REPORT OF THE CIVIL JUSTICE COUNCIL WORKING PARTY IN RELATION TO BOUNDARY DISPUTES

INTRODUCTION

In 2016 the Civil Justice Council was invited by the Ministry of Justice to put forward recommendations as to the means of improving the resolution of disputes between individuals concerning the boundaries to their land.

Prior thereto a Scoping Study had been produced by the Ministry which revealed concern expressed by Members of Parliament as well as a widespread acknowledgment that such disputes were often bitter, expensive and time consuming. Such observations had been previously expressed by a number of highly experienced members of the judiciary. In Alan Wibberley Building (1999) 1WLR 894 Lord Hoffman observed that: -

Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army.

More recently in Pennock v Hodgson Mummery LJ indicated: -

The unfortunate consequences of a case like this are that, in the absence of any compromise, it always costs a lot of money and usually generates a lot of ill-feeling that does not end with the litigation. None of these things are good for neighbours.

This consensus led the Ministry of Justice to reflect on possible alternative methods of resolving this type of disputes and it is in that context that the Council was asked to prepare a report.

AREAS FOR CONSIDERATION

The principal concern was the impression that litigation through the court process was a cumbersome and expensive way in which to define a boundary between two properties. At the conclusion of any litigation the parties were likely to remain neighbours probably on worse terms than previously.

It followed that the most appropriate way of dealing with disputes of this nature was to try to avoid litigation altogether or if it could not be avoided then to ensure that the case was prepared at proportionate cost with both parties exchanging all relevant documentation at an early stage.

A Private Members' Bill advanced by Lord Lytton who is a Chartered Surveyor suggested that one way of resolving boundary issues would be to create a structure which broadly replicated the provisions of the Party Wall Act and the Working Party also considered this proposal as part of its remit.

The Working Party was conscious that many parties in disputes involving their properties acted in person or with limited legal advice. It therefore concluded that any of its findings and recommendations should be presented in an accessible form and widely circulated to outside agencies such as local authorities and Citizen Advice Bureaux.

Finally, the Working Party accepted that despite all attempts to obviate litigation there would remain a given proportion of cases which may never settle and accordingly consideration had to be given to streamlining any court processes and ensuring that the costs expended in such cases were proportionate.

METHODOLOGY

The Council convened a Working Party under the Chairmanship of one of its members, District Judge William Jackson. The Working Party subsequently comprised representatives of interested parties including mediators, the Property Litigation Association, the Property Tribunal and the Royal Institute of Chartered Surveyors.

From the initial meetings it became clear that: -

1)-There was no great enthusiasm for a system akin to the Party Wall Act. There were often issues involving adverse possession, prescriptive rights, Rights to Light and Rights of Way and a delineation of a boundary per se would not resolve those issues. Secondly the proposal was predicated on the basis that both parties would instruct expert surveyors and in the event of a dispute between them a third expert would be required. The level of expenditure would therefore be appreciable.

2)-Any pre-action protocols whether sanctioned by the Civil Procedure Rule Committee or otherwise would have to be light touch and easy for individuals acting in person to operate. The main issue would be that of effective negotiations as opposed to a rigorous compliance regime.

3)-Once proceedings are issued it is very difficult to contain costs. The court cannot budget for costs already incurred and by the stage of the Costs and Case Management Conference both parties will have acquired their own experts whom they would be reluctant to jettison. It followed that the main object of any change must be to encourage alternative forms of dispute resolution at as early a stage as possible before such substantial costs are incurred.

4)-The Property Litigation Association assisted in the production of a straightforward pre-action protocol which it was content to be made available for the Council's purposes and which could be utilised fairly easily even by those acting in person. A copy of the latest version is attached.

After the initial meetings it became apparent that the Royal Institute of Chartered Surveyors (RICS) had for some time operated a Committee which sought to ensure best practice and accreditation to its members when dealing with boundary disputes. As a consequence, meetings were held between the Secretariat and Judicial members of the Council on the one hand and members of the RICS Committee on Boundary Disputes on the other hand. These meetings proved extremely useful to the Council and it is grateful to RICS for facilitating them.

RECOMMENDATIONS

1)-The Council should publicise by its website and general circulation to interested parties a guide for potential litigants in Boundary Disputes. A draft is attached. The emphasis should be on encouraging the parties to use alternative forms of dispute resolution yet at the same time emphasising the benefit to be gained from solid advice from lawyers and/or contact with an expert approved by RICS. Details of the proposed RICS Neighbour Disputes Service are enclosed.

2)-Boundary disputes throw up the potential for too many other issues whether legal or social to enable the matter to be determined in a similar manner to the Party Wall Act.

3)-The parties should still be able to use the adjudication process enabled by the Land Registry Division of the First Tier Tribunal (Property Chamber) and this scheme has the benefit of its free mediation service and a level of expertise from a Tribunal Judge experienced in this area of the law. It is recommended that this somewhat underused procedure should be more extensively publicised.

4)-If legal proceedings take place then the powers available to Judges of effective case management should be considered and must be used. These would include compulsorily staying the proceedings to enable the parties to attempt ADR, working on the premise that a jointly instructed Surveyor should be the default option, requiring the parties to attend the initial Costs and Case Management Conference for the purposes of negotiation and limiting the parties' ability to recover more than fixed costs on the basis that these types of cases would be suitable for the intermediate track envisaged by Lord Justice Jackson in his most recent report. The CPRC should be consulted about whether the proposed protocol and above recommendations would need to be incorporated in any rule changes.

5)-Overall the documentation available to both professionals, the voluntary advice sector and potential litigants must stress the need to produce a cost-effective solution and regard legal proceedings as a last resort.