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The Property Boundaries (Resolution of Disputes) Bill 2016-updated

The Property Boundaries (Resolution of Disputes) Bill ("the Bill") has entered the committee stage of examination and debate in the House of Lords. It had its first reading in the House of Lords on the 13 July 2017. The Bill can be found here: https://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0019/17019.pdf

The Bill includes proposals aimed at providing an 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. It is a private member's bill that was introduced by the Cross Bencher Peer- the Earl of Lytton. He is a surveyor and a Fellow of the Royal Institute of Chartered Surveyors. He was also involved in the formulation of the Party Wall Act 1996 and is currently the chairman of the RICS Boundaries and Party Walls Professional Panel.

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. It was disappointing to note that the costs of surveyors was not used in a comparison exercise. It is also disappointing to note that whilst the adversarial nature of the existing regime of two sets of lawyers is criticised, the replacement under this Bill is two sets of surveyors and possibly a third with a quasi-judicial role!

Its aim as stated by the explanatory notes published on the 13 July 2017 is to reduce costs and speed up the process for resolution by offering "*a consistent procedural template for resolving a dispute*". The notes also promise, to ensure "*future flexibility"* by a Code of Practice to be approved by the Secretary of State.

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 if you're a surveyor) to be dealt with by appointed surveyors-up to three appointed surveyors. It attempts to prevent any squabbles between surveyors by providing for the parties to either appoint a joint surveyor, or appoint their own surveyors who will then appoint a third surveyor (see clause 5(1) of the current version of the Bill). At clause 5(2) those appointments cannot be rescinded but clauses 5(3) to (9) in particular set out mechanisms to cater for a failure by a surveyor to act within a 10 day time period, the failure of one party to appoint a surveyor, or if a surveyor "*neglects to act effectively*". Clauses 5(10) to (11) then sets out the mechanism for the surveyor or the 3 surveyors or "*any two of them*" to resolve the boundary dispute or the private right of way.

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 regulation and control 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.

I had hoped that further amendments to the Bill would have meant the definition of owner or adjoining owner would encompass long leaseholders but the current version does not address this point. Why? Therefore we are left with a situation of a long leaseholder not being able to take action. As I suggested in my earlier article if 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, apparently quick and economical procedure, I can only assume the Earl of Lytton has little experience of the multitude of leaseholders and their interests.

In its current form the regulation of surveyors for this type of work is unknown. How can the consumer who has no option but to use this procedure be confident their chosen surveyor is competent to settle a dispute and protect their interests?

In a previous draft Clause 6 of the Bill it allowed for regulations to be made for any malpractice or malfeasance by any surveyor carrying out their duties under the Act. In the current format of the Bill at clause 8 the regulation of surveyors reverts to the industries governing bodies to establish a Code of Practice without further explanation and permits statutory instruments to be made. What force will such a Code of Practice have? There is no explanation in the accompanying explanatory notes.

Clause 6 of the current version of the Bill stipulates notices under the Act are to be governed by the "*Civil Procedure Rules as amended from time to time and in accordance with the Code*". Lawyers and judges will know how often the CPR is altered and the disputes about effective service. Will surveyors know and can they really be expected to utilise the CPR as a lawyer would to abridge time for example? The Code is not defined but I assume it means the Code of Conduct for surveyors. The clause is poorly drafted and I can only assume, again, the Code of Conduct will, if this Bill becomes law, make different service provisions that are separate from the CPR as otherwise service disputes and the adequacy of notices will generate a further cottage industry.

Unless there are alterations it seems to me there are routes for an increase in negligence claims against surveyors as in the current draft at Clauses 5(3), and (6) to (9) 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. Furthermore in clause 5(6) it permits one surveyor to proceed ex parte if the other appointed surveyor refuses to act effectively and any action then taken ex parte and "*anything so done by him*" will be "*as effectual as if he had been an agreed surveyor*". 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 current version of clause 5(8) also refers to a default mechanism for appointing a third surveyor by an appointing officer of the local Authority or the Secretary of State in the event the other appointed, possibly squabbling, surveyors can't act effectively or neglects to act within 10 days. How that time frame will work remains to be seen as does the already beleaguered local authority officers' capacity to undertake any more work or responsibility. I would respectfully suggest a re-think is needed!

An overview of 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. However the adequacy of the plan, its scale and dimensions are not stipulated. Perhaps the intended Code of Practice will set out the requirements and one hopes the plans will be Land Registry compliant from the beginning otherwise the costs will be high for the user.
- 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. The third surveyor has a quasi-judicial function but there is no guarantee of independence as where his or hers ultimate duty lays is not clear from the Bill.
- 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. There is no indication or guidance on the fee structure. As this is intended as a compulsory mechanism one wonders if the fees will be capped?
- The surveyor's findings would be conclusive, and could only be challenged if an appeal was made within 28 days to the Business and Property Court Division of the High Court 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.

This Bill's procedure, whilst in theory could be quicker and cheaper than the current route to boundary dispute resolution, 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 and ultimately lawyers.

Another problem with the Bill is that it assumes surveyors are not bias in anyway and only allows for an appeal to the High Court. If the parties only appoint one surveyor where does s/he's ultimate duty actually lay? An expert appointed under the Civil Procedure Rules has a duty to the Court. In this Bill there is no guarantee of independence. Furthermore are surveyors prepared to act as a mediator if they are the agreed surveyor?

If the driving force of this Bill is to assist the potential land owner one would have thought given the process is compulsory and the determinations final the route for an appeal would be the County Court where the fee for the issue of proceedings are lower and it is perhaps perceived as more accessible to a lay person. Even the Party Wall Act 1996 which settles disputes concerning temporary interruptions to a property provides recourse to the County Court so it is unclear why recourse in the Bill is only to the High Court.

Another factor that concerns me is the fact that this compulsory mechanism provides surveyors with a protected market. So how will the consumer be protected on fee levels? Will there be fee capping in the Code of Practice? Lawyers' fees are capped under the CPR.

My view remains that there are fundamental flaws in these proposals. Surveyors do not have the professional expertise to deal with all the various factual and legal issues that come up in boundary disputes or contentious rights of way issues; the proper legal construction of documents, estoppel and boundary agreements and lastly but by no means least issues of adverse possession. Determining a boundary is not just a question of a surveyor looking at plans on conveyances and transfers, and looking at features on the ground. There will be many factual and legal issues that cannot be dealt with in this proposed procedure, which it is intended will be compulsory.

Perhaps the second reading at the Committee stage (which has not been set as at the date of this updated article) will address some of the flaws.

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3 August 2017