Neighbours at war

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Neighbour disputes can cause anger, conflict and rack up huge legal costs. So the future is mediation, says James Kavanagh

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Neighbour disputes can be hostile, fractious and expensive, so mediation can often appear inappropriate because destructive attitudes and intense emotions are already entrenched. But perhaps it is this perceived weakness that gives mediation a strong role: neighbour disputes are often more about the underlying issues and relationships between people than technical issues such as where a boundary is located, access rights or high hedges.

Strengths

Mediation is part of a portfolio of alternative dispute resolution (ADR) processes that enable conflicts to be resolved outside litigation. ADR can cover informal and formal negotiation, settlement meetings, arbitration, conciliation, mini trials, mediation and many other routes. Various forms of ADR are now supported by the judiciary, and ADR concepts have been added to many national, regional and international guidelines.

The UK introduced ADR concepts into the Civil Procedure Rules 1998 , the EU Council of Ministers adopted the mediation directive 2008/52/EC in 2008, and more recently RICS worked with the UN Food & Agriculture Organization on the addition of ADR wording to the global soft law instrument Voluntary Guidelines on the Responsible Governance of Tenure .

These guidelines have been adopted by all members of the UN General Assembly, and in many cases are the first opportunity for land professionals, including surveyors, to engage with ADR and mediation principles. One of the major strengths of many ADR processes, and especially mediation, is that they can be used across borders and legislations within any legal system.

This is especially important in the land sector, where different ownership rights, tenure and identification can co-exist even in particular countries: for instance, many developing nations operate official land registration systems that run alongside customary or shared ownership systems. Indeed, some customary systems have an in-built cultural process for mediation such as the ?stool? system in Ghana where tribal elders will officiate over land and neighbour disputes.

Mediation

Mediation in the broadest sense is a voluntary, non-binding and private dispute resolution process in which a neutral person helps the parties reach a sustainable, negotiated settlement. One of the key tenets of mediation is that it is conducted ?without prejudice?, which allows parties to be sure that the process is confidential, to the extent permitted by law, and any information that is disclosed, views that are expressed or positions or concessions that are offered will not be held against them if the case goes to litigation.

There are several different models of mediation, with the facilitative style being the most popular, as well as the most suitable for neighbour disputes. It enables a sustainable settlement to be reached by the parties, which can be structured into a legally binding signed agreement. The evaluative model of mediation is also helpful, as it allows a sometimes court-appointed expert from the relevant sector, in the role of mediator, to make suggestions for possible settlement.

The mediation process has 5 generally agreed stages ? preparation, opening, exploration, negotiating and closing. It is vital for a mediator to understand each of these and how they interconnect. For example, if both parties have been strongly encouraged to engage with mediation, the preparation stage is vital for a mediator so they can get a grip on the case, before the opening and negotiating stages.

Bad cases

One of the foremost neighbour dispute experts in the UK, David Powell FRICS, often refers to his ongoing ?psychological profiling? of the participants in boundary disputes ? suburban *Daily Mail* readers, Ford Mondeo drivers, life members of the National Trust, recently retired people with time on their hands ? and how even small disputes can escalate with breathtaking speed to expensive litigation, poisoning relationships for years, if not forever.

One dispute in Hertfordshire, Cameron v Boggiano [2012] EWCA Civ 157 , began when planners used a thick pen to mark out boundaries. The area represented was just 60cm wide, yet the legal costs ran to ?400,000. In Cheltenham, Gloucestershire, meanwhile, neighbours spent 2 years fighting over a 6m2 patch of land in Charalambous v Welding [2009] EWCA Civ 1578 . A recent report by the Ministry of Justice (MoJ) said that warring neighbours often use boundary disputes ?as a weapon? to ?bully? each other, and they are often motivated more by ?jealousy and greed? than genuine disputes over boundaries.

On a much larger scale, Ethiopia and Eritrea went to war in the 1990s over their international border, which was based on an ad hoc Italian survey from the 1930s, with the result that several thousand people lost their lives. The ongoing border dispute between Pakistan, India and China on the Siachen Glacier has also caused regional tension and sporadic outbreaks of conflict for decades. The International Court of Justice has introduced ADR processes to help resolve many of these disputes.

Costs

According to the MoJ report, boundary cases typically cost between ?10,000 and ?50,000. Mediation offers a valuable way to move towards a settlement without having to go to court. The issue of cost and the considerable possibility of negative verdicts ? no matter how strong a party feels its case is ? are good reasons to push parties towards settlement.

For example, the total costs in Faidi v Elliot Corporation [2012] EWCA Civ 287 were more than ?140,000 : this was a dispute between neighbours about the timber flooring to one flat, which was said to cause noise that would not have been heard if underlay and a carpet had been in place. All 3 Lord Justices commended mediation in their judgments. However, neither side had even written to the other proposing mediation until shortly before the Court of Appeal hearing.

Role of the expert

In the UK, Ordnance Survey mapping information provides the basis of the property title plan, and is an indication only of the geographical extents of a parcel boundary. More in-depth title information may also be found in the deeds, assuming they still exist. Other systems, such as

the Napoleonic land codes or the German Grundbuch , offer more accurate measured boundaries. However, no system can entirely eliminate neighbour disputes, which may open up from the least provocation or from historic issues that are often unrelated to the boundary problem.

Settlement at mediation allows the parties to agree solutions that the courts cannot offer

RICS provides information and professional guidance for chartered surveyors on the following topics:

- how to research a boundary dispute case file professionally, in Boundaries: Procedures for boundary identification, demarcation and dispute resolution guidance note, 3rd edition, 2014 ;
- standardised documentation for party walls awards, in Party wall legislation and procedure guidance note, 6th edition, 2011 ;
- how to calculate rights of light loss, in Rights of light guidance note, 2nd edition, 2016 .

The government and the Land Registry also produce a wealth of technical guides and information. However, experts can often feel under pressure to take one side or the other in the hothouse atmosphere of a neighbour dispute, forgetting that they should be giving professional advice on the facts rather than trying to support a client.

Cases of chartered surveyors acting on spurious evidence and in an adversarial capacity are numerous. Surveyors from more structured cadastral systems in Europe have expressed their bewilderment at their UK counterparts, reporting such unprofessional, confused but perhaps understandable behaviour to RICS. The nature of the UK general boundaries system does allow a certain amount of ambiguity in boundary identification and demarcation; but where the role of the expert is misconstrued, it can and does lead to disastrous consequences, with an often chastening appearance in court and before the RICS regulatory team for the expert chartered surveyor.

But mediation can offer a valuable way for an expert chartered surveyor to reach a settlement, either through the facilitative or evaluative model, by eliminating the win-at-all-costs approach. So rather than facing the attitude that ?You are my expert, I pay your wages, help me win this dispute,? the expert becomes ?Our mediator and expert ? we pay your wages, help us find a settlement to this dispute.?

The judicial view

The judiciary and legal profession has a love?hate relationship with neighbour disputes, and has been trying to bring ADR into play. The Party Wall etc. Act 1996 is a successful legislative instrument that has at its heart a robust ADR model , employing a ?third surveyor?. Tens of thousands of party wall awards have been agreed and very few end up in dispute. Many of the ADR principles at work in these situations could be employed in other types of neighbour dispute.

Under the Property Boundaries (Resolution of Disputes) Bill 2016?17 some court enforcement would be brought to ADR, either as an agreed settlement or as some kind of evaluative mediation, with an expert chartered surveyor and trained mediator making technical suggestions to help reach an agreement. This is already the approach taken in several countries such as Sweden and Denmark, where licensed expert land surveyors

have the legal authority to impose a solution on parties in a dispute over boundaries or other land issues, and that solution is legally registered, being recognised by the cadastral authorities.

Reforms

The MoJ report concludes that radical reforms are not needed. It says: ?Responses suggested that often boundary disputes are caused by, or are merely symptoms of, personal disagreements between neighbours.? The study found that 170 boundary disputes reach the court a year, although surveyors told officials that they were seeing up to 1,000 a year. The report concludes: ?We consider that the piecemeal improvement of the current system, without impinging on its flexibility, is likely to be a better approach to making boundary disputes easier and less expensive to resolve than adopting an untried and radical solution.?

The report should form the basis of a future agreement on a much more robust court enforcement process or even system of compulsory mediation for neighbour disputes. At the time of writing, RICS, the Law Society and the Civil Litigation Council are discussing these issues.

The future is bright

Expert mediation does now seem to have some momentum in neighbour disputes, with not only legislative and judicial support but also a dawning realisation by expert chartered surveyors and protagonists that such disputes can be settled without resort to litigation and courts.

There seem to be 3 major factors prompting parties towards a mediated settlement.

1. **Costs:** litigation can cost a small fortune and often outweighs the actual value of the disputed land. Mediation offers a much more economical way forward. Settlement at mediation allows the parties to agree solutions that the courts cannot offer
2. **Settlement at mediation** allows the parties to agree solutions that the courts cannot offer. This could enable compromise or agreement on secondary benefits that might not be directly related to the physical problem; for instance, to keep a fence where it is but allow joint access to the back gate and driveway.
3. **Permanency:** neighbour disputes can have a nasty habit of recurring unless the agreement is registered as, for example, a determined boundary with the Land Registry. A mediated, sustainable settlement that engages both parties can be developed into a legally binding agreement.

Mediation has a lot of potential for helping people move away from entrenched, emotional positions and towards sustainable settlements. It also offers the expert chartered surveyor a way not only to hone their people and mediation skills, but also to draw directly on their strengths in the technical areas of practice.

The future is mediated.

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Further information

- Related competencies include Analysis of client requirements , Cadastre and land management , Legal/regulatory compliance
- This feature is taken from the RICS Land Journal (November/December 2017)
- Related categories: Disputes ; Dispute resolution ; Neighbourly matters