

Boundaries and Easements

It is important to appreciate that a proposal relating to the use or development of a property might well involve several of the legal principles set out below. Accordingly, when trying to ascertain where it is "legal" to build an extension or other new construction upon the property one owns it is necessary to have reference to at least the following sections:

Above all it is highly recommended that if any development is proposed the relevant plans be submitted to a Jersey Property Lawyer in order that he can provide specific advice as to whether or not the proposed development would encroach upon the neighbouring property or breach any restrictions to which the specific property is subject.

It is also imperative to appreciate that if rights need to be varied or obtained from a neighbour or a boundary varied this can only legally be done by means of a contract passed before the Royal Court. Mere hand shakes or informal agreements between neighbours frequently will not be legally binding or enforceable.

Boundaries

It is important as a first step in any proposed development to establish the precise boundaries of the property to be developed. Jersey Common Law recognises certain quasi building restrictions which can significantly impact upon the ability to build up to the boundary line. Additionally, it is important not to build beyond the boundary line in such manner that one is encroaching upon a neighbour's property.

The starting point when planning any development is to establish the exact position of the boundaries. This should have been established in the properties title deeds by reference to walls, boundary stones and other physical enclosures and also by means of lines of demarcation described in the deeds. It should, in many instances, be possible to establish the boundary line within a matter of millimetres.

The obligation to set back

Jersey Common Law imposes an obligation on every property owner to set back any new building (or any part thereof such as paving slabs, drains, etc.) constructed on his property at least 18 inches from the boundary line. This Common Law obligation is frequently cancelled in the property owner's title or deeds by way of an express ability to build right up to the boundary line without leaving an "off-set " or "relief". This express ability usually takes the form of an enclosure clause which stipulates that one or other or both of the neighbouring proprietors can build

right up to the boundary line without leaving an off-set or relief.

The obligation to leave an off-set or relief is something different and distinct from the obligation not to establish windows or other openings too close to one's neighbour's property. Windows and other openings must be set back at least three feet from the boundary.

Certain types of walls and stones

If the property's boundary is stated to be an existing enclosure such as a wall, bank or hedge (not being a wall, bank or hedge claimed by the neighbour) the owner of the property can build right up to such physical enclosure, although by so doing he might be deprived of access rights to build or maintain the facade or gable of the new building or other construction in the future. There is no obligation to leave an off-set or relief towards a party owned wall or other party owned enclosure nor towards a wall that the owner of the property owns with or without an off-set.

If the property's deeds claim the ownership of a wall it is the presumption that the wall is owned with the benefit of an 18 inch off-set beyond the wall. It is the line formed by the outer extent of this 18 inch off-set that forms the boundary line. If the property's deeds claim the ownership of a wall and state that the wall is owned without an offset no land is owned beyond the wall. In this instance, the boundary line is the outside face of the boundary wall itself. If the wall or other physical enclosure which forms the boundary is in the ownership of the neighbour the claim to such wall or other enclosure will be made in the neighbour's title deeds and one's own title deeds could well be silent as to the ownership of such wall or other enclosure. Unless there is provision to the contrary in the title deeds, an off-set must be left towards the neighbour's wall or other enclosure (if he claims no off-set) or towards the extent of his 18 inch off-set if he claims the ownership of the wall or other enclosure with the benefit of an 18 inch off-set.

If a wall or other enclosure is stated to be party owned the demarcation or boundary line runs down the middle of that wall or enclosure. As stated above there is no obligation to leave an offset towards such wall or enclosure.

If properties are divided merely by means of a demarcation line and there is no provision which enables one to build either over or up to that demarcation line the obligation to set back or leave an off-set of 18 inches applies and must be observed.

Boundaries and Easements

In the rare case that boundary stones have been established in the deeds but no enclosure clause has been created, the obligation to leave an off-set can cause some confusion. If boundary stones are stated simply to be party owned there is an obligation on both owners to set back 18 inches from the demarcation or boundary line running through the centre of those stones. If the boundary stones are stated to be party owned (without off-set) there is no obligation to set back 18 inches and either party may build a wall (which will be his property without an off-set) right up to the demarcation line running through the centre of the stones.

If boundary stones belong to the property's owner with an off-set he can build right up to the outer face of the boundary stones and will additionally own the 18 inch off-set beyond the stones. A neighbour in turn would have to set back 18 inches from the outer extent of such off-set so as to leave a three foot gap towards the neighbour's wall. If the boundary stones are stated to belong to the property's owner without an off-set he can build right up to the outer face of the boundary stones but will not own an 18 inch off-set beyond the stones. The neighbour wishing to build towards those stones must leave an 18 inch off-set unless there is something to the contrary in his title deeds.

Windows and openings

Jersey Common Law recognises a very basic form of right to privacy. No window or other opening (construed by Jersey law as any manner of opening such as an overflow pipe or air vent) which could conceivably provide a view may be established within three feet of the boundary line ascertained by reference to the principles stated above.

In the case of a window it is accepted that, if the window is sealed up so that it cannot open and is established in opaque glass, there is no infraction of the Common Law rule.

Clearly, the obligation to set back walls containing windows and other openings three feet back from the boundary line (unless a contractual right to maintain them closer has been established in a contract passed before the Royal Court) is different from the obligation to leave an off-set. If the wall needs to accommodate windows or other openings it needs to be at least three feet back from the boundary line, whilst if no windows or other openings need to be established a gap of 18 inches will suffice.

Access rights

Perhaps the main purpose of an off-set or relief was to provide a mutual three foot wide strip for access purposes between the neighbouring properties. Such a limited area is clearly inadequate for proper maintenance access and in modern conveyances it has become normal to provide for an express right of access over a neighbouring property with or without workmen, ladders, scaffolding and tools. In the absence of an off-set or relief or express

access right there is no implied right of access to go on to a neighbouring property to undertake building, repair or maintenance works.

Party owned walls and enclosures

Either owner may make reasonable use of a party owned wall. Unless there is an express provision to the contrary in the title deeds a party may not use more than his half width of the party owned wall. Even then he may not do so if such use undermines or over burdens the wall.

A party owned wall may not be demolished or substantially altered without the consent and participation of the neighbour.

A window (or other opening) cannot be established in a party owned wall unless there is a clear express right to such effect in the title deeds.

The costs of maintaining and repairing a party owned wall are borne in equal shares by the relevant two neighbours.

If a party owned wall is in a state of disrepair there is no right for one party to unilaterally undertake the necessary maintenance works nor to go on to the neighbouring property to undertake works to the party wall. There is a Common Law right of action which may be brought against a neighbour who will not participate in such repairs compelling him to participate and contribute his half share of the costs of the repairs.

Caution needs to be exercised if it is proposed to build over the width of a party wall. As indicated above, the Common Law position is that one cannot build over more than one's own half of the wall. If one builds over the whole width of the wall one is encroaching upon the neighbour's property. However, if one builds only on one's own half there will be no right to go on to the neighbour's property to either build or repair unless a specific right of access for maintenance purposes is created by means of a deed passed before the Royal Court.

To make matters more complicated, in some instances old deeds provide that if a party owned wall is to be increased in height then such increase must be effected over the whole width of the wall and such increase so established will be equally party owned in the future. This particular type of provision often subsists in respect of old town properties, but may be absent from the more recent conveyances of the property.

Encroachments

Much emphasis and importance is placed by Jersey law upon the ownership of land. Jersey Common Law accordingly maintains that whoever owns the soil owns everything above and beneath it. Accordingly, if part of a new building (such as roofing or guttering) overhangs the neighbouring property it is an illegal encroachment unless provision has been made for such encroachment in the

Boundaries and Easements

title deeds. Additionally, if something (i.e. part of foundations or drains) has been established beneath the neighbour's property it is an illegal encroachment unless provision has been made for such encroachment in the title deeds.

There is generally no right of self-help known to Jersey law. Accordingly, the owner who suffers the encroachment cannot take action himself to physically remove the encroachment but must obtain a court order. An exception exists in respect of encroaching roots. The neighbour into whose land such roots encroach may remove them without a court order. He on the other hand cannot cut overhanging branches but must obtain a court order compelling his neighbour to cut them back.

Common Areas

If the property is owned together with an interest or share in neighbouring or adjoining property (for example, a courtyard or estate roadway) such that the property owns a fraction of that road or courtyard, it is imperative that it be understood that the common area cannot be altered without the consent and participation of all co-owners. Accordingly, it is not possible to establish "sleeping policemen" on a communally owned estate roadway unless all co-owners consent. In a similar manner, it is not possible to alter the physical layout of the common area such as a courtyard or "crescent type" garden so as to make the one a garden and the other a parking area without the consent of every one of the co-owners. If any major reorganisation of such type is undertaken a deed of arrangement should be passed before the Royal Court setting out the new arrangements.

If an area is owned in common with one or more neighbours it is usual for the deeds to set out the rights which each co-owner may exercise over the relevant area. In the absence of express rights each co-owner is entitled to make equal use of the common area with his co-owners for the purpose for which the common area was established, e.g. the right to come and go over a road way owned in common, or to park upon a courtyard owned in common. If the deeds are silent as to the rights which a co-owner may exercise over the common area difficult issues of interpretation can arise and the advice of a lawyer should be obtained, not least if any development is proposed which may affect the common area.

Building restrictions, rights of way and drainage and other rights

Great caution needs to be taken when the deeds contain an express building restriction. It is critically important that the extent of the restriction and the area affected by it are clearly identified.

There are, however, other rights which effectively take the form of building restrictions. We have mentioned above the obligation to leave a set off or relief and not to build

on such 18 inch strip of land even though it is one's own property.

Additionally, if a neighbouring property or properties enjoys rights over one's property it is important to appreciate that in certain circumstances those rights can effectively operate as building restrictions. If part of one's property is subject to a right of way it is important to ascertain the extent of that right of way before building in proximity to it. If one builds over the area subject to the right of way the neighbour who has the benefit of that right can insist by means of legal proceedings that the new construction established over the right of way be removed. In a similar manner, one cannot build over an area where a neighbour has been given the right to establish drains or other services together with a right of access to come onto one's property for the purpose of maintaining their drains or other services. Again, if the neighbour has a right in his deeds to come onto one's property with workmen, scaffolding and ladders in order to maintain his walls or the side of his house the area of one's property over which he may exercise such rights cannot be developed or changed so as to deprive him of that right.

Water

A property owner through whose land a stream passes may use the water from the stream, but the stream may not be damned or diverted so as to deprive those lower down the stream.

A property owner may retain rainwater which falls upon his land, however, he cannot cause it to drain onto his neighbour's property other than in accordance with the natural lie of the land or in such manner as has been contractually provided for. The owner of the lower land is obliged to accept the water which naturally flows onto his land from the higher land in its accustomed channels. Modern legislation imposes criminal penalties for water pollution.

Connection Rights

If drains or services serving a neighbouring property drain through one's property caution needs to be exercised before one connects to such drains or other services. It may well be that the rights in favour of the neighbour were created in such manner that they are for the exclusive use of the neighbour and the owner of the property under which such drains or services are established may not use them unless a right to join onto them is created by means of a contract passed before the Royal Court.

Necessity for a contract passed before Court
If one needs to acquire rights from or vary rights, boundaries or restrictions with one's neighbour or the neighbour's consent is required in respect of any of the above matters it is almost certain that such rights will have to be granted or the consent recorded by means of a contract passed before the Royal Court. Any oral or

Boundaries and Easements

written agreement will be effective (subject to proof) only against the original parties to that agreement and will not be enforceable against a purchaser or other party who subsequently comes to own the property.

No prescriptive acquisition of rights

It is not possible under Jersey law to acquire a right over a neighbouring property (such as a right of way) by long user, regardless of whether it can be shown that the right has been exercised for 20, 40, 100, 200 or more years. On the other hand, a right over one's neighbour's property can be lost if it is not exercised for 40 years or more.

No alteration of right

Without the agreement of the parties recorded in a contract or deed passed before the Royal Court it is impossible to alter the burden or nature of the relevant right. Accordingly, if one's land is subject to a right in favour of a neighbour's property one cannot alter the relevant location so as to make the right less valuable or more difficult to exercise. For example, placing a gate across a roadway forming part of one's property over which one's neighbour has a right of way would be an infringement of this principle if there is no express provision in the title deeds permitting the owner of the roadway to establish a gate across it.

In similar fashion, the property owner (whose property is called the "dominant tenement") who has the benefit of a right over his neighbour's property may not exercise it in such manner as to increase the burden on the property (called the "servient tenement"), which is encumbered with the obligation to provide the right. Obviously if a property is being developed so that its nature alters there is a very real and serious risk that the burden upon the servient tenement is altered. If the burden upon the servient tenement is altered then the dominant tenement loses the benefit of the rights and if it continues to avail itself of those "lapsed" rights it is doing so without right and title. This whole issue is referred to by property lawyers as the concept of "aggravation". If a development is being contemplated it is always sensible to check with a legal adviser as to whether any essential rights might be lost by virtue of aggravation.

Obligation to be a good neighbour

There is a certain amount of Jersey case law which recognises the obligation of a property owner not to so use his property as to cause detriment to that of his neighbour. Instances where the Royal Court might hold that such obligation has not been honoured would be where property is developed in such manner that the neighbouring property is deprived of physical support or shelter from the elements.

Enforcement

If development is undertaken in such manner that buildings or other constructions are established upon areas subject to building or other restrictions (Common Law or otherwise) the Royal Court can only order compliance with the restriction. It accordingly will order demolition so far as is necessary to comply with the terms or effect of the restriction. It does not have the ability to award damages instead of compliance, although it may award damages in addition to an order for compliance.

About Ogier

Ogier is an award winning offshore legal and fiduciary services provider. The Group advises on all aspects of BVI, Cayman, Guernsey and Jersey law and provides fiduciary services through a global network of offices covering all time zones and key financial markets.

Ogier continues to be recognised as a leading law firm by the principal legal directories, including Legal 500 and Chambers.



Boundaries and Easements

Contact details

Jersey

Chris Renouf - Partner
+44 (0) 1534 504106
christopher.renouf@ogier.com

Peter Bertram - Partner
+44 (0) 1534 504111
peter.bertram@ogier.com

Martin Le Boutillier - Managing
Associate
+44 (0) 1534 504106
martin.leboutillier@ogier.com

Barry Le Feuvre - Senior
Conveyancer
+44 (0)1534 504117
barry.le_feuvre@ogier.com

Tim Bechelet - Senior Conveyancer
+44 (0)1534 504101
tim.bechelet@ogier.com

Kate Westwater - Senior
Conveyancer
+44 (0)1534 504122
kate.westwater@ogier.com

Client briefing

This client briefing has been prepared for clients and professional associates of the firm. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Ogier includes separate partnerships which advise on BVI, Cayman, Guernsey and Jersey law. For a full list of partners please visit our website.