

# The English and Hong Kong Cadastres

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## Abstract

In the light of the changes taking place with the Land Registration Act (LRA) 2002 in England and Wales it is an appropriate and opportune time to consider also the impact of the Land Titles Bill (LTB) 2002 in Hong Kong. The influence of the English system on that in Hong Kong would be less likely since the latter's political changes of 1997 but the surveying profession of each country can certainly learn by each others' experience.

Of interest to the cadastral surveyor is that both pieces of legislation referred to above make specific reference to boundaries. The acknowledgement of the need to further consider the involvement of boundaries, and boundary disputes, can only enhance the employment prospects of the surveyor in each country and also to consider the course contents in the appropriate degree courses.

While the Hong Kong LTB converts the current Deeds Registration system into a Title Registration system, there is no attempt in the process to change the existing land boundary regulations despite their reliance on an established fixed boundary process.

The LRA in England and Wales builds on the 1925 legislation which allowed for a fixed boundary in certain circumstances, but in the future by providing for the power to determine rather than fix a boundary, and all that the difference in wording that this means. The implication of this change will be that more determined boundaries might be surveyed, especially for future new developments and for resolving squatters' rights which can rely on boundary disputes.

This paper will concentrate on the issue of property boundaries as they are set out in the respective acts and the impact this has on wider issues including how the surveying community interprets and implements them.

## 1 Introduction

Land Registration in England and Wales has had an interesting and very different history when compared with other European countries. The Romans, who constructed mounds or other fixed marks to form the turning points of boundaries, started some of the earliest records of the setting out of villages. This process continued with the Saxon, Norman and subsequent periods particularly where the open field system continued. The Diocletian's reform on taxation in AD 287 necessitated the need for a land survey to enable the land tax to be collected that was to be based on land holdings. Tax collection became one of the major reasons for the implementation of a cadastre.

The Domesday Survey of 1086 was unique as being one of the earliest records of land holding as well as recording occupants, livestock and buildings. It was undertaken in one year and completed in 1086 some 20 years after the Norman Conquest. While the records still exist they did not record boundaries. This leads one to question whether boundaries had the same importance then as they have today? It is possible that with the low density of population together with the availability of land for clearing and the large land holdings the land owners were probably not particularly interested in internal sub-divisions within their holdings.

The above records were used until 1522 when they were updated and referred to as the New Domesday Book. The 1535 Statute of Uses was an attempt to convert all uses into legal estates. Parallels to this approach can be seen in the LRA of 2002.

The system in Hong Kong that is considered in this paper dates back to the 1844 Land Registration Ordinance which is one of the oldest ordinances still in force in that part of China. The objective was to provide a means of deeds registration for the existing properties.

The priority of the changes incorporated in the LTB is that the Deeds Registration would change to a Title Registration. There is no additional intention with the amendments to change the boundary system.

The benefits of changing to a Title system from a Deeds system is that the new title will depend on reference to the title register. In the past the deed and other supporting information had to be investigated at each time of transfer. This will speed up the transaction and ideally reduce the costs and uncertainty while transfers take place.

During the change over the two systems will be running in parallel. The resultant title registration system will be similar to that in England and Wales except that the one (E&W) has a general boundary while HK has an approximate boundary system (Tang and Cheng 2002).

What is also very different is that HK relies on ownership of land by the state with all land leased to the users, while the properties in E&W are freehold. The freehold land can be leased and provided the lease is more than seven years this can under the LRA of 2002 be registered.

It should be noted that land registration serves two major roles: as an information provider and a protection provider (Palmer 1999). This will ensure that on the one hand the information is standardised while providing a security of title.

It is suggested by McEwan (2001) that a deeds registration system is less expensive and operates more quickly than that for a title system. This cannot stand up the test and certainly cannot afford the security that a title system provides for owners.

## **2 Boundary Justification**

A property boundary is an essential requirement for the registration of a property as it defines the extent of physical ownership. To date boundaries have been recorded, either as a fixed or general boundary. There are arguments in favour of both systems, however there is a situation where only one system is justified.

Boundary disputes can usually be rectified satisfactorily only when a fixed boundary is put in place of a disputed general boundary.

Fixed boundaries can be replaced only with another fixed boundary unless there is a complete change in the system within a title registration jurisdiction

Where there is currently no natural or man made boundaries occurring within a new development the fixed boundary method may be justified to ensure the precise extent of properties.

The issue of Commonhold or Strata Titles may justify that fixed boundaries be adopted; in this example with co-ordinates supplied in three-dimension.

General boundaries can usually be justified where there is a well established acceptance of boundaries by adjoining owners. This usually precedes the implementation of land registration, but it can also be adopted as a replacement of the fixed boundary system as has occurred in Kenya (Ogalo 2002).

The issue that Dale (2003) argues for is a record of the rights that are contained within a boundary rather than a precise measurement of the boundary itself.

### 3 Boundaries in England and Wales

The Land Registry Act of 1862 introduced the Land Registry and provided the boost that the Ordnance Survey (OS) needed to introduce a countrywide survey at a large scale (Maynard 1989). The LRA Act of 1862 was unfortunately not a success because there was the need to define the boundaries precisely, and by the time of the Land Transfer Act of 1875 only some 650 titles were registered. From 1875 to 1897 only a further 113 titles were registered. The difficulties experienced by owners between establishing the position of the physical and precise boundary was at the root of the problem. With a well established physical boundary, a hedge or wall, the justification of a precise boundary was being questioned, as was the speed at which registration was taking place.

Land did not have to be registered until 1897 when compulsory registration was introduced for limited parts of the country with the new Land Transfer Act (Maynard 1989). This was limited to the City of London. The Land Registration Act of 1925 extended the area of compulsion to Greater London.

The amount of land currently registered is some 74 per cent. While this represents a large figure it shows that since 1989 when all land in England and Wales had to be compulsorily registered when it was sold, that there is still a long way to go. Working on the assumption that land changes ownership every 7 years on average, then 14 years later there are a number of entries missing. The compulsory registration at the time of sale started in the Greater London area in 1925 as stated above. The spread of compulsion was completed in 1989. This shows that there will be a stage at which certain land that will not change ownership will be excluded from the registry. A system of compulsory registration of the remainder over a period of time could be introduced.

The new legislation (LRA 2002) has extended its compulsion by ensuring that in future leases of 7 years or more will have to be registered. With the LRA of 1925 there was an option to 'fix' the boundary, though this has not happened to any significant extent in the numbers fixed to date. In 1925 there was considerably less private ownership, most persons rented their houses, hence the number of properties were considerably less. Another change was that in 1925 there were fewer jointly owned properties. It is currently usual practice for partners to equal shares in a property.

The change from fixed to determined boundaries anticipates that there will be an increase in boundary determination. It is suggested that there are currently some 100 chartered surveyors involved in determining and resolving boundary disputes.

With the LRA of 2002 there is a change of emphasis, hence the use of the word 'determine' instead of 'fix'. The use of general boundaries is to continue as in the previous Act. It is still accepted that a general boundary does not determine the exact line of the boundary. This always leaves the potential for a boundary dispute, though this is less likely when a well defined physical object like a wall is the boundary.

The Land Registry Rules (LRR) of 2003 may make provision enabling or requiring the exact line of the boundary of a registered property to be determined and may, in particular, make provision about:-

- a) The circumstances in which the exact line of the boundary may or must be determined.
- b) How the exact line of a boundary may be determined.
- c) Procedure in relation to applications for determination.
- d) The recording of the fact of determination in the register or the index maintained under section 68.

The LRR 2003 set out the procedure for applications for the determination to be made to the register.

Of particular interest of surveyors experienced in curvilinear boundaries is the issue of accretion and diluvion. The boundary as recorded in the registry can be subject to the operation of accretion

and diluvion. A specific agreement is required to ensure that a determined boundary is not subject to the issue of accretion and diluvion.

The changes in the cases of adverse possession where the former 12 years has been reduced to 10 but now with provision for the owner to dispute the occupation. For a boundary dispute with regard to adverse possession the following conditions must apply:-

- a) Land must adjoin the squatter's land.
- b) Boundary has not been determined, or in the past, fixed.
- c) For 10 years the squatter was unaware that the land belonged to the neighbour.
- d) The land in question must have already been registered for more than one year.

The application for adverse possession will trigger a notification at the Land Registry to any person having a legal interest (Cook 2003).

#### **4 Boundaries in Hong Kong**

The current situation is such that only Authorized Land Surveyors (ALS) who are usually members of the Land Survey Division (LSD) of the Hong Kong Institute of Surveyors (HKIS) may carry out subdivision surveys of private lands. This came about through the Land Survey Ordinance of 1996.

The new regulations LTB of 2002 makes provision for owners to apply to the Director of Surveys to have their property boundaries determined and registered in the Land Registry. Despite this facility the land boundaries will not be guaranteed.

Most interested surveyors would argue for the land boundaries to be a part of the recently introduced title registration system. The survey history of the country shows that previous cadastral surveys are not acceptable. It was only after the establishment of the Geodetic Datum in 1980 that individual surveys were tied into this datum. There has since 1980 only been about 7 per cent of the properties surveyed and tied to the datum.

According to the authorities they intend reviewing the situation as the number of properties is tied to the datum, but provide owners to have their boundaries determined and registered.

#### **5 Common Approach to Boundaries**

The common situation in England and Wales and Hong Kong is that despite the high value of land, especially in the major conurbations, the apparent need for accurate guaranteed fixed boundaries has not been seen to be necessary. The general boundary system in E&W provides the means to have a boundary determined and when registered this is guaranteed.

This would only seem to be primarily intended when a boundary dispute occurs, not for an increase in security. One could say that if there are few disputes the necessity for fixed boundaries cannot be financially justified.

However, in Hong Kong the boundary can and does become determined without the provision of a guarantee.

#### **6 The Future**

The future trends are that there will be more determination of boundaries in England and Wales whilst in Hong Kong there will be further increasing pressure to accept the changes that the new title registration system involves and to promote the acceptance of the guaranteed fixed boundary.

With new technology including GPS the cost of co-ordinating property boundaries is less expensive than by former methods employed by cadastral surveyors. For HK the conversion to the Geodetic Datum of 1980 would therefore seem to be a diminishing excuse to accept boundaries and more important to ensure that they become guaranteed.

With the advent of many more government agencies undertaking land use surveys in E&W the OS Digital Mapping becomes increasingly useful and can be used for showing property limits (Powell 2003).

While the fixed boundary has been retained in continental Europe it is unlikely to be accepted in E&W unless European Union legislation brings into force a common cadastral policy (Bullard 2002). This argument also applies to the Deed and Title system which differs in Europe (Bogarts and Zevenbergen 2001).

## 7 Conclusions

There is a great concern in Hong Kong, how good is a cadastral survey if the resultant survey at the appropriate cost according to the regulations will not result in a guaranteed boundary.

The situation in England and Wales is such that the owner who applies for a determined boundary is provided with guaranteed boundary with all that entails.

The justification of a complete fixed boundary system in E&W could not be justified for no other reason that the state could not afford to pay for this any more than owners would.

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