles v Miller (1810) 3 Taunt 137, 138 'The rule about ditching is this. No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on top of it.'

It should be noticed that this rule involves two successive presumptions. First, it is presumed that the ditch was dug after the boundary was drawn. Secondly, it is the presumed that the ditch was dug and the hedge grown in the manner described by Laurence J. If the first presumption is displaced by evidence which shows that the ditch was in existence before the boundary was drawn, for example,



as an internal drainage ditch which was later used as a boundary when part of the land was sold, then there is obviously no room for the reasoning of Laurence J to operate."

The hedge and ditch rule was used by the Court of Appeal in the case of *Parmar v Upton* [2015] EWCA Civ 795, [2015] 2 P&CR 379 in which Briggs LJ (with whom Arden and Ryder LJ agreed) gave the judgment of the court. In that case, the title deed or deeds which separated the parcels of land on either side of the disputed boundary had been lost, and so could not be used to determine the exact position of the boundary. However, there had for many years been a hedge and ditch running along the boundary (although the hedge had since largely disappeared), so the hedge and ditch rule was engaged. The claimant (Mr Upton) owned the 'hedge-side' land, and so relied on the rule to assert ownership of the hedge and ditch against the defendant (Mr Parmar) who owned the 'ditch-side' land.

It was evident that the ditch was dug after the boundary had been fixed, so the first presumption was not rebutted, but the defendant argued that the second presumption - that the ditch was dug by the claimant's predecessors in title at the very extremity of their own land, throwing back the soil and planting a hedge on it - was rebutted. However, the court was not persuaded that there was sufficient evidence to rebut the second presumption (and, even if there was, it led to the same conclusion as the presumption) and rejected the arguments to this effect, as follows:

- i. It was argued that the ditch was dug for the purpose of drainage rather than to mark out a boundary. However, Briggs LJ said, at para. [32], that: *"Nothing in the authorities about the hedge and ditch rule show that it is a necessary part of the underlying presumptions that the ditch was dug as a boundary ditch, i.e. to demarcate a boundary, rather than as a drainage ditch. On the contrary, farmers generally dig and then maintain ditches at not inconsiderable expense for the economic purpose of draining farmland so as to improve its yield, whether as arable or pasture, rather than for the anxious purpose of the precise defining of their boundaries with their neighbours... The farmer is digging the ditch at the extremity of his own land because he must not cut into his neighbour's soil."*
- ii. Given that (a) there were mature trees along what was said to have been the hedge line and (b) the ends of the ditch had run beyond the boundary and onto the defendant's land, it was argued that the ditch was dug by the defendant's predecessors in title within their land for the purpose of draining the coppice of trees that used to stand on it. However, Briggs LJ



rejected this as being contrary to the first instance judge's findings that (a) the mature trees were part of the hedge rather than the coppice and (b) it was unlikely money was spent on draining the coppice rather than the fields of the claimant's land (paras. [33]-[34]).

- iii. The best argument was that, as the ends of the ditch had run on beyond the boundary between the claimant's and defendant's parcels of land and onto the defendant's land, the digging of the ditch could not be regarded as an exercise carried out purely by the claimant's predecessors in title within the confines of their own land, and, therefore, the second presumption was undermined. Indeed, it was argued that the ditch might have been dug entirely by the defendant's predecessors in title within their own land.

However, Briggs LJ thought there were other possible explanations for the extent of the ditch, which instead involved the part along the boundary being dug by the claimant's predecessors in title on their land, and it could only be speculated which explanation was correct. This was not sufficient, as "*presumptions must be rebutted by evidence, rather than by mere speculation. The evidence must demonstrate at least a probability that the events inherent in the presumption did not occur*" (para. [37]). Indeed, the judge would have concluded as a matter of fact that the boundary part of the ditch was dug by the claimant's predecessors in title on their land rather than the other way around.

The defendant also argued that subsequent conveyances of the claimant's and defendant's respective parcels of land displaced the hedge and ditch rule because they seemed to show the ditch as falling within the defendant's land. Briggs LJ held that, properly construed against the relevant factual matrix, the conveyances actually showed the ditch as falling within the claimant's land, but, in any event, the conveyances in themselves could not have been determinative of the disputed boundary in the case because (as stated at para. [13]):

"First, if the conveyance of land on one side purports to convey land beyond the pre-existing boundary, then it is to that extent a brutum fulmen. The seller cannot convey that to which he has no title. Conversely, if the conveyance appears at first sight to stop short of the pre-existing boundary then a common sense construction of it must ask the question whether the parties really intended to reserve to the seller an apparently useless strip along the edge of the land being transferred."



Finally, it is noted that Briggs LJ began his judgment by suggesting that one of the benefits of the hedge and ditch rule is to enable neighbouring landowners to know the position of their boundary and avoid the often 'wholly disproportionate cost and stress of having to litigate a boundary dispute'. Unfortunately, the parties in *Parmar* had not avoided this outcome, which Briggs LJ expressed in literary fashion, at para. [1], as follows:

"The blood, toil and sweat which has been devoted to this litigation would even have horrified Prince Hamlet who, watching Fortinbras march away with his army, observed ". . . while, to my shame, I see The imminent death of twenty thousand men That, for a fantasy and trick of fame Go to their graves like beds, fight for a plot Whereon the numbers cannot try the cause, Which is not tomb enough and continent To hide the slain? O, from this time forth My thoughts be bloody, or be nothing worth!"

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