

## **The Property Boundaries (Resolution of Dispute) Bill 2016**

The Property Boundaries (Resolution of Dispute) Bill 2016 is due to enter the committee stage of examination and debate in the House of Lords although no date has been set for this as at the date of this article.

The Bill can be found here: <https://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0019/17019.pdf>

During the second reading of the Bill on 9 December 2016 there was discussion on issues including the costs of conventional litigation and the adversarial nature of disputes. The Bill includes proposals aimed at providing an informal alternative to the Court and Tribunal determination of boundary disputes and rights of way by introducing the expert determination of boundary and rights of way disputes by qualified surveyors. Its aim is to reduce costs and speed up the process for resolution.

The Bill is or was modelled on the Party Wall Act 1996 in that it takes the dispute out of the hands of the squabbling neighbours (and arguably lawyers) to be dealt with by appointed surveyors.

The Bill was first introduced in the 2012-13 parliamentary session but it did not progress. The current version of the Bill, introduced in May 2016, made some crucial amendments to the original 2012 draft by including a reference to appeals to the High Court; the addition of a new Clause which provided for a means of jurisdiction over the conduct of surveyors by reference to the powers of their relevant professional bodies; and a definition of “*boundary*”. That definition states a boundary “*means an invisible plane which can extend above and below ground, defining the exact extent of the owner of land’s property*”. The “*owner of land*” means “*a freehold owner of land who is desirous of establishing the position of a boundary between his land and the land of an adjoining owner or a private right of way*”. The definition of “*adjoining owner*” equally only refers to a freehold owner of land.

Hopefully further amendments will mean the definition of owner or adjoining owner will encompass long leaseholders otherwise a bizarre situation will exist if the Bill receives Royal Assent in its current form. Imagine the scenario of a long leaseholder with a 999 year lease and a dormant but separate entity freeholder (who has no interest or motivation to determine a boundary or protect a right of way given its reversionary interest extends into the mists of time) has the ability to protect its interests in a seemingly quick and economical way but the long leaseholder, who is immediately affected by the boundary dispute or interference with their right of way, can’t utilise this new procedure.

In its current form the regulation of surveyors may also have to be altered; Clause 6 of the Bill allows for regulations to be made for any malpractice or malfeasance by any surveyor carrying out their duties under the Act. Unless there are alterations to the regulations it seems to me there are routes for an increase in negligence claims against surveyors as in Clauses 5(6) and (7) it refers to a surveyor refusing to act effectively or neglecting to act effectively. There is no definition of what acting effectively means in the Bill. Anyone involved in Party Wall Act 1996 disputes will be

familiar with the spats between surveyors, so I consider guidance on “*acting effectively*” is needed from professional bodies at the very least.

### **The Proposed Procedure**

- Where a land owner wishes to establish the position of a boundary or private right of way, a notice, accompanied by a plan, is to be served on the adjoining owner of the land or user of a private right of way establishing the proposed line of boundary or the private right of way.
- If the adjoining owner does not consent to the line of the boundary contained in the notice or the right of way a dispute is deemed to have arisen.
- Where a dispute arises, both parties shall either select one agreed surveyor or each party will select a surveyor, who will then jointly select a third surveyor.
- If reasonable access is denied to allow the surveyor entry onto the land, then an offence may be committed. If found liable on summary conviction the penalty is a fine of an amount not exceeding level 3 on the standard scale (which is currently £1,000).
- The surveyor would then determine the dispute and set out his decision in an award, which would also provide who should pay the costs of the dispute.
- The surveyor’s findings would be conclusive, and could only be challenged if an appeal was made within 28 days to the High Court-Technology and Construction Court which is now the Business and Property Courts of England and Wales
- Within 28 days after the expiry of the appeal period, the owner of the land would be required to submit the award to the Land Registry, and the award would then be noted on both titles of the affected land.

Such an alternative procedure, whilst in theory will be quicker and should be cheaper than determination by the Court or the Property Chamber (First-tier Tribunal), will rely on the expertise of surveyors and their ability to comprehend fully the legal implications of the historic conveyances and property documents. Often these documents have a significant bearing in establishing the line of the boundary and title to land. The Bills explanatory notes state:-

*It is not the purpose of the Bill to allow surveyors to determine matters of title. The Bill leaves this to the courts. However, title depends on the interpretation of documentation related to the physical evidence on the ground. The Bill seeks to enable surveyors in the disciplines of boundary identification and demarcation to settle the issues that typically arise in respect of such documentation”.*

One hopes the demarcations do not become blurred, if they do it will result in further work for the strained court system.

### **Proposals by the Law Commission for terminating easements**

On 18 May 2016, following the Queen’s Speech, it was announced that the Government would bring forward proposals to respond to the Law Commission’s recommendations in a draft Law of Property Bill. The Law Commission’s project covered easements, covenants and profits à prendre-therefore including rights of way (the proposals can be found at: <http://www.lawcom.gov.uk/project/easements-covenants-and-profits-a-prendre/>)

Presently it is difficult to claim that an easement, such as a right of way, has been abandoned, even if the easement has not been used for many years. The Law Commission's proposals are to simplify the legal requirements relating to the abandonment, modification and release of easements.

### **The Law Commission's Proposals**

- To establish a rebuttable presumption of abandonment if 20 years of non-use of the easement can be shown.
- To give the Tribunal the power to modify and discharge future easement; modification of the easement will only occur where the new easement will not be materially less convenient, nor more onerous, than the existing easement.
- The express variation or release of an easement to be a registerable disposition at the Land Registry.

Given the Government is busy with Brexit the timetable for a new Law of Property Bill incorporating some of the Law Commissions proposals seems aspirational. Whether any of these proposed changes or the impact of them have been considered on the Property Boundaries (Resolution of Disputes) Bill remains to be seen.

Samantha Jackson

1 Chancery Lane

23 March 2017

*This article is provided free of charge for information purposes only; it does not constitute legal advice and should not be relied on as such. No responsibility for the accuracy and/or correctness of the information and commentary set out in the article, or for any consequences of relying on it, is assumed or accepted by any member of Chambers or by Chambers as a whole.*