



## Land Surveying Division Chairman's Message



Sr Koo Tak Ming LSD Council Chairman

### Use of Extrinsic Evidence to Determine Land Boundaries

A land surveyor is an expert in various aspects of measurement science using specialized tools. Surveyors are vested with a duty to determine land boundaries according to the original intention of a grant. However, we face difficulties in our work, as we may not be able to recover the original ground situations and may have to rely on extrinsic evidence in our land boundary determinations. I would like to share with you some of the findings from the work of Sr Edmond Cheung.

It is the grantor's intention, expressed within the four corners of the title document, which helps determine the title conveyed. Extrinsic evidence, also known as extraneous evidence or evidence aliunde, is that which is not furnished by the title document itself, but derived from outside sources.

The general rule is that extrinsic evidence is not admitted to contradict, vary, or add to the terms of a title document, which clearly defines the land or interest transferred. There must be ambiguity with the description before one can resort to extraneous matter.

The term, "ambiguity," may be interpreted as connoting any doubt, uncertainty, double meaning, or vagueness that is inherent in the descriptive words themselves, or that which may arise in an application of a descriptive plan to the surface of the Earth.

In *Chadwick v Abbotswood* [2004] EWCH 1058 (Ch), the property was described as "the land edged red on plan". The Court held that when the definition of the parcels in a conveyance or transfer is not clear, the court must have recourse to extrinsic evidence, particularly the physical features on the ground.

Lewison J said:

*The principles applicable to the interpretation of a transfer of real property are not open to serious doubt. A transfer, like any other contractual document, must be interpreted in the light of the background facts reasonably available to the parties. Although it has been said that extrinsic evidence is not admissible to contradict the words of a transfer where the language of the transfer is clear, this may need reconsideration in the light of the modern approach to the interpretation of contracts: Partridge v. Lawrence [2004] 1 P. & C.R. 14 per Peter Gibson L.J. But in any event, the transfer in the present case is far from clear. Where the definition of the parcels in a conveyance or transfer is not clear, then the court must have recourse to extrinsic evidence, and in particular to the physical features on the ground. As Bridge*

*L.J. put it in Jackson v. Bishop (1979) 48 P. & C.R. 57: "It seems to me that the question is one which must depend on the application of the plan to the physical features on the ground, to see which out of two possible constructions seems to give the more sensible result."*

*The question is one to be answered objectively: what would the reasonable layman think he was buying? Since the question must be answered objectively, it follows that evidence of the parties' subjective intentions, beliefs and assumptions are irrelevant; as are their negotiations.*

In *Acco Properties Ltd v Stephen* [2011] EWHC 1362 (Ch), the parties were involved in a boundary dispute. Although the case did not involve any new principle of laws, the Court summarised the principles that applied to the determination of boundaries before making the judgement.

Simon Barker J said:

*...a judge should have regard to three further important yardsticks or rules of thumb. These are: (1) when considering any acquisition of property, it is vital to consider what a reasonable layman would think he was buying; (2) every case turns on its own facts; and (3) the task of the court is to assess all available and admissible material in arriving at its answer, and then to achieve the correct answer...*

In *Ali v Lane* [2006] EWCA Civ 1532, the parties came up with three possible lines and asked the Court to decide on the right one. The Court chose one, relying, in large part, on evidence that was external to the actual conveyancing documents. The Appeal Court held that in construing a conveyance related to disputed land in which the information contained in the conveyance is unclear or ambiguous, the court is entitled to examine extrinsic evidence such as the measurements shown in other related conveyances, evidence related to the physical features on the land at that time, and evidence of subsequent conduct provided that it is of probative value for determining what the parties to the original conveyance had intended.

Carnwath LJ ruled that extrinsic evidence must be of probative value. He said:

*In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended... (emphasis added).*



*The qualification is crucial. When one speaks of "probative value" it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise related, to physical features which were in existence in 1947...*

In some case, we have to be careful if we have to rely only on topographic features in our surveys. Black LJ in Dixon v Hodgson [2011] EWCA Civ 16124 warned of the danger of deciding where a boundary is by simply relying on the physical appearance of the ground features while neglecting or excluding the title documents. He said:

*...The prevailing problem, as I see it, was discarding the Transfer plan completely because of its lack of clarity and construing the Transfer by looking at the physical features on the ground as at the date of the Transfer without the plan in his hand. A reasonable layman without the plan no doubt would have concluded as the Recorder did that the low wall was the boundary but he would have been engaged in the exercise of construction without one of the most important pieces of evidence...*

*I differ from the Recorder reluctantly as he went about his task with conspicuous care and he had the great advantage of being able to visit the site itself. I have not found the issues here at all easy to determine as the sight of an obvious boundary structure, such as the low wall, in place at the time of the Transfer, naturally gives rise to the assumption that that is indeed the boundary...*

*...Looking at that with plan in hand, the obvious conclusion would be that the indentation on the plan represents the open gate with the hinge at the south end. The reasonable layman would therefore have found the starting point of the boundary in the east because the plan can now be*

*interpreted to show that it begins at the north end of the gate...*

In Dixon v Hodgson [2011] EWCA Civ 1612, the transfer plan, which was meant to define the property, was unclear and problematic. Finding that the transfer plan did not enable him to determine the precise position of the boundary, the trial judge made reference to the physical features on site at the date of the transfer and ordered the boundary to be situated along the northern face of a low wall. The Appeal Court held that although the trial judge had applied the correct test to decide where the boundary line lay between the two properties, he wrongly discarded the transfer plan completely. In this case, there was a clearer colour copy of the site plan. This "clearer plan" had, as its foundation, the same printed plan as the transfer plan, but it was used for a different purpose. With the clearer copy in hand, the Appeal Court determined that the boundary in the plan did not run along the low wall and concluded that it should run along another ground feature.

We should understand what the law said and apply our expertise to the land boundary survey to retrieve the intention of grant to resolve "land boundary problems".

### Syllabus Part I Examination of the APC of the HKIS LSD (Revised: March 2013)

The revised Syllabus is now available on our website. You can read it at [http://hkis.org.hk/en/professional\\_apc.php?division=LSD&x=9&y=9](http://hkis.org.hk/en/professional_apc.php?division=LSD&x=9&y=9) before you plan to take the Part I Examination. You may want to contact our Secretary at [lsdec@hkis.org.hk](mailto:lsdec@hkis.org.hk) for any further information on the new APC and new R&G.

### LSD Contact Points

If you have any views or questions on the Council's work, please feel free to send them to the Hon Secretary at [lsd@hkis.org.hk](mailto:lsd@hkis.org.hk) or to me at [lsdchairman@hkis.org.hk](mailto:lsdchairman@hkis.org.hk).

## LSD APC Part I Written Assessment (15 June 2013)

**Date:** 15 June 2013 (Saturday)

**Time:** 10:00 am to 11:30 am

**Venue:** Hong Kong Management Association, Room 201, 2/F, First Commercial Building,  
33-35 Leighton Road, Causeway Bay

**Only Probationers who have been approved to enter the LSD APC scheme are eligible to apply for this Part I Written Assessment.**

Completed form (APC-3/LS) together with the application fee (i.e. a cheque of HK\$550 payable to "SURVEYORS SERVICES LTD.") must be returned to the HKIS **no later than 5:30pm on 31 May 2013 (Friday)**. Late submission will not be accepted. Incomplete application form will not be entertained.

Please note that the syllabus has been revised. The revised syllabus and application form (APC-3/LS) for the LSD APC Part I Written Assessment could be downloaded from our HKIS website (HKIS main page -> Professional Development -> APC -> LSD at [http://www.hkis.org.hk/en/professional\\_apc.php?division=LSD&x=7&y=11](http://www.hkis.org.hk/en/professional_apc.php?division=LSD&x=7&y=11))

Note: Typhoon & Rainstorm Arrangement

The Written Assessment will be postponed if typhoon signal No. 8 or above or the black rainstorm warning is in effect at 8:00 am on the day of the Assessment. Notice of postponement will be issued later.