PARTY WALLS

Articles concerning the law and practice of the Party Wall etc. Act 1996

EDITED BY BENJAMIN MACKIE

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Party Walls: Articles concerning the law and practice
of the Party Wall etc. Act 1996
First Edition 2022
TPWC Publishing

Typesetting and cover design by Sadie Butterworth-Jones

ACKNOWLEDGEMENTS

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Image credit: Ian Woodley

INTRODUCTION

Benjamin Mackie

'It is better to debate a question without settling it than to settle a question without debating it'.
~ Joseph Joubert

I read the above quote by chance, and it later occurred to me that most books about the subject of 'party walls' were arranged in such a way as to give the reader an explanation of the law and practice of party wall matters, but without the debate. This is entirely understandable, as readers want definitive answers.

This book is different, in that there are articles which contradict each other. The strength of this book is that there is an array of voices, all contributing to the broader debates around party wall matters.

It was important to me, as an editor, to ensure voices were heard across the spectrum. I hope this book can act as the catalyst to inspire a new generation of contributors. I have included one of my own articles, not because I consider myself to be an adept writer, or to have brainy opinions. I would like to show people that they shouldn't be afraid to debate.

Attempts were made to make this book more inclusive, as diversity can strengthen the quality of debate to counter any echo chamber. Briefly, an echo chamber is where people encounter beliefs and opinions that echo their own. This can stifle debate. With a wealth of views and different interpretations, I am convinced that this is an exciting, thought-provoking book.

I often wonder whether the Party Wall Act is in safe hands, and like many, I have my frustrations. However, I conclude that the Act is in good hands, and there are many reasons to be optimistic. The two main professional bodies (Pyramus & Thisbie and the Faculty of Party Wall Surveyors) are working to educate practitioners and the public alike, but they require the assistance of their members to ensure they can continue their good work. Party wall events organised by these professional bodies are often busy, and this shows a general enthusiasm, which can only be a good thing.

Debate must be encouraged, and people should be open-minded. This book can encourage debate through the excellent articles submitted by the authors, but it cannot assist those with closed minds. I'll leave you with Albert Einstein: *'The measure of intelligence is the ability to change.'*

1. SERVING VALID NOTICES

NOT AS SIMPLE AS IT FIRST APPEARS

Rob French

ABSTRACT

Serving valid notices is the essential first step in progressing a request to exercise rights granted by the Party Wall etc. Act 1996. It is an entirely sound assumption that if an initial party wall notice is invalid, then any resultant associated award served must also be invalid and any works progressed by way of that award could be found to be unlawful. Serving notices is often perceived as an inconvenient and generic exercise to which only limited attention and time is afforded. In these overly litigious times, a review of the common pitfalls and misconceptions related to the serving of party wall notices is essential. When considering 'serving valid notices', it is necessary to consider both the means of creating valid notices and the means by which such valid notices are served. The following key areas of party wall practice and associated case law are therefore explored in this paper: the sections of the Act which prescribe service requirements; types of notices — Line of Junction, Section 2, Adjacent Excavation and all other lesser used notices and how to ensure they are validly drafted; ensuring notices are served on the correct person and / or legal entity; validly noting owner details. Key findings are: a detailed description of

proposed notifiable works is essential; the service provisions of Sections 15(1) and 15(2) must be taken in their literal sense; notices served on a 'body corporate' must be served on the; Secretary or Clerk'; Section 1 notices must accurately describe the intended wall and differentiate between Section 1(2) and 1(5) rights; Section 6 notices must include detailed drawings and elevations and full details of any strengthening or safeguarding works is proposed; notices must always list all owners in full; always record proof of service; building owners must be asked if it is intended to change the building owner entity; Section 12(1) notice must be served before any associated notifiable works commence.

Keywords: serving, notices, validity, injunction, party wall, excavations

THE SERVICE DIRECTIONS PRESCRIBED BY THE PARTY WALL ETC. ACT 1996

Sections 15(1) and 15(2) of the Act[1] prescribe the specific means by which notices under the Act must be served. In general terms, Section 15(1) describes the service of a notice where the recipient is a known entity, and the address of the recipient is known. In comparison, Section 15(1) prescribes the method of service where the decision is necessary to serve on 'the owner'. There are only subtle differences between the two, but it is very important to note the wording specific to each and not to cross contaminate the particulars of each.

Section 15(1)[2] states (emphasis in bold and underlined added):

> 'A Notice of other document required or authorised to be served under this Act may be served on a person —
>
> (a) by delivering it to him in person;
> (b) by sending it by post to him at his usual or last known residence or place of business in the United kingdom;

> or
>
> (c) in the case of Body Corporate, by delivering it to the Secretary or Clerk of the Body Corporate at its registered or principal office or sending it by post to the Secretary or Clerk of that Body Corporate at that office.'

Section 15(2)[3] states:

> 'In the case of a Notice or other document required or authorised to be served under this Act on a person as owner of premises, it may alternatively by served by:
>
> (a) addressing it to "the owner" of the premises (naming them); and
>
> (b) delivering it to a person on the premises or, if no person to whom it can be delivered is found there, fixing it to a conspicuous part of the premises.'

As will be seen in the details of the case mentioned below, it is all too easy to fall foul of these specific requirements, leaving notices open to their validity being questioned.

In the case of *Barberini v Weihe (2016)*[4] a well-respected party wall surveyor served notices on behalf of the building owner following a Land Registry search which revealed that the relevant adjoining owners' details on Land Registry were listed 'care of a solicitors' company, as is very commonly the case. The party wall surveyor (at the time of service of notice acting as the building owner's agent) served notices in two ways. First, he served the relevant notices addressed to the adjoining owners 'care of' the solicitors at the solicitors' noted address and secondly, he served a second set of notices by post addressed to the adjoining owners at the adjoining property in question. No response was received from the adjoining owners and so the building owner's surveyor, following a deemed dispute, proceeded to make a 10(4)(b) appointment and the two

surveyors then proceeded to make and serve an award. Upon receiving the award, the adjoining owners appeal to the County Court on two key points. The first related to the level of involvement of the building owner's and adjoining owners' surveyor's assistants and the second, that the original notices had not been validly served. His Honour Judge Bailey (HHJ Bailey) found in his judgement[5] that the adjoining owners were in fact correct and that the originally served notices were not validly served and for this reason alone, the awards were found to be invalid. Interestingly, HHJ Bailey also found within his judgement[6] and reported that the awards were capable of being found invalid due to the level of involvement of the surveyor's assistants in the procurement of the awards; but of course this separate matter, while interesting, is not specifically relevant to this subject.

The reason that HHJ Bailey found that the awards had not been validly served under Section 15(1) was because he considered that the 'care of' the solicitors' firm was not the adjoining owners' 'usual or last known residence or place of business in the United Kingdom'. In relation to Section 15(2) HHJ Bailey found within his judement[7] the notices were valid first, because sending the notices by post is not considered 'delivering it to the person on the premises or, if no person to whom it can be delivered is found there, fixing it to a conspicuous part of the premises', and secondly, that the adjoining owners successfully argued that their 'usual or last known residence or place of business in the United Kingdom' was not the adjoining property.

HHJ Bailey did express sympathy in his judgement[8] for finding himself caught up in such technicality, but considered that the Party Wall etc. Act 1996 service requirements should be construed in their literal sense and not in a purposive sense. This finding should therefore be a lesson to all surveyors not only with regard to the requirements for serving notices but also for all wording within the Act. HHJ Bailey's finding[9] that the wording of the Act must be taken in its literal sense leaves no discretion as to interpretation.

In reality, what this means for party wall surveyors is that where Land Registry details an adjoining owner's address as a 'care of' solicitors' address, the only valid way in which a notice can be served is in addressing the notice to 'the owners' and affixing the notices to a conspicuous part of the adjoining owner's premiss. This will no doubt result in the need for many additional unpopular visits to the adjoining owners' properties; however, if surveyors and their appointing owners do not wish to be caught out by 'technicalities' then such additional visits will be unavoidable.

An alternative service option would be to attempt to contact the solicitors' company noted as the 'care of' address and establish with them the correct address for service on the adjoining owner and to record this confirmation in the surveyors' files. It is, however, common to discover that the solicitor noted in the Land Registry Title no longer exists or upon contact, confirms that they have not acted for the adjoining owner for many years. If no adjoining owners' details can be obtained, then of course unfortunately service must take place as per Section 15(2) and that an additional visit to site with a suitable tool for 'fixing' the notice to a 'conspicuous' part of the 'premises'.

In relation to the services of notices, one must also now consider the introduction of 'The Party Walls etc. Act 1996 (Electronic Communications) Order 2016';[10] the only current amendment to the Party wall etc. Act 1996. In brief, this stipulates that where there is a confirmed willingness to receive notices electronically, this willingness has not been rescinded and there has been a specified email address to which notices are to be sent, then valid service can be electronic. Obviously, at the point that a building owners' agent or a building owner serves notice, the email address of the adjoining owners is seldom known and so this electronic order relates more to the service of awards than to the service of notices.

It has been voiced recently that the findings in the *Barberini v Weihe (2016)*[11] case and the introduction of the 'The Party Wall etc. Act 1996

(Electronic Communications) Order 2016'[12] have been superseded by the findings in the case of *Knight v Goulandris (2018)*[13]. This is only true in very specific circumstances where proof that the adjoining owners have received a document served is available. This case related to the service of an award and subsequently the adjoining owners claimed that it was not validly served. Within correspondences, they were, however, deemed to have acknowledged receipt. This was also a case heard by HHJ Bailey and within his judgement[14] he found that as the purpose of correct service was to ensure receipt, confirmation of receipt naturally indicated valid service by whichever means service has been made. As can therefore be seen, this case has only limited relevance with regard to the service of notices. Specifically, in the Barberini v Weihe (2016)[15] case, the adjoining owners were found not to have confirmed receipt of notices but did confirm receipt of awards which they then deemed to be invalid.

Within Section 15(1) extracted above, the words 'Body Corporate' and 'Secretary or Clerk' are highlighted. Taking this wording in its literal sense, there is a risk that if we do not serve on a 'Body Corporate' by way of addressing the notices to 'the Secretary or Clerk' of that Body Corporate, it could be considered that notices have been invalidly served. This does, however, raise a number of questions which may only be answered by the Courts. Some of the questions are: What of the adjoining owner body corporate does not have a designated Secretary of Clerk? Can you address notices to 'the owner' and / or 'the Director', and the Secretary or Clerk? If you address a notice to 'the Secretary or Clerk of a company and the company has no Secretary or Clerk and therefore the notices disappear into a company's post system either? Does this mean that notices have or have not been validly served?

In such situations, of course, it is tempting to suggest that common sense should prevail; however, where judges feel that the wording of the Act must be taken in its literal sense, careful consideration does need to be given as to how best to service notices in reality in order to provide compliance with sometimes extraneous wording / words.

PRODUCING VALID LINE OF JUNCTION NOTICES

The section above explores the 'valid service' element of 'serving valid notices' and the following section will now explore the validity of the notices being served.

Running through the Act in chronological order, the first detailed notice is, of course, the line of junction notice detailed in Section 1. Section 1(2)[16] states (emphasis in bold and underlined added):

> 'If a building owner desires to build a party wall or party fence wall on the line of junction he shall, at least one month before he intends the building works to start, serve on any adjoining owner a notice which indicates his desire to build and describes the intended wall.'

This section makes clear that a valid line of junction notice must describe the 'intended wall.' Simply therefore stating 'to build a wall on the line of junction' is highly unlikely to satisfy this criteria in a literal sense. Suitably detailing the proposals for the benefit of the adjoining owner is as always key.

> Section 1(4)[17] of the Act states:
>
> 'If, having been served with a Notice described in subsection (2), an Adjoining Owner does not consent under this subsection to the building of a party wall or party fence wall, the Building owner may only build the wall —
>
> (a) at his own expense; and
>
> (b) as an external wall or a fence wall, as the case may be, placed wholly on his own land.

And consent under this subsection is consent by notice served within the period fourteen days beginning with the day on which the notice described in subsection (2) is served.'

Section 1(5)[18] of the Act states (emphasis in bold and underlined added):

> 'If the Building Owner desires to build on the Line of Junction a wall placed wholly on his land, he shall, at least one month before he intends the building works to start, serve on any Adjoining Owner a notice which indicates his desire to build and describes the intended wall.'

A Section 1(2) notice should be served where it is intended to build a new wall astride the line of junction and a Section 1(5) should be served where it is intended to build a wall wholly on the building owner's land. There is some practice among surveyors of serving both a Section 1(2) and 1(5) notice to cover a situation where the building owner wishes to build a party wall astride the line of junction and then if the adjoining owner refuses this request the surveyors fall back on the fact that a 1(5) notice has also been served. Such surveyors have, of course, not considered the wording of Section 1(4) as in essence this morphs a Section 1(2) notice into a 1(5) notice in such circumstances. With the drafting of valid notices, a point which needs to be repeatedly made is that the entire premise of a notice is to place an adjoining owner in a position of understanding the building owner's intended works to such a degree they are capable of making an informed decision as to whether they wish to consent or dissent to the works and appoint a surveyor. It should therefore be considered that serving a 1(2) notice and 1(5) notice in tandem represents two entirely separate requests for rights under the Party Wall etc. Act and legally such opposing notices may actually extinguish each other. This practice is therefore unnecessary and potentially could create a compromised situation for the building owner.

In recent years, a body of thought is growing momentum among surveyors that it is possible to serve a line of junction notice for raising a wall above an existing building on the adjoining owner's land where this adjoining owner's building abuts the boundary. To

put this is context, this would be where an adjoining owner has their own building wholly on their land on the boundary and the building owner wishes to raise an adjacent wall higher than the adjoining owner's structure as notifiable works under the Party Wall etc. Act 1996. The reason that the building owner would wish for this to be classed 'notifiable works' is of course to take advantage of the access rights that the Act permits. This practice should of course cease as Section 1(1)[19] of the Act states:

> 'This section shall have effect where lands of different owners adjoin and (a) are not built on at the line of junction.'

If the adjoining owner has a building built up to the line of junction, then the 'lands' of the adjoining owner are very much and obviously 'built on'. If the drafters of the Act intended for the line of junction to be considered a vertical plane, then surely the works 'lands' would not have been used. The point at which 'lands of different owners adjoin' cannot hover in mid-air above an adjoining owner's property. While this point may deviate slightly from the subject of 'serving valid notices', in a legal sense this is wholly relevant as if such a matter is to be heard before a Court, then the very matter the Court will be deciding is if a notice served to acquire such a right, and therefore access rights, is valid or not. The Courts will therefore undoubtedly soon need to decide if such notices are invalid.

Another common practice with regard to the use of line of junction notices relates to circumstances where the building owner has an existing structure built up to the line of junction and wishes to demolish this building in order to raise a new and assumedly taller, more substantial structure. No line of junction in the existing circumstances can be served as the 'lands' of different owners' are 'built on', and so the building owner proceeds to demolish the existing structure (assumedly complying with health and safety legislation and ensuring no trespass takes place), and then proceeds to grub out the associated foundations. The building owner then considers themselves to have a true line of junction situation

whereby 'the lands of different owners' adjoin and (a) are not 'built on at the line of junction'. The building owner then proceeds to serve line of junction notice requesting permission to construct a new wall and acquire the access rights by the Act.

Such notices can only be considered valid if there is no remaining structure 'where lands of different owners adjoin'; however, in this situation there is a major issue to be considered. If the original structure's foundations were eccentrically loaded this wall and the eccentrically loaded foundation could be entirely removed from the building owner's land (again subject to health and safety law and with no trespass). In this scenario there would then truly be nothing 'built on at the line of junction once the structure and foundations are removed'. If, however, the existing building owner's structure does not have eccentrically loaded foundations then there will be a small strip of foundation which is on the adjoining owner's land. To remove this without consent could potentially be an injunctable trespass and to attempt to trim the building owner's foundation away from this section of foundation on to the adjoining owner's land creates two issues — the first being that trimming the foundations in this way could be considered to require notice under Section 2 of the Act. The second is that if the small strip of foundation is left on the adjoining owner's land, can it then truly be considered that the lands of different owners are not built on at the line of junction? With more and more development sites requiring demolition of existing buildings prior to new development works starting, coupled with adjoining owners' and surveyors' growing awareness of the financial benefits of procuring access licences, these issues will surely play out in the Courts over the coming years.

SERVING VALID SECTION 2 NOTICES

The requirements for obtaining the rights detailed under Section 2 of the Act are stipulated in Section 3(1)[20] as follows:

> 'Before exercising any right conferred on him by Section 2 a Building Owner shall serve on any Adjoining Owner a notice (in this Act referred to as a "Party Structure Notice") stating:
>
> (a) the name and address of the Building Owner:
>
> (b) the nature and particulars of the proposed work including, in cases where the Building Owner proposes to construct special foundations, plans, section and details of construction of the special foundations together with reasonable particulars of the loads to be carried thereby; and
> (c) the date on which the proposed works will begin.'

As previously mentioned, the key to a valid notice, therefore, is to provide the adjoining owner with enough detail to put them in the position to understand the proposals and make an informed decision as to whether or not they wish to consent to the works. The key is therefore not in detailing which subsections under Section 2(2) (a)-(n) are applicable, but instead to accurately describe the notifiable works for which the building owner wishes to seek rights. It is common practice among surveyors to take a blanket approach to serving notices and to detail many of the subsection letters (a)-(n), even where some in no way relate to the intended works. Such a vague and wide-ranging notice is unlikely to be valid as it will, of course, confuse the adjoining owners and not give the requisite understanding needed to guide their consent or dissent decision. This may then lead to the need for additional notices to be served when additional works are proposed or the proposals change; however, this is a necessary evil and in the pursuit of ensuring notices are valid, is therefore essential.

In Section 3(1) it is also made very clear that the intentions with regard to special foundations must be depicted by way of 'plans, sections and details of the construction of the special foundations together with reasonable particulars of the loads to be carried thereby'. Again, this text must be taken in its literal sense and if

these details are missing then the notices could be proven to be invalid. If original notices served do not include details of special foundations and particulars of loads and it later transpires that special foundations are intended, then it should be considered if new notices are required in order to make the subsequently agreed awards valid.

Consideration must also be given to circumstances where a building owner wishes to raise a wall on the building owner's land abutting a party wall. This is another situation where the building owner wishes to serve valid notices and thereby acquire access rights under the Act. This must, however, be very carefully considered. Section 2(2) (a)[21] states:

> '(a) to underpin, thicken or raise a party structure, a party fence wall, or an external wall which belongs to the building owner and is built against a party structure or party fence wall.'

This could be construed to only relate to circumstances in which the building owner already has an existing wall built abutting a party wall and such a notice would not be valid where this not already such an abutting wall in place. This would appear to be the case, as in no other section in the Act does it purport the work 'raise' to give a right to construct a wholly new wall. In fact, in other sections of the Act, such as in Section 1, it states 'build' as referring to the construction of a new wall. This does, however, contradict the generally accepted understanding that the Act is an enabling piece of legislation. This is yet again, in this age of developing existing buildings, a matter which will surely play out in the Courts in the near future.

SERVING VALID SECTION 6 NOTICES

Serving adjacent excavation notice requirements are detailed under Section 6(5);[22]

> 'In any case where this section applies the Building Owners shall at least one month before beginning to excavate, or excavate for and erect a building or structure, serve on the Adjoining Owner a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundations of the building or structure of the Adjoining Owner.'

Section 6(6)[23] then further states (with bold emphasis added):

> 'The Notice referred to in subsection (5) shall be accompanied by plans and sections showing:
>
> (a) the site and depth of any excavation the building owner proposes to make;
>
> (b) if he proposes to erect a building or structure, its site.'

Again, and as always, a detailed description of the works is key but in relation to adjacent excavation notices additional details are essential in the way of the building owner's requirement to include 'plans and sections showing (a) the site and depth of any excavation … (b) if he proposes to erect a building or structure, its site'. The absence of this information will make such notices invalid. When serving adjacent excavation notices, the plans and sections must therefore be saved and recorded together on file to prove they were included.

Section 6(5) also makes very clear that the building owner must state whether they are proposing to 'otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner'. Such intentions must therefore be discussed with the scheme structural engineer and confirmed when the notices are served. If this intention is not confirmed when the notices are served, then the original notices could be considered invalid or, in fact, new notices will be required if this does become the intention. The wording of the Act as always is therefore very important and must be taken in its literal sense.

OTHER NOTICES/REQUESTS

There are, of course, a few other lesser used notices which can be served under the Part wall etc. Act. These are generally for ten-day requests, Section 4 counter notices, Section 8(3) and 8(6) access notices and Section 11(7) notices for a request to maintain the height of a wall as a counter notice on receipt of a Section 2(2) (m) notice. These notices must all be adequately detailed and served by way of the general principles stated throughout this paper.

Another contentious notice is the Section 12(1) notice requesting that a building owner provide security for expenses. Validly serving such a notice is not complicated; however, it is essential that it is served before the associated notifiable works commence.

RELEVANT CASE LAW RELATED TO SERVING NOTICES GENERALLY

In *Bennett v Howell (1981),*[24] the notices served were not dated and so the judge found that they were invalid (*Hearson* [25]). This is an obvious outcome, as the statutory notice period for serving notices cannot be considered to commence unless the date of the service is detailed.

In *Hobbs, Hart & Co v Grover (1899),*[26] the judge considered that not enough detail of the proposed works was included in the notices, and they were therefore invalid.[27]

In *Mannai Investments v Eagle Star Life Assurance Company Limited (MAY 1997),*[28] a leaseholder served notice to exercise a break clause within their lease. While this matter would therefore not appear on first impressions to relate to party wall matters and the service of associated notices, it is actually wholly relevant — the reason being that the freeholder stated that the notice was invalid because it contained minor errors. The judge found against the claimant and

stated that such minor errors in a notice do not invalidate the notice unless the errors relate to the statutory requirements. In this case, the minor errors were not found to interfere with the requirements under statute and so the break clause was found to be valid. The judge summarised that as long as the requirements under statute are correct and any minor errors are not considered to have affected the recipient's ability to understand the intention of the notice, then then notices would not be found to be invalid.[29] While therefore this finding related to a different area of law and practice, it is relevant when considering minor errors relates to party wall notices.

OWNERS' DETAILS

As most surveyors are aware, it is very common, for tax or joint venture purposes, for the building owner entity to change, either during the award negotiation period or during the construction period. It is therefore very important to establish with the original building owner if it is intended to change the owner entity of the building owner's property, as such a change after notices are served can be disastrous for a project, since any change in ownership will extinguish the validity of notices and therefore rights created by awards. Such changes in ownership can easily be dealt with if realised from the outset, as simply a contract for purchase can be created between the then current building owner and the legal entity to which the ownership is to transfer. Notices can then be served in the name of the building owner and also in the name of the future proposed owner.

All surveyors should also be aware that Land Registry details are not always up to date and in fact in some instances can be at least six months out of date. Whilst surveyors have in reality sometimes no option but to serve on the adjoining owners detailed in the Land Registry, other checks should be made to try and establish that the Land Registry detailed adjoining owners are in fact the current owners. If the adjoining owner is listed as a company, it is good

practice to check this company on Companies House and establish if their address has been subject to change since registry was made. Where serving on a person as an owner, unfortunately in most cases surveyors will have no option but to serve on the Land Registry detailed owner and hope that the Land Registry is correct. It may well be that this would legally be considered as valid service as with no other means of establishing a legal ownership, can it be reasonable to suggest such action can result in invalid notices? This may potentially be yet another matter for the Court at some point to decide.

Where notices are served on more than one person as joint owners of an adjoining property, the court cases of *Crosby c Alhambra Company Limited (1907)*[30] and *Lehmann v Herman (1993)*[31] provide guidance.[32] They do, however, detail conflicting views on the validity of serving on only one of the two or more joint tenants.[33] Discrepancies aside, a belt-and-braces approach is to ensure that notices are served in the name of all listed adjoining owners as separate entities.

If the adjoining owners are listed by the Land Registry at alternative addresses, then unfortunately notices will need to be served on each separate joint owner at their separate address. The question as to whether each joint owner then has the right to appoint their own separate surveyor again is a question for the Court to decide, but certainly separate notices will need to be served in order for them to be considered valid.

Lastly, where an adjoining owner or adjoining owners are detailed at multiple addresses, notices must be served to each and every address in order to ensure that a valid notice is served because the building owner, or building owner's surveyor acting as agent, will be unaware as to which address the notice will actually be received.

WHEN IS A NOTICE VALIDLY SERVED?

Freetown Limited v Assethold Limited Freetown Ltd c Assethold Ltd (2012)[34] confirms by reference to Section 7 of the Interpretations Act that notices served by post should be considered as received on the second day after posting.[35] This case also confirms that a notice served via Section 15(2) by fixing it to a conspicuous part of the property should be considered as served the day after affixing.[36] In the eyes of a judge, however, surely no service can be considered valid without requisite proof. By whichever means a notice is served, surveyors must ensure that they have proof of such service. If sending documents by post, proof of post or logging the post within a journal would be wise; if affixing a notice to the property, taking a dated picture of the notice would be similarly wise.

SUMMARY

In order to serve valid notices under the Party Wall etc. Act 1996 the following key points should always be considered:

- It is always essential to accurately describe the proposed works in order to put the adjoining owner in the position of being capable of making a decision as to whether or not to dissent to the notice. This is essence is surely the overriding requirement of a notice. All surveyors must ensure that the notices served are not too vague and / or generic. This is the most common pitfall of the notice drafting and service process. This process should not be considered a generic administrative task but instead an essential first step in the legal process of obtaining rights under the Act which needs to be tailored to each adjoining owner's specific circumstances and unique ownership details;

- The service provisions of Sections 15(1) and 15(2) must be taken in their literal sense, not a purpose sense, and surveyors must ensure that they comply entirely and completely with such requirements;

- Where serving on a 'body corporate', careful consideration should be given as to whether the notices can reasonably be served on the 'Secretary of Clerk' and research should be undertaken to establish if such a company does in fact have a 'Secretary or Clerk';

- Section 1 notices must accurately describe the intended wall and differentiate between Section 1(2) rights and Section 1(5) rights;

- Section 2 notices must be suitably detailed to describe the intended notifiable works and not the general intentions of the building owner's project as a whole. If the works are to include special foundations, then the notices must include full details, drawings, calculations of the loads to be taken by the special foundations;

- Section 6 notices must include detailed drawings and elevations;

- Section 6 notices must include full details of any strengthening or safeguarding works if proposed;

- Always list all owners in full and undertake background research to check if these owners, as persons or businesses, are still the current owners. Also check if their addresses remain current. Company address should be checked on Companies House. Any research undertaken to this extent should be recorded.

- Ensure that proof of valid service is recorded in line with the provisions of Section 15(1) and 15(2) in case the means of service is questioned;

- Always specifically ask and record the answer to the question to the building owner: 'Is it intended to change the building owner legal entity either in the award procurement process or during the works period?' The ramifications of not asking this question are of course obvious and profound;

- For Section 12(1) notice to be valid, it must be served before any associated notifiable works commence.

REFERENCES

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(2) *Ibid.,*note 1.

(3) *Ibid.,*note 1

(4) *Barberini v Weihe (13 October 2016) Central London County Court (TCC).*

(5) His Honour Judge Edward Bailey, Judgement Manuscript, *Barberini v Weihe; (13 October 2016); Central London County Court (TCC).*

(6) *Ibid*, note 5.

(7) *Ibid,* note 5.

(8) *Ibid,* note 5.

(9) *Ibid*, note 5.

(10) Gov.uk (1996), 'The Party Wall etc. Act 1996 (Electronic Communications) Order 2016, Statutory Instruments 2016 No. 335', available at http://www.legislation.gov.uk/uksi/2016/335/pdfs/uksi_20160335_en.pdf (accessed 16th November, 2018).

(11) *Ibid.,* note 4.

(12) *Ibid.,* note 10.

(13) *Knight v Goulandris (2018) EWCA Civ 237.*

(14) His Honour Judge Edward Bailey, Judgement Manuscript, *Knight v Goulandris (2018) EWCA Civ 237.*

(15) *Ibid.,* note 4.

(16) *Ibid.,* note 1.

(17) *Ibid.,* note 1.

(18) *Ibid.,* note 1.

(19) *Ibid.,* note 1.

(20) *Ibid.,* note 1.

(21) *Ibid.,* note 1.

(22) *Ibid.,* note 1.

(23) *Ibid.,* note 1.

(24) *Bennet v Howell (1981).*

(25) *Hearsum M, Practical Party Walls, (2014).*

(26) *Hobbs, Hard & Co v Grover (1899).*

(27) *Hearsum M, Hobbs, Hard & Co C Grover Case Summary, Morrisons Solicitors,* available at https://www.morr-law.com/cases/hobbs-hart-co-v-grover/ (accessed 16th November, 2018).

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November, 2018).

(29) *Ibid.,* note 28.

(30) *Crosby v Alhambra Company Limited (1907).*

(31) *Lehmann v Herman (1993).*

(32) Bickford-Smith, S., Nicholls, D. and Smith, A. *(2017), Party Walls Law and Practice, Fourth Edition, LexisNexis.*

(33) *Ibid.,* note 32.

(34) *Freetown Limited v Assethold Limited Freetown Ltd v Assethold Ltd (2012) EWCA Civ (14 December 2012).*

(35) *Ibid.,* note 32.

(36) *Ibid.,* note 32.

Image credit: Joseph Birnie

2. HOW MUCH CONSTRUCTION DO YOU KNOW...?

Alex Frame

I am quite shocked at the lack of constructional knowledge of our 'young' surveyors these days. Such does not seem to be taught in the schools/colleges/universities etc as it was 'in my day'.

It is quite essential that a party wall surveyor should have a knowledge of basic construction, or else how can he/she possibly know what to look at/for when visiting the site or viewing the drawings.

I have met party wall surveyors who want to have an engineer check such things as:

- Foundations on a standard single storey rear extension.
- Steel beams into a party wall.
- Additional loading on a party wall for a loft conversion.

Surely such things should be well within the surveyor to judge upon, albeit there may of course be some exceptions. Why are they so scared to decide upon simple construction issues in knowledge that they should have?

Running off to a 'checking' engineer is NOT the answer, who by the way should always be capped as to the time/costs they take. Engineers should only be simply 'reviewing' a scheme as to whether it works or not and must not, generally without good reason, be allowed to check every page of calculations, clocking up many hours that the building owner is expected to pay for. Ask for specialist reports when clearly not needed, ask for unnecessary monitoring, expect to make many site visits.

If an architect/designer shows a foundation depth of 1 metre on his section and when I attend site I find that there are trees very close by, I know that the foundation depth proposed is wrong and should be deeper or an alternative foundation design should be requested. (all subject to various site conditions and I am of course generalising here, but you get the picture). This is the sort of knowledge that a surveyor should be expected to have and deal with.

Knowing the construction of solid and cavity walls, the bonds, timber frame details. Floor and roof carcassing, should all be within a standard knowledge of a surveyor and yet shockingly I have met many who have not got a clue about such things.

Simply knowing the Act as a party wall surveyor is simply just not good enough, yet many will want to charge extortionate fees, because 'that is the going rate' I was once told.

The Faculty of Party Wall Surveyors can help all surveyors in this respect in that they run a one day course showing many construction drawings relating to issues mentioned in the Act, such as raising a

party wall and foundation underpinning etc. You might be surprised as to what you don't know.

No..... a frog in a brick is not the same as a toad in the hole....!

3. ENGINEERING

THE TECHNICAL IMPLICATIONS OF SECTION 6

Michael Clark

SYNOPSIS

The application of Section 6 is considered from an engineering perspective. The provisions are compared with engineering theory. Examples of the effect of adjacent excavation are given. A warning is provided that that 'permissible' excavation may not always be safe.

KEYWORDS

Section 6. Party Wall etc. Act 1996. Angle of repose. Adjacent excavation

INTRODUCTION

Section 6 of the Party Wall etc Act 1996 relates to adjacent excavation & construction and states:

6 (1) This section applies where:

(a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured horizontally from any part of a building or structure of an adjoining owner; and

(b) any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations of the building or structure of the adjoining owner.

6 (2) This section applies where:

(a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of six metres measured horizontally from any part of a building or structure of an adjoining owner; and

(b) any part of the proposed excavation, building or structure will within those six metres meet a plane drawn downwards in the direction of the excavation, building or structure of the building owner at an angle of forty five degrees to the horizontal from the line formed by the intersection of the plane of the level of the bottom of the foundations of the building or structure of the adjoining owner with the plane of the external face of the external wall of the **building or structure of the adjoining owner.**

It is interesting to note that no mention is made of a party wall or line of junction and the word 'structure' is not defined or distinguished. It could be a timber fence post.

The clauses can be represented graphically by Figure 1.

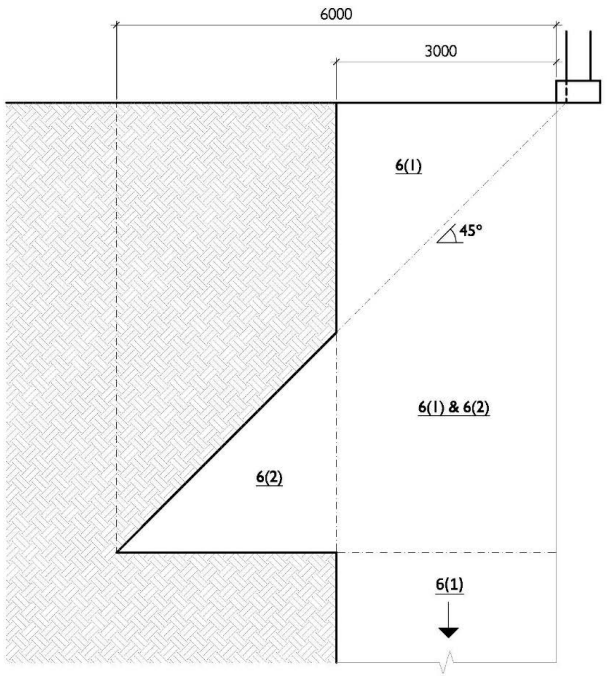


Figure 1

Section 6(1) applies within 3 metres and to any depth whereas Section 6(2) has a depth limitation of 6 metres. Whether or not the removal of the ground below the 6(2) 'cookie bite' within 6m but at a depth greater than 6m is 'notifiable' is matter for discussion because the 45o plane stops at a depth of 6m.

What we can take from this is that the Act appears to suggest it is perfectly acceptable to excavate down to the level of the adjoining owner's building foundations within 3 metres and to continue safe excavation at 45o thereafter.

The engineering justification for this is not clear but it may be a reference to the natural angle of repose of soils.

Any material, including soils, when loosely tipped, will arrange itself in an inclined pile whose angle depends upon the physical qualities of the material. The main quality which dictates the angle of the pile, or repose, is the friction or cohesion between the individual pieces of material. Figure 2 shows a pile of loose, granular material which has distributed itself at its natural angle of repose.

Figure 2

Adding more material will not increase the angle, the additional material would simply slide down the face of the pile and arrange itself at the safe angle of repose. By definition, there is no factor of safety in this system because any additional material will simply slide down the slope; no further material or load can be applied to the pile. It is at the point of failure.

This is not a safe situation to create on site by excavation. Naturally occurring soils exposed by excavation are not piles of loose material but they do possess a physical characteristic similar to a natural angle of repose. Granular soils (sands & gravels) have an 'internal angle

of friction' Φ and cohesive soils (silts and clays) have 'cohesion' C. Internal friction and cohesion allow soils to support load and endure excavation when they are used as engineering materials. The greater the values of Φ and C, the stronger the soil. For engineering design purposes cohesive soils are sometimes given equivalent (effective) values of Φ. Figure 3 provides typical values of Φ for various soils.

Soil Type	Φ
Firm Sands & Gravels	up to 35°
Loose Sands & Gravels	28°
London Clay	19°-22°

Table 1

As can be seen, the natural effective internal friction is somewhat less than 45° and is affected by disturbance, such a reduction in density caused by adjacent excavation.

Section 6 also infers that it is possible to excavate to the underside of a foundation with impunity and it is often that sites are 'prepared' for work by reducing the level of the ground to the underside of the foundations prior to awards being in place. This is also a potentially hazardous activity.

Figure 3 provides an extract from the work of Professor Karl von Terzaghi.

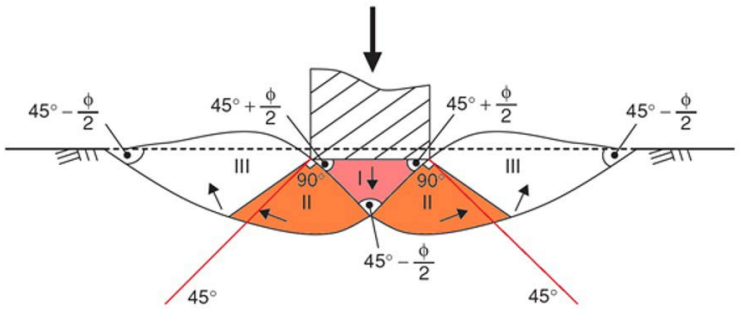


Figure 3

The figure represents a foundation (hatched) sitting on horizontal ground equal in level on both sides. The foundation is loaded and the three zones marked I,II & III are what Terzaghi suggested to be the soil wedges 'mobilised' by the loading. Zone I behave as an arrowhead pushing downwards into the soil displacing the two Zones II which rotate outwards about the corners of the foundation pushing Zones III upwards causing heave of the ground on either side of the foundation. This mechanism can be observed in empirical testing and predicted by numerical modelling.

It is clear to see that any soil (surcharge) above the level of the underside of the foundation will add resistance to the upward movement of Zones III and increase the load carrying capacity of the soil. Reducing the level of the soil will have the opposite effect.

This model can also be used to investigate the possible effects of adjacent excavation.

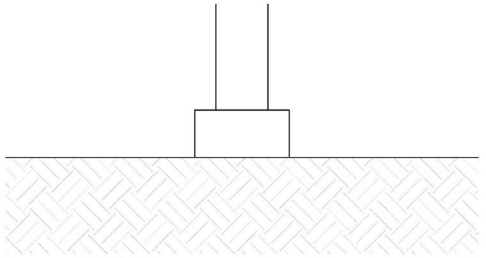


Figure 4

Consider a simple party wall foundation supported on level ground.

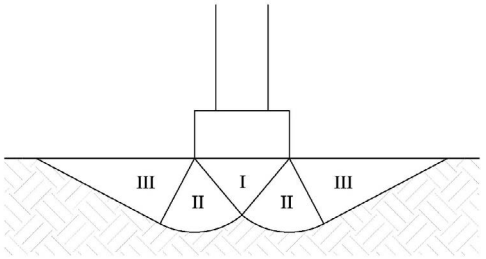


Figure 5

Adding and simplifying Terzaghi's zones in Figure 5.

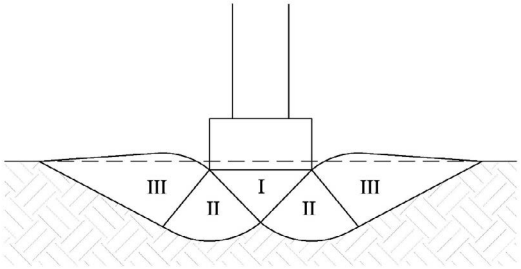


Figure 6

Applying load to the foundation in Figure 6 induces the predicted heave of the ground. At this stage the 'system' is stable and relies upon the weight of the soil 'wedges' and the friction between them.

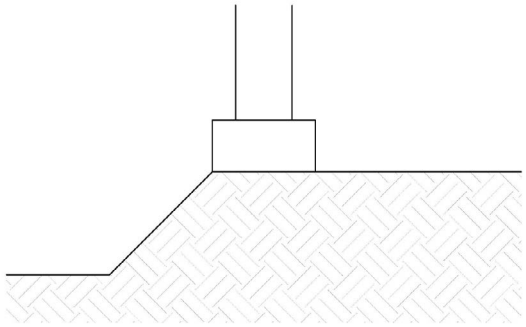


Figure 7

Now consider the situation in which a 45o excavation has taken place on one side. This is a common occurrence on the Building Owner's side of a party wall, prior to the service of awards.

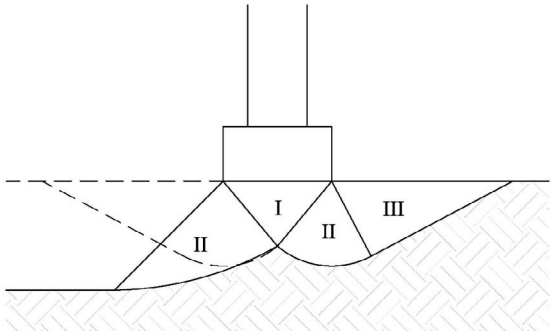


Figure 8

Adding the Terzaghi zones it is already possible to see the potential weakness of this arrangement. The left hand Zone III is completely missing and the left hand Zone II is cut to a 45o slope which is in excess of it's own angle of internal friction.

Adding load to the system results in the distortions illustrated in Figure 9.

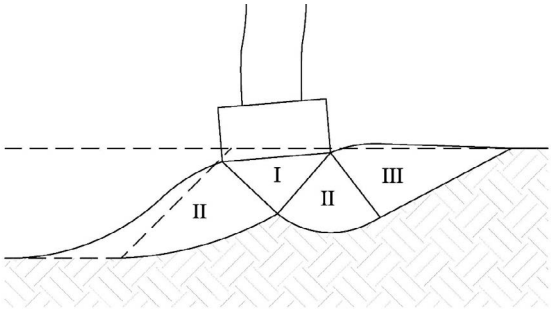


Figure 9

The arrowhead Zone 1 has not been stabilised by the asymmetric arrangement and the left hand Zone II has 'slumped' to its natural 'angle of repose' allowing the foundation to rotate and subside.

SUMMARY

Although Section 6 does not appear to have been informed by engineering principle, it does provide a workable set of rules to trigger the Act. The intention of this article is to highlight the dangers of assuming all excavations within the 'bounds' of Section 6 are safe. Each situation should be considered in isolation without reference to generalities or 'rules of thumb'. It is no defence to say, 'the excavations were not notifiable under the Act'.

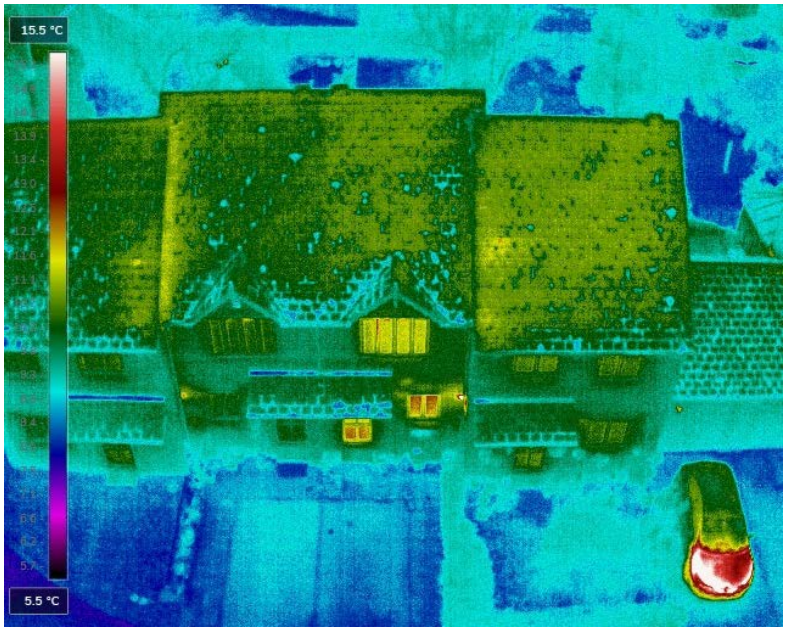


Image credit: Richard Bedford

4. DEALING WITH THE BLOODY-MINDED BUILDING OWNER

PARTY STRUCTURE NOTICES, AND GOING TO COURT

Edward Bailey

INTRODUCTION

(1) My first pupil-master, an Oxonian Scot, was a treasure trove of esoteric information. He took a great interest in his pupils, in part, I always suspected, because he was usually on the lookout for a challenge other than the next set of papers. He set himself both the daily task of teaching me something new about the law, and the daily challenge of finding some fact or matter outside the law of which I had thitherto being ignorant. This challenge was rarely difficult, and its success was met, invariably, with the recitation of the maxim "It's wonderful how knowledge doesn't spread".

(2) Wonderful or otherwise, we all learn, repeatedly, that knowledge about the law relating to Party Walls is spread mighty thin, if indeed it can be said to be spread at all. This is hardly surprising. A secondary school curriculum that included even a basic introduction to party wall law would engender suspicion, for the remainder of such a curriculum would be strange indeed. And the brightest student can obtain a bachelor's degree in law, a post-graduate degree in law, and a professional qualification, even with enviable honours, without this little legal backwater crossing his (or her) horizon.

(3) Personally, I had spent some four or five years in practice at the Bar before I encountered the intriguingly entitled London Building Acts (Amendment) Act 1939. I approached it from the construction rather than the chancery side of things, and found to my considerable gratitude, in a set of chambers that aimed for the soubriquet 'commercial' more than anything else, that any instructions relating to the 1939 Act were usually sent in my direction. In those dark days, the county court, with a civil jurisdiction limit which in my time rose from £400 to £1,200 and then to the staggering heights of £4,000, was generally thought to be beneath contempt. Certainly no interest was ever shown in the decisions of its judges, and so the (to my mind at least) brilliant contributions I offered to the jurisprudence of this little legal backwater by way of insightful submissions found their way into judgments to which no-one paid the slightest interest.

(4) Accordingly when, nearly 30 years later, I found myself sitting in the TCC list of the Central London County Court (jurisdiction in civil matters now unlimited!) with yet another application for an interim injunction to restrain the continuation of building work in breach of the provisions of the Party Wall etc Act 1996, I was generally sympathetic

to the building owner who told me that on commencing his works to a party wall he had been completely unaware of the existence, let alone the provisions, of the 1996 Act. Even where the building owner had had to obtain planning permission, the fact that the 1996 Act would plainly apply to the permitted works, plain even to a half-competent council planning officer, was apparently not drawn to the attention of the successful applicant. The 1996 Act was one of those pieces of knowledge that, wonderful to relate, did not spread.

(5) But among the many ignoramuses are the b*st*rds to whom knowledge of the Act has indeed spread, and that knowledge came as most unwelcome news. They know that notices should be served, that party wall surveyors are likely then to become involved, and that, worst of all, the building owner usually ends up paying the fees of both his own and the adjoining owners' surveyors. Relying on the average citizen's great reluctance to go to law, (courts being frightening places and lawyers expensive beyond all imagining), these building owners charge straight in and aim to complete their party wall works before any court can usefully prevent them. A reassuring word to the neighbour that everything will be done to ensure that the works are completed as quickly as possible, (you bet!), and a few kindly words to the effect that there will be no noisy weekend working, and there was a reasonable prospect of getting out of statutory compliance, at least until it is too late for the AO to obtain such benefits as are available to him under the Act.

(6) My attitude to such so-and-sos, once I was confident that they had been correctly identified, could be summed up in two words: "indemnity costs". However I have learnt recently (to my concern) that this attitude may have been one of the (many?) ways in which I was out of step with at least some of my brethren on the bench.

(7) So how should the adjoining owner and his surveyor approach the situation created by the bloody-minded building owner ("the BMBO")?

Might there have been a notice?

(8) The first and fundamental point to remember is 'no notice, no Act'. The BMBO will not have served a notice, at least not a formal notice, because he wants to evade the application of the Act. But it may be that he has engaged in pre-works correspondence, perhaps because he is apprehensive that if the first thing the AO knows about his works is loud noises affecting the party wall he may be more likely to be stirred into action than if he has been gently warned about the works in advance. The assiduous party wall surveyor assisting the exasperated adjoining owner ("the EAO") will ask to see any letters or other documentation that may have passed between the neighbours in the weeks and months before the works commenced.

(9) Any pre-works documentation should be considered carefully. Unwittingly the BMBO may have provided one or more documents sufficient to constitute a notice. But what constitutes a Notice? Plainly a Party Structure Notice must be a document because it is required to be served. There is however no statutory necessity for a document constituting a party structure notice to state in terms that it is such a notice or, indeed, contain the word 'notice'.

(10) What the party wall surveyor must be careful to avoid, in any circumstances, is leaving the strict confines of the Act and seeking to generate a Notice by asserting that, eg, letters or notification documents which may refer to proposed works but are not obviously intended to be notices served

under the Act do in fact constitute a Notice which justifies the appointment of party wall surveyors and, ultimately, the making of an Award.

(11) There are three statutory requirements for a party structure notice under s.3(1), namely (a) the name and address of the building owner, (b) the nature and particulars of the proposed work, and (c) the date on which the proposed work will begin. All three requirements must be met before there is a valid statutory notice, although it is perfectly possible for a document to constitute a valid notice which does not within itself meet all three requirements provided it refers to other documents which, taken together with the first document, meet the statutory requirements. The prime example is the party structure notice which refers to plans, sections, and other drawings which provide the particulars of the proposed works. Indeed, where special foundations are proposed, s.3(1)(b) makes it plain that such additional documents are expected to accompany the notice document. A party structure notice, incidentally, does not have to be signed unless its terms make a signature imperative.

(12) Requirement (a) is clear enough. A document which comprises an effective party structure notice must have the BO's name and address.

(13) Requirement (b), "the nature and particulars of the proposed work" is more open to interpretation. The 'nature' of the work may be simply stated and, eg, "loft extension" or "removal of chimney breasts" or "repairs" or "heightening the parapet wall" will be sufficient. But 'particulars' of the proposed work can be more problematic. In a substantial majority of cases, where the BO is behaving responsibility, the BO will have available plans, specifications and drawings prepared for planning and building regulation consents

and construction, and copies of these documents can be attached to the party structure notice and thus provide the AO with a wealth of particulars of the proposed work. But in the present context the party wall surveyor is looking to see whether documentation provided by a BMBO does in fact comprise a party structure notice when no such notice was intended and any particulars of the proposed work are likely to be thin on the ground.

(14) What is required to provide sufficient particulars for the purposes of s.3? This question fell for consideration in the case of *Hobbs, Hart & Co v Grover* [1898] 1 Ch 11 where the provision in question, s.90(1) of the London Building Act 1894, was in the same terms as s.3(1) 1996 Act. *Hobbs, Hart & Co* was rather an extreme case. The BOs had purchased no 75 Cheapside intending to pull the building down and rebuild it without being certain whether the party wall with no 76 Cheapside needed itself to be rebuilt. The party structure notice served on the AO simply set out almost the entirety of s.88 of the 1894 Act; as if today a party structure notice recited the entirety of s.2(2) as the proposed works to be carried out. It is perhaps a comment on the approach adopted by the profession at the time that counsel for the BOs were able to argue that this was the form of notice regularly used by "London architects". The BO's argument was that they could not give a notice in detail before they knew the precise condition of the wall, and that would not be known until it had been exposed by pulling down the remainder of the property.

(15) This argument found favour with Channell J. who accepted that the detail of the necessary works might not be known for many months, and he upheld the notice on the BO's undertaking not to act on that part of the notice which covered the raising of the party wall without first giving the AO inspection of his plans and a further period of ten

day in which to appoint a surveyor. This did not wash before a strong Court of Appeal. The law report records Chitty LJ asking "Should not the notice be such as will enable the adjoining owner to judge whether he shall consent or object to the proposed works?" and Vaughan Williams LJ asking "Ought not the notice to give such particulars of the proposed works as will enable the adjoining owner to judge whether it will be necessary to pull down the old wall?". In the chair was Lindley MR who asked "How can the notice be sufficient unless it enables the adjoining owner to see what counter-notice he should give under s.89?", this section being the forerunner of s.4. In the event all three members of the Court of Appeal concurred in the judgment of the Master of the Rolls: "In my opinion the notice ought to be so clear and intelligible that the adjoining owner may be able to see what counter-notice he should give to the building owner under s.89. This is the key to the whole matter." (Judgments were often short and to the point back then!).

(16) Whether the Court of Appeal today will feel bound by the comment that the ability to serve a counter-notice is "the key to the whole matter", may be doubted. It can be discounted as simply a comment relating to the particular appeal before the court. However, a consideration of s.4(1) does suggest a fair amount of detail is required to give the required "particulars" for otherwise how will the AO know whether to require "chimney copings, breasts, jambs or flues, piers or recesses or other like works" in his counter-notice? On the other hand, were the nature of the works to be such that there would be no question of a counter-notice requiring chimney copings, breasts, jambs etc etc ever being served, is it arguable that the necessary particulars can in practice be very thin?

(17) In my view not, and the questions posed by the other two members of the Court of Appeal (set out above) become

pertinent. If a reasonable AO is unable to make an informed decision whether or not to consent to the proposed works on the basis of the particulars provided, a party structure notice will have failed to fulfil its statutory purpose. The fact that most AOs will (sensibly) not agree to the works and will expect party wall surveyors to be appointed is nothing to the point.

(18) Requirement (c) ("the date on which the proposed work will begin") is, on the face of it, very clear; a date is required. In practice a date is rarely given, presumably because no BO can be confident when his builders will actually start, although as long as the date provided is at least two months after the date of service of the notice it is difficult to see how any objection can be taken if the date is missed. What happens in practice? Of the two leading textbooks in this area one (very sensibly) avoids offering precedents. The other, perhaps because of its multiplicity of authors, does offer precedents and suggests "I propose to begin work after the expiration of two months from the date this notice is served on you, or earlier if you agree". The RICS suggested party structure notice is in very similar terms: "… it is intended to carry out the works detailed below after the expiration of two months from the service of this notice, or earlier by agreement". Other templates offered on line are also in similar terms. Only the gov.uk website template specifies the insertion of a particular date, and then subject to a note which states the "If you do not know exactly when your works will start you may wish to add 'or thereafter'".

(19) Is the standard party structure notice defective for want of a date? Arguably yes. The Act requires "the date" not "the date not before which" or "the date after which", and it is hardly difficult to specify a date, even though it may be difficult to keep to it once specified. From the AOs' point of view it is of interest to know when the works will commence, and

the standard form template merely gives him a ten-month window (the notice does of course lapse if the works are not commenced within twelve months of service) during which the works might start. On the other hand life for the BO could become impossible if his party structure notice could be challenged on the basis that the date given had come and gone without the works starting. I would not expect a court to strike down a party structure notice which did not strictly meet the requirements of the Act, although framing the judgment might not be straightforward. Further comment would be tedious.

(20) The upshot of the above is that it will be a rare case where the BMBO has provided sufficient particulars of his works in documentary form, and also complied with the other requirements for a party structure notice to enable a party wall surveyor to find such a notice on any pre-works documents sent by the BMBO to his neighbour. It is important that a party wall surveyor, seeking to help the EAO in the face of a determined BMBO, does not to take things too far in an effort to bring the scheme of the Act into play. He runs the risk that the BMBO will simply ignore the subsequent Award and the work put into the Award will be wasted because the court will find that there was no notice.

No party structure notice served

(21) Somehow the BMBO has to be persuaded to serve a party structure notice, something he will presumably be most reluctant to do. What if he simply refuses, and ignores threats of proceedings, as to which see paragraph 22 below? With more than a little ingenuity it might be possible for the AO to turn himself into a building owner. For example, the owner concerned could himself serve a party structure

notice relying on s.2(2)(b), for any work carried out by the BMBO without express agreement from the AO or under the authority of an award will constitute damage to the party structure which will then require 'repair'. This party structure notice could be served together with a letter pointing out that s.8 of the Act enables a building owner and his workmen 'to enter and remain on any land or premises for the purpose of executing any work in pursuance of this Act', and stating that in order to repair the party wall such alterations as the BMBO has carried out without agreement or statutory authority will have to be undone and the party wall returned to its original condition. This approach should certainly set the cat among the pigeons! Indeed the situation might be inflamed even further by stressing in the letter accompanying the party structure notice that after the party wall has been repaired by returning it to its original condition the BMBO, as adjoining owner, will be making use of the building owner's work. Accordingly under s.11(11) of the Act the BMBO will become liable to pay a due proportion of the expenses incurred by the building owner in carrying out that work, the due proportion being the entirety of the expenses!

(22) I would not however myself advise an EAO, however infuriated by the BMBO, to follow this course and serve his own party structure notice, although that is not a reason not at least to threaten the service of a notice. It is fraught with difficulty, and who knows how the High Court or county court judge before whom the matter eventually comes will react. (He/she may have no sense of humour.) An AO is best advised to remain an AO and to proceed accordingly. Where neither cajoling or threats succeed, 'proceeding accordingly' means seeking an interim injunction in the county court, or, if so advised, the High Court. This should not be as scary as many surveyors and owners believe, but has to be approached in a sensible

and careful manner. As to what constitutes a 'sensible and careful manner' I comment on below.

(23) The BMBO must be threatened with injunction proceedings, and this threat should be contained in or accompanied by a letter stating in terms that the BMBO's blatant disregard of the 1996 Act is a matter which warrants an immediate order for indemnity costs in the event that the BMBO refuses to desist from his illegal behaviour and forces the EAO to bring proceedings for injunctive relief. It is to be hoped however that the threat of injunction proceedings, or if this fails the service of a party structure notice with letter indicated in paragraph 8 above, will persuade the BMBO to serve his own party structure notice. The BMBO will probably know that an Award cannot be made retrospectively and he may reckon that at this stage of his works he has secured his advantage. An Award served late in the course of construction will have little to cover and the reasonable costs of the party wall surveyors in making an Award as to the remainder of the work will not amount to much.

(24) To an appreciable extent the BMBO who reckons as suggested above will be right; he may well have avoided the full impact of the Act. But to the extent that there remain party wall works to complete, the party appointed surveyors will be able to make an award. In this regard the BMBO may serve a notice and then, in recalcitrant mode, refuse to appoint a building owner surveyor. Faced with the recalcitrant BMBO the EAO will have to appoint a surveyor for him, under s.10(4) of the Act, and in the absence of a swift appointment by the BMBO the earlier the ten day notice required by s.4(b) is served the better.

An Award albeit late

(25) The Award covering the remaining party wall works should cover the standard ground in the standard manner. The Award may also cover compensation for any damage that the AO may have sustained, whether of a serious structural nature, eg cracking to the party wall, or the loss of a flue where a chimney breast is removed, or of a more minor but nonetheless irritating nature such as damage to plasterwork and interior decoration. (The provisions of s.9 relating to easements, there widely defined, may come into play where there is structural damage.)

(26) Where compensation is included in the Award the BMBO will find himself at a potential disadvantage. Having proceeded outside the provisions of the Act no Schedule of Condition will have been prepared of the adjoining owner's property. Being himself of that persuasion the BMBO may well be suspicious that the AO is taking advantage of the situation and is seeking to obtain by way of compensation the cost of remedying pre-existing defects. The BMBO may even be right, but he has no-one but himself to blame where the benefit of the doubt is given to the AO.

(27) The BMBO may be 'clever' and argue the toss on compensation. He could point out that s.7(2) of the Act mandates compensation to an AO or occupier "for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act". The BMBO could seek to argue that damage suffered by an AO was as a result of work executed by him before the service of the party structure notice and is therefor not work executed in pursuance of the Act. But once the Award is made where will this argument get the BMBO? He will have to appeal the Award to the county court under s.10(17). The AO can

then (a) contest the appeal on the basis that it is up to the BMBO to establish that the damage was not caused by work under the Award but by his earlier work in breach of the Act (hardly an attractive proposition) and (b) issue his own CPR Part 7 proceedings, to be heard at the same time as the Appeal, seeking damages for trespass and possibly nuisance in respect of any of the damage which the BMBO establishes was caused before he served his party structure notice and which was therefore in breach of the provisions of the Act. Either way the AO will recover the cost of making good any damage caused by the BMBO.

(28) I can well understand that surveyors practising in this field become extremely annoyed and frustrated where BMBOs breach the provisions of the 1996 Act. I totally get where they are coming from. Section 16 of the 1996 Act makes it a criminal offence for an occupier of land or premises to refuse to permit a person to do anything which he is entitled to do with regard to that land or premises under s.8(1) or (5) (Rights of Entry) or to hinder or obstruct a person attempting to exercise rights under s.8(1) or (5). I understand that there is a move to persuade Parliament to amend s.16 to make it an offence to undertake any work covered by the Act without serving the requisite notice. I am cautious about such a proposal. Will it be an offence of strict liability and so catch anyone who undertakes party wall work without a notice even where there is no intention to evade the Act? Or will the prosecution have to prove some form of *mens rea*, and if so what?

(29) My concern is that any such addition to criminality under s.16 as is preposed would create yet another criminal offence in what is essentially a civil statute that will sit unused on the statute book. There are literally scores if not hundreds of such offences in the company, insolvency, and financial services fields that are rarely if ever invoked. Will the Crown

Prosecution Service be expected to bring the prosecutions? They cannot manage to prosecute the offences they already have. Or will the RICS seek the necessary statutory authority to become a prosecution authority? How would it cope were this authority granted? Or are we to expect the AO to bring a private prosecution? In my view an AO who embarked on a private prosecution, in the hope that the BMBO will be liable to a fine "of an amount not exceeding level 3", (the present fine under s.16) would be either stark raving bonkers or have a lot of time on his hands together with a real animus against the BMBO.

Legal proceedings in a 'sensible and careful manner'

(30) Over the years, and especially recently, I have found myself listening to tales of woe about the cost of litigation. Some more harrowing than others, but all (apparently) my fault! The especial bugbear is the difference between the costs recovered by the winning party from the loser after standard assessment, and the bill presented by the winner's solicitor. For what it is worth, these tales of woe have left me of the view that the main problems owners face as litigants are threefold: (1) instructing solicitors or direct access counsel who are not truly experts in what is after all a very niche area of practice; (2) not having clear fee agreements in place; and (3) not having a clear strategy as to what to do after an interim injunction has been obtained.

Instructing solicitors or counsel who are truly experts in the field

(31) There are, at present, more lawyers chasing work than there is work chasing lawyers. A party wall surveyor advising an

owner should stress the need to instruct a solicitor or a direct access barrister who really does know his or her way around this area of practice. Such an instruction is likely to reduce overall cost, delay, and stress, in addition to increasing the prospects of success. This may mean instructing someone other than the solicitor or counsel who usually acts for the owner, however brilliantly they may have performed in other contexts. The family solicitor may be reluctant to admit to a lack of close familiarity with Party Wall work, but the sensible and careful owner should instruct an expert and certainly wishes to avoid paying for someone to learn about the Act and, frequently, providing a less than expert service. Either the P&T or the Faculty should be able to recommend someone suitable. Alternatively, the Party Wall Mediation Scheme website has a list of lawyers, both solicitors and counsel, who are available to help together with an indication of their charges. (There is also help on the website as to how to start an appeal against a party wall award within the 14 day (in cold reality 13 day) period within which an appeal has to be brought in order to preserve the appellant's rights pending (hopefully) a mediated solution.)

Clear fee agreement in place

(32) This is a sensitive subject, and there is not sufficient space to deal with the matter properly in this article. Most lawyers will insist on agreeing an hourly rate, for it can be very difficult to determine in advance how much time any particular matter will take. Some will agree, in addition to an hourly rate, to provide a maximum fee for any particular stage of proceedings (eg (i) interim injunction application including Claim Form and Particulars of Claim, (ii) any further pleadings, disclosure, witness statements and

expert reports, (iii) settlement negotiations, (iv) hearing). An EAO may even be able to arrange a conditional fee agreement. He will almost certainly have an excellent case. But whatever agreement is made it should be clear as to cost, and ensure that there is both a review after an interim injunction has been obtained, and that the lawyer makes abundantly plain to the EAO what alternatives he has after obtaining an injunction together with the costs implications. Many BMBOs will not agree to a mediation, but some form of alternative dispute resolution ('ADR') should be offered to the BMBO, for the courts are required to investigate what attempts the parties have made to resolve their dispute without continuing with court proceedings. Failure to engage with ADR can have significant costs repercussions. It is also important to protect the EAO costs' position with one or more suitable CPR Part 36 offers.

(33) The party wall surveyor should remind the EAO to check his insurance policy. Many household policies include legal expenses cover. Any reference to insurers should stress both that time is of the essence because an interim injunction is contemplated, and also the importance of having a lawyer specialist in the field of party walls. (Some insurers may have pet solicitors who are jacks of all trades and have entered into deals with insurers on low rates in order to get the work. It is unlikely that a proper specialist will be found among such ranks.)

(34) The party wall surveyor should also stress to the EAO that he can help keep costs down by doing some of the work himself. Any competent lawyer will need to ascertain all the relevant (and potentially relevant) facts of the matter. All means all, because it is absolutely essential for a claimant seeking interim injunctive relief that he puts before the Judge all facts which may affect the granting of an injunction or its terms, and a claimant who fails to make full disclosure to the

court may well find himself in trouble. The EAO can greatly assist his lawyer, and reduce his bill of costs, if he prepares his own detailed chronology of events. Two columns are all that are essential, but a third helps. The first column has the date, the second column records the fact or facts which arose on that date in sufficient detail for it to be clear, and the optional third column identifies any document referred to in the second column or any photos taken of work being undertaken or damage caused by the BMBO relevant to the second column entry. Providing copies of all the documents in date order (earliest at the top) and with page numbers in the bottom right hand corner earns extra brownie points. Preparation of a chronology will be much easier if the EAO has kept notes or made diary entries of relevant facts from the outset. The party wall surveyor brought in to help an AO before he becomes an EAO could usefully advise the AO to keep such notes.

(35) The properly enthusiastic EAO will also prepare a first draft of his witness statement to be used in court proceedings. This should state that the EAO is the owner of his property (and if possible state when the BMBO acquired the neighbouring property) and then comprise a chronological account of everything that has happened relating to the party wall from the first date on which the EAO became aware of the BMBO's works through to the instructing of the lawyer, in shortish numbered paragraphs. The party wall surveyor can help here as well. For the purposes of obtaining an injunction he will be required to provide a short statement (which can be called a report) setting out how and when he came to be instructed, the visits he has made to site, and how it is that he can be confident that the BMBO is carrying on party wall works without engaging the Act. The sooner such a report is prepared the better, for the lawyer can rarely proceed without it.

Clear Strategy

(36) The BMBO who will not engage with the EAO's surveyor and will not stop his work will either have to be allowed to get away with his non-compliance with the Act, and (possibly) face legal proceedings in due course to recover the cost of any damage he causes to the AO's property, or be stopped by interim injunction. The BMBO will almost certainly be counting on the EAO to be too reluctant to bring legal proceedings and, however annoyed the EAO may be with the BMBO's flouting of the law, it does make sense for the EAO to assess what damage may result from the BMBO's works before taking action. For such an assessment the EAO will need the assistance of his surveyor. This assessment must be undertaken swiftly (hours not days) for delay in acting may result in an injunction being refused. The EAO finds himself in an unenviable position; will the BMBO act as a constructor in the same cavalier manner as he has adopted towards the provisions of the Act, and cause a degree of avoidable damage, or will he do his work properly and safely without causing any or any significant damage to the AO's property.

(37) The legal route alternative to letting the BMBO have a free rein is to issue a CPR Part 7 claim for an injunction and damages and apply for an interim injunction. A letter (both served through the letter box, with photographic evidence of service, as well as being posted) advising the BMBO that an injunction is being sought is advisable, but not absolutely essential where the previous correspondence demonstrates that the BMBO has shown no inclination whatever to comply with the 1996 Act. An interim injunction is readily obtainable either in the county court or High Court provided that there is clear evidence, in a witness statement or expert report, that the work being

undertaken by the BMBO is indeed work caught by the Act. This is a question of fact, and it will usually be clear and unarguable. The legal test for the granting an interim injunction is threefold (i) a good arguable case, (ii) damages an inadequate remedy and (iii) the balance of convenience favouring the grant of an injunction. (Purists will tell you that the first test in the *American Cyanamid* decision from which these principles are derived is usually stated to be 'serious issue to be tried', but better in the present context to state it as I have.) Indeed, for the cautious litigant a 'good arguable case' will not be enough. He will want to proceed only with a certain (an unarguable) case, ie where there is no possible dispute as to whether the 1996 Act is engaged and that no party structure notice was served under the Act. Whether this certainty can be delivered is a matter for the party wall surveyor, using his expertise.

(38) Any specialist solicitor or direct access barrister will have a draft injunction in electronic form all ready to complete with the necessary particulars, along with an appropriate claim form, and draft particulars of claim. It will help a swift application (and assist to keep costs down) if the owner and his party wall surveyor have prepared (i) a chronology of the relevant events and correspondence which can be incorporated into a witness statement (by the owner or, if necessary by the party wall surveyor) and (ii) a witness statement (usually short) from the party wall surveyor describing the nature of the works being undertaken by the BMBO and explaining how these works engage the Act and confirming that no party structure notice has been served. All courts should hear urgent injunction applications on an hour or two's notice. Safer in London to go to the Central London County Court in the Strand where all the circuit judges have experience of interim injunctions and there are more judges available than in any other county court.

(39) There should be no difficulty in obtaining an interim injunction. The party wall surveyor's witness statement will establish the merits of the case, the uncertainty as to what may happen with a BMBO blithely continuing party wall works without seeking let alone obtaining an Award makes damages an inadequate remedy, and the balance of convenience plainly favours the EAO where the BMBO is refusing to act within the law. The party wall surveyor does need to advise the EAO that he will be required to give a 'cross-undertaking in damages'; that is an undertaking to pay any damages the court may order should it eventually turn out that the interim injunction should not have been given and the BMBO has suffered loss as a consequence of the injunction being made, but provided the case is clear that the Act was indeed engaged and the BMBO did ignore the Act's terms there should be no real concern that the cross-undertaking will ever come into play.

(40) The interim injunction will require the BMBO to stop party wall works (it cannot properly also stop the BMBO carrying out non-party wall works) until surveyors have been appointed under the Act and an Award made. Strictly, a party structure notice must be served at least two months before the date on which the works begin. But with the consent of the AO (and it is very much in his interests to consent) a party structure notice can be acted on with the appointment of surveyors as soon as the BMBO appreciates that he has to comply with the Act.

(41) Once an injunction is complied with and an Award is made there will be no further need for the legal proceedings, unless it is apparent that the BMBO caused damage to the AO's property before the party structure notice is served and party wall surveyors appointed. At this point a strategy decision is required. On the one hand the EAO may adopt what might be seen as the 'standard approach'. This will

be to continue the Part 7 claim through is various stages (service of defence, any Reply, disclosure of documents, witness statements, expert reports, and through, if necessary, to a trial). This course enables the EAO to bring in any specific claims for damages that might arise out of the BMBO's works. There may even, occasionally, be good reason to add to the injunctive relief against the BMBO. But this approach runs a risk on the question of costs. All the costs involved in the obtaining of the interim injunction should, in due course, be the subject of a costs order made against the BMBO. However the longer the proceedings run, and the more issues of damage, compensation and other injunctive relief are raised, the greater the chance that issues other than the simple one on which the injunction was obtained (ie work without engaging the Act) will arise which may eventually be determined in the BMBO's favour and so have a detrimental effect on costs from the EAO's viewpoint.

(42) The alternative approach is to endeavour to bring the Part 7 claim to a swift conclusion. Ideally this will be by agreement with the BMBO, under which the BMBO pays the costs of the proceedings to date and which leaves over any issue as to compensation or damage to the party wall award. This should have the attraction to the BMBO that his liability to costs is kept down to those already incurred. But, true to his nature, the BMBO may refuse to agree to an early termination of the Part 7 proceedings hoping perhaps to bully the EAO into a better settlement from his point of view if he keeps the proceedings going with the concomitant increase in potential liability in costs for the EAO. Such a refusal of the BMBO calls for an immediate CPR Part 36 offer, putting the BMBO on a clear warning that not only will he be liable for indemnity costs for the interim injunction proceedings (for an appropriate letter covering these proceedings will have been sent before they were

commenced, see paragraph 23 above) but will be liable to pay indemnity costs for all subsequent proceedings.

(43) Where the BMBO remains unfazed by the risk of indemnity costs, and he serves a defence which contains no suggestion of a viable answer to the claim that he carried out party wall works without engaging the 1996 Act, consideration can be given to the EAO obtaining a judgment summarily against the BMBO. Care has to be taken here however not to do anything that might detrimentally affect any subsequent claim for damages the EAO may have against the BMBO arising out of his works.

(44) In the event that the Part 7 proceedings continue to a trial, and there is also an appeal against the Award under s.10(17), do make sure that both the claim and the appeal are heard together. This will result in a considerable saving of court time, and of litigants' costs.

(45) There are, I fear, too many possible alternative factual situations for safe guidance to be given in this article which covers every eventuality. At the end of the day the individual EAO has to rely on the advice given by his party wall surveyor as to the construction issues and his lawyer as to the legal and procedural issues. But the point to stress is that the EAO should have a clear view as to where his proceedings are going and for what purpose. Too often, I fear, proceedings drift on and on, sometimes with serious results as to cost for the EAO.

(46) Apart from the above there is always prayer; "Lighten our darkness, we beseech thee, O Lord; and by thy great mercy defend us from all perils and dangers of this night, and from neighbours who fail to comply with the Party Wall etc Act 1996 …" !

5. THE LIFE OF THE BUILDING OWNER'S SURVEYOR

Mark Amodio

There is a wealth of resources to draw upon within our field, you just need to know where to look and have the desire to learn. What is particularly good about the resources we have at our disposal is that they all come from different angles and approaches. There are many ways to skin a cat and there appears to be many ways to agree an award.

That is the primary purpose of a party appointed surveyor, agree an award to resolve the dispute. That has to be at the core of what we do. But cor blimey, it sometimes is hard work, then again sometimes it's a breeze and sometimes you think it's going to be difficult but it turns out to be straightforward, and vice versa.

Every project is different. That's one of the reasons I love my job. It's unpredictability. Well sometimes I love the unpredictability. It all depends what capacity I am acting in. It also depends on the people but on the whole most people involved are good people and mean well.

Acting as the building owner's surveyor is a tough gig, I think harder than that of an agreed surveyor. There are so many stakeholders to balance. So challenging to manage expectations of the person that wants to undertake works to their property, which of course is their right to do so as soon as they have planning permission.

The contractor is often waiting in the wings, sometimes even centre stage, having already often agreed a start date with the building owner, the building owner's surveyor is usually chasing his/her tail immediately. Adjoining owner's surveyors quite correctly request information to support the timing and manner of the works, there isn't such information available but the building owner wants to start and wants the award to permit them to. It's all the fault of the building owner's surveyor. The delays the costs arising from missing the slot with their contractor. The additional fees that have arisen to produce the information that was missing. The information that at the beginning the building owner's surveyor stated they would need to conclude matters promptly. The building owner wanted to serve notices regardless, fair enough I guess, it is their call ultimately.

Not only are the building owner and the building owner's contractor at odds with the building owner's surveyor at this stage but also the designers. They will often say 'I have not had to produce this before for an award' well I say' that is all well and good but it is reasonably requested and needs to be supplied in order to complete the award. The engineer will not provide section details showing the adjoining owner's foundations, the engineer will not provide temporary works details but the contractor says it is fine they have done hundreds of these types of jobs. The building owner's surveyor is often pulling his / her hair out at this stage but of course we must remain calm and collected, which we do at all times. Politely going about our duties to ensure matters can be resolved. You have to be emotionally strong in the heat of the battle to agree an award.

In addition to all of these tensions which invariably always end up being absorbed by the building owner's surveyor, you will

sometimes have your fellow surveyor acting for the adjoining owner fanning the flames of discontent. Often doing very little to protect the building owner's surveyor from undue, unfair scrutiny. Don't get me wrong, sometimes that scrutiny may be appropriate but for the most part there is little harmony between the party appointed surveyors and I find this quite sad. I hear of stories from the days of John Anstey and I sometimes wish I was a party wall surveyor then. There seemed to be chivalry and respect and you could challenge someone's view on the subject without the whole process descending into chaos. I wonder sometimes how it got to this; is it the sign of the times, the fact no one seems to pick up the phone for that initial chat before the formalities are agreed upon? Is it because some surveyors do everything themselves whilst others use administrators and delegate? I'm really not sure but I often brace myself for battle when a neighbour dissents and appoints a surveyor. It needn't and shouldn't be like that. In fact it ought to be the opposite, we should support one another to reach a fair and unbiased conclusion and deal with the tensions that arise shoulder to shoulder.

The fact we are appointed to make decisions and not be told what to do by owners should give the party appointed surveyors all the opportunity in the world to be united in their approach but we rarely see this play out. On the occasions when as a building owners surveyor you conclude an award with your counterpart with skill and effectiveness and the contractor is on site in time, the designers applaud you for assisting with an issue on a detail they didn't spot and most importantly the neighbours are still on good terms, you kick back and think to yourself, what would the world do without party wall surveyors.

I hope this publication continues as the next time I am asked to write, I'll offer the reader my musings as an agreed surveyor, a wildly different journey to that of the building owner's surveyor, a journey that may actually be free from tensions I have alluded to above, contrary to what many people would think.

6. THE EXTENT OF THE PARTY WALL SURVEYOR'S JURISDICTION

UNDER THE PARTY WALL ETC ACT 1996 ('THE ACT')

Stuart Frame

Party wall surveyors are appointed under the Act for the sole purpose of resolving disputes between the parties that are to do with works to which the Act relates, and they achieve this by making an 'award'. Section 10(10) sets this out explicitly:

> "(10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter—
>
> (a) which is connected with any work to which this Act relates, and
>
> (b) which is in dispute between the building owner and the adjoining owner."

The surveyor's jurisdiction therefore derives solely from the Act and is strictly limited to the extents that the Act provides. Such limits on the surveyors' jurisdiction are important given that are in a 'quasi-judicial' position making decisions that affect owners' private property rights. As was said in the case of Gyle Thompson v Wall Street Properties Ltd1 (decided under the predecessor legislation to the 1996 Act):

> *"Section 46 et seq. of the Act of 1939 give a building owner a statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests. The position of the adjoining owner whose proprietary rights are being compulsorily affected, is intended to be safeguarded by the surveyors appointed pursuant to the procedure laid down by the Act. Those surveyors are in a quasi-judicial position with statutory powers and responsibilities. It therefore seems to me important that the steps laid down by the Act should be scrupulously followed throughout and short cuts are not desirable...*
>
> *Having regard to the functions of surveyors under section 55 and their power to impose solutions of building problems on non-assenting parties, the procedural requirements of the Act are important and the approach of surveyors to those requirements ought not to be casual."*

In that particular case, the surveyors' award was declared by the court to be invalidly made and of no effect because the surveyors had awarded the Building Owner the right to conduct certain building works that were not works to which the Act related. Additionally, there were a number of procedural errors made by the surveyors that also invalidated the award.

1 [1974] 1 W.L.R. 123

Where surveyors do not adhere to the Act's procedures, or make an award that deals with building works or other matters that do not fall within the Act's regime, then such an award may end up being declared void and a nullity by the courts. There have been numerous cases in recent years under the 1996 Act where this has been the case.

In ***Property Supply Development Ltd. v Verity***[2] the award was declared void as the procedural requirements under section 10(4),(5) of the Act, which allow for a replacement surveyor to be appointed on one occasion only, had been used wrongly to appoint a second replacement surveyor.

In ***Zissis v Lukomski***[3]***,*** an award was declared void because no third surveyor had been selected at the time the award had been made. The tribunal of surveyors was therefore not properly constituted, in accordance with the requirements of section 10(9) in that particular case.

In ***Barberini v Weihe***[4]*,* the award was declared void because the relevant provisions for the proper service of notices and also a request under section 10(4) were not followed. Accordingly, both the notices and the request were said by the court to have not been served properly and therefore everything that followed, including the award, was declared to be void.

In ***Reeves v Young & Antino***[5]***,*** an award made by the purported replacement third surveyor was also declared void by the court as the pre-conditions for replacing the original third surveyor found in section 10(9) had not been met.

2 (Unreported) Central London County Court; 17th December 2015.

3 (Unreported) Brentford County Court; 1st December 2005.

4 (Unreported) Central London County Court; 13th October 2016

5 (Unreported) Central London County Court; 3rd January 2017

Ex parte awards (awards made by one surveyor alone) can also only be made if the preconditions found in section 10(6) or (7) are met. Such awards are particularly vulnerable to a challenge that they have been made without, or in excess of, the party wall surveyor's jurisdiction. In ***Cooke v Ashmore***[6] an *ex parte* award made by one surveyor was declared void because the other surveyor had not "neglected to act effectively" as per the provisions of section 10(7).

In ***Rega v Mills***[7]**,** the adjoining owners had tried to refer their dispute to the third surveyor under section 10(11) of the Act. A subsequent award made by the two party appointed surveyors was declared void as the disputed matter should have been dealt with by the third surveyor.

The above are examples of awards being declared void where the procedural requirements of section 10 of the Act have not been scrupulously followed by the surveyors. However, it is not only breaches of the procedures that will render an award void. Whilst acting in a quasi-judicial capacity, party wall surveyors are also subject to more general, fundamental and overarching principles, such as those of natural justice. Whilst it is important to note that party wall surveyors are not the agents of those instructing them, and are therefore under no duty to abide by the instructions of their appointing owners, they will still need to abide by the basic rules of natural justice when making an award. As HHJ Bailey said in ***Mills v Savage***[8]**,**

> *"Receiving and considering any submissions or representations each side wishes to make is an essential part of the quasi-arbitral role of the party wall surveyor...*

6 [2018] EWHC 2863 (TCC)

7 (Unreported) Newport County Court; 20th April 2020

8 (Unreported) Central London County Court; 15th June 2016

> *Party wall surveyors are exercising a quasi-arbitral function. They are bound by the rules of natural justice. It is axiomatic that in considering and making an award, a party wall surveyor, and this must include a third surveyor, must enable the parties to make submissions if they wish and must give due consideration to any submissions made."*

In that particular case, the award made by the third surveyor was declared void by the court because the third surveyor had refused to allow the building owners to make representations to him because they had not complied with his (unlawful) direction to pay monies on account to him.

This principle was endorsed by HHJ Parfitt in ***K Group v Saidco***[9]**,** where the learned judge stated,

> *"Party wall surveyors are subject to the requirements of natural justice or to put the same point a different way, those parties who are to be impacted by awards made under the Act have natural justice rights related to such awards. Quite how those requirements will work out in any particular case will always be very sensitive to the particular circumstances. The court will always have regard to the party wall surveyor as being a statutory appointment designed to deal with matters practically and justly and will not be too prescriptive about what is required. However, I would agree with the appellants that an essential requirement of any award process is not to make an award against somebody who has absolutely no idea you are considering an award, who has no idea about the existence of any dispute or issue which might be the subject of an award, has no idea about the process that is purportedly involving them and have had no opportunity to participate."*

9 (Unreported) Central London County Court; 19th July 2021

In that case, an award was declared void for a number of different reasons, but in particular because the relevant building owner had not been made aware of the fact that an award was being made.

As was noted at the outset, it is also a requirement that there is a 'dispute' between the parties for the surveyors to have any jurisdiction in the matter. That may be seem obvious, but there has been a tendency for some party wall surveyors to assume control over all matters and make awards as and when they see fit, particularly where there are issues of loss and damage caused to the adjoining owner by the building works. Party wall surveyors should therefore only be making awards when the parties themselves are genuinely unable to reach agreement about such matters, and there is a dispute that requires resolution by them.

In ***Evans v Paterson***[10], the two surveyors made an award for compensation to an adjoining owner for building works said to have caused damage to the adjoining owner's property. However, the building owner was not informed, and remained oblivious to the fact that the two surveyors were making an award for that purpose. Consequently, the award was declared void by the court, and in doing so, HHJ Backhouse endorsed the words of HHJ Parfitt, saying,

> *"In my judgment, those words apply with considerable force to this case. The Appellant remained completely unaware of the nature of the damage alleged or what, if any, remedial works were expected or required. The two surveyors provided no indication that they had inspected No. 11 or that they were preparing an award dealing with the issue. The Appellant was given no opportunity to come to an agreement with [the adjoining owners] or to make submissions or to participate in the process in any way...The process was, in my judgment, fundamentally unfair.*

10 (Unreported) Central London County Court; 17th November 2021

> *I am conscious that the Act is designed to provide a quick, efficient and final method of resolving disputes and that a degree of flexibility is required. However, the process must also be fair and impartial. Whilst an allegation of damage to No.11 was a matter 'connected with any work to which this Act relates' for the purposes of s10(10)(a), I conclude that there was no dispute for the purposes of s10(10)(b) between the parties to give rise to a jurisdiction to make the Third Award."*

Finally, where the Act should have been engaged, but the building owner has unlawfully carried out works to which the Act relates, but without either first serving a notice, or waiting for an award authorising the proposed works, the position is that the adjoining owner's remedies must be pursued at common law, and cannot be obtained retrospectively under the Act's regime. Where surveyors make an award in such a situation, no doubt with the best of intentions, they are still nevertheless at risk of the award being declared void. Such a situation arose in the case of ***Shah v Power & Kyson***[11]**.** In that case, and in declaring the award void, HHJ Parfitt stated,

> *"Now it is clear from those passages that there is a clear distinction between the common law and rights and remedies arising out of the common law and the dispute resolution mechanism under the Act. The difficulty I have with the defendant's position in this case is that it inevitably mixes them up or ignores the distinction in favour of the surveyors being able to determine what are essentially common law rights (here the claim for damage to the wall from works carried out without a party wall notice is a claim in common law nuisance or negligence)...*

11 (Unreported) Central London County Court; 2nd March 2020. It should be noted that at the time of writing, permission to appeal this decision to the High Court has been granted.

> *In my view the clear outcome of those authorities, at Court of Appeal level, addressing the jurisdiction of surveyors under the Act and the interrelationship between the 1996 Act and its predecessors and the common law, is that [the surveyors] were acting outside of their jurisdiction."*

It is clear then that the party wall surveyors' jurisdiction stems solely from the Act, and it is strictly limited by the terms of the Act. If surveyors produce awards which travel outside of those parameters, either by not adhering to the Act's procedures scrupulously, or by offending more general principles, such as natural justice, making an award when there is no dispute to be resolved between the parties, or by simply making an award where the Act has not lawfully been invoked in the first place, then such awards are likely to be declared void by the courts, and will be of no effect.

Image credit: Ian Woodley

7. ACCESS RIGHTS UNDER THE PARTY WALL ETC. ACT 1996

Michael Cooper

I was asked by Mr Mackie to contribute to this book and to pick a subject I would like to write about. Over recent years I have presented many seminars, and this has involved a great deal of research, but one aspect of the Party Wall Act that I found most interesting was the question of access to others' property.

It seems to me that the Act overrides the old adage that 'an Englishman's home is his castle'. This statement comes from the English judge and jurist **Sir Edward Coke** (pronounced cook) (1552-1634) who declared in a ruling known as Semayne's Case, that there were strict limits on how Sheriffs may enter a person's house in order to issue writs.In a famous and much quoted decision from 1604 Coke declared that "the house of every one is to him as his Castle and Fortress as well for defence against injury and violence, as for his repose", which over the years has become simplified to "a man's home is his castle". Coke's ruling was rather more complex, in that it did allow for the forcible entry of Sheriffs into a person's house in order to issue a writ for the return of stolen property or goods that were owed in a debt. However,

the Sheriffs had to follow strict procedures in doing this, such as requesting entry first. Also, the house owner could not hide within his house a fugitive or the stolen property of another person. That being said, Coke did make it very clear that the "prime directive" which Sheriffs had to follow was that a house owner had the absolute right to defend him/herself against thieves and murderers and also had the right to "assemble his friends or neighbours to defend his house against violence". If the Sheriffs did not follow the correct procedure in issuing writs, then the homeowner had the right "to shut the door of his own house" in their faces.

I would suggest that the same rules for 'following the correct procedure' for entry must apply under the Party wall etc. Act 1996 and to that end, I refer you to section 8:

To examine section 8 of the Party Wall etc. Act 1996 ('the Act'), we first have to consider what is meant by access. Strangely when researching the term, I came across a 14th century French definition where 'acces' with one 's', was described as an "onslaught or attack" and at the same time the 14th century English definition was 'to enter with or without permission'. A slightly different view from two adjoining owners across a common boundary and with the two descriptions being often not unlike how owners feel when confronted with scaffold in their gardens.

This article will cover the sections of the Act that imply or permit access, and by whom, what the access is for and where it is reasonable, the powers we as surveyors have to award access, the permitted periods for access and how to achieve the access when prevented. I will also look at some of the terms we use such as 'unnecessary inconvenience' and 'compensation' and then a quick look at some other available mechanisms for access provision such as the Access to neighbouring land Act.

Let us start with what the Act says about access. In section 2 2(2) of the Act there is a list of 13 permitted rights, (13 things an owner

can do and is permitted to do by the Act). What is interesting is that many of those rights simply cannot be performed without access, as their very action requires activity beyond the boundary. Take for instance the raising of a party wall — assuming the wall is astride the boundary, the construction of half the other side of the boundary is, of course, an action across the boundary.

In another of the permitted rights, the right of demolition of a party wall and potentially laying open the adjoining owner, the Act says, under section 7(3), of the building owner that he shall 'make and maintain so long as may be necessary a proper hoarding, shoring or fans or temporary construction for the protection of the adjoining land or building and the security of any adjoining occupier'. Clearly this cannot always be done on his side, if, for instance, the reason for the laying open relates to excavation for a foundation or trench on the BO's side, as the only placement of that hoarding must be the other side of the boundary or hole.

The Act itself has a very relevant three letters that being the: 'etc' in the title which, in parts, has nothing to do with party walls at all, as can be evidenced by section 2(2)(j). Here, we have walls that abut and are in different ownership, but the Act allows for that BO to 'cut into the wall of an adjoining owner's building in order to insert a flashing or other weather-proofing of a wall erected against that wall.

It is pretty clear to me that we cannot cut into the AO's building without, in some way, crossing that boundary to get across to the neighbours' building, so clearly, the Act foresees access as being required.

Under section 1 of the Act, even where consent is not granted to build astride the boundary, there is very specific reference to construction beyond the boundary, by permitting the placing of footings and foundations such as are necessary to construct a wall built on the land of just one owner.

Whilst some would consider the placing of foundations across the boundary as unnecessary and whilst I will come back to the definition of the term 'unnecessary' later, I would like you to consider why the right to construct 'necessary foundations' is in the Act at all, if it is not, at the very least, considered to be a possibility?

Let us not forget the right to place foundations across the boundary are, of course, actions that are subject to the requirement to make good, which applies equally where it appears at section 1(7) (which deals with the placing of a wall on your own land) as it does later at section 7(2) (the section that deals with losses or damages) and we will come back to this later.

This right to interfere was expressed in some of the earlier cases on party walls. Of course, the Act has been around in many forms for many years with the immediate predecessor being the London Building Act's Amendment Act 1939, part VI under which the Gyle Thompson[1] case was heard (by the way if you are new to party walls that case is widely referred to today and is a must read) but even before the 1939 Act, there was party wall specific legislation and judges often refer, as did the judge in Gyle Thompson case, to 'rights to interfere without the other owners consent'.

The judge in Gyle Thompson even went on to say that 'this interference was without his consent and despite his protests when referring to the AO'.

I think, therefore, the Act is very clear in that it foresees work across the boundary but what mechanism in the Act specifically provides access and to who?

It all falls quite neatly into six, very short but succinct paragraphs in section 8 of the Act and this also deals with who has rights of entry.

1 *Gyle-Thompson v Wall Street (Properties) Ltd* WLR 123; 1 AII 295.

Yes, it is true, we surveyors have a right to entry, and this seems logical, but quite the purpose of this entry is not that clear and can be quite difficult to understand.

Surveyors have a right of entry for 'the purpose of carrying out the object for which we are appointed,' this is, in effect, the settlement of a dispute under section 10. Can it be reasonably argued, therefore, that we have a right of access to take a condition record in advance of any dispute over damage?

It might be argued that access is not provided for a condition record as there isn't a dispute to settle until there is damage. If the quantum of damage is disputed, then I suggest we have to go in next door to be able to determine that dispute, and the right to determine a dispute is provided for the surveyors under section 10 of the Act. I often hear it said that the Act contains no obligation to take a condition record, and that's quite right, it doesn't but isn't it sensible to do so?

Frankly, this notion of not taking a pre-condition record as a common point of reference for the adjacent structure is, in my opinion, absolute nonsense, I would suggest that it's not only possible under section 8, but essential, for the surveyors to make that initial inspection to consider the adjacent premise's construction and to ensure our award allows for the protection of the delicate parts of the structure and personal fittings and fixtures, and whilst we are there, we may as well record the condition to avoid the resolution of a later dispute becoming difficult to determine. To those doubters out there, I say, let's not change recognised practise, and think seriously about taking a condition record for the sake of both owners providing what will be a common point of reference to avoid future disputes.

So, who else has a right of access? The Act tells us that 'A building owner, his servants, agents and workmen' do and that their right is for 'the purpose of executing any work in pursuance of this Act'.

The very words 'in pursuance' give a shudder to the spine of many an experienced party wall surveyor, but I'm pleased to say that now, I think we have some reasonably clear guidance from the courts, and I believe the majority of us now recognise the authority in Kaye v Lawrence[2]. The judge in Kaye v Lawrence effectively said that if a notice has been served, the works to facilitate the notifiable works are in pursuance. Although this case had more to do with security of expenses, and whether they could be requested for section 6 works, the judge said that common law was replaced by the Act and in fact he specifically touches upon access rights, when he says 'the Act creates new rights… permitting the building owner to carry out work on the land of the adjoining owner.'

Of course, we mustn't forget that this is not a high court decision and other county court decisions, where the merits of access were specifically debated, conflict with this view, in particular, the case of Sleep v Wise[3], however, in Kaye v Lawrence the judge was more senior in the technical courts and it's the latest we have to go on, so personally I think you would have to be foolhardy or very rich to wish to debate this in a higher court, that's not to say it will not happen of course!

So, what do we know so far?

The Act defines activities (the permitted works) for which access is likely to be available.

- The Building Owner and practically anyone engaged by him has a right to interfere with next door, for the works provided for under the act if they are considered to be in pursuance

2 Kaye v Lawrence [2010] EWHC 2678 (TCC)

3 *Davis v Sleep v Wise& Wise 2006*

- The works must have been 'notified' and let's not forget here that access also needs to be notified with the correct service of notice under section 8 of the Act before it is attempted!

- We know we as surveyors can enter next door (again subject to proper notice) but we have to have a good reason.

This is all a bit too easy, isn't it? What else does the Act demand of those requiring entry? Well, this is where it gets a little complicated.

Let's consider when we can utilise those rights of access provided for by section 8.

In Section 7 and in particular section 7(1), it throws a bit of spanner in the works as it gives us our first rule, a simple rule at that — 'the BO shall not exercise any right conferred on him' (the permitted works and the right of access) 'in such a manner or at such a time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier'.

What on earth does that mean?

Before we explore that section, section 7 also goes on to recognise that damages may result and deals with the resolution of this under section 7(2). So, it seems that the possibility of damage is not considered unnecessary inconvenience but rather a possibility that one must accept to some degree.

To understand the term 'unnecessary inconvenience', it's important to recognise that the Act authorises interference with an adjacent owner and that interference, as provided by the Act, supplants the common law rules of trespass, in other words, we can go next door to undertake permitted works. The action of authorised access therefore is not an unnecessary inconvenience in itself. This theory is reoccurring in case law, take for instance, if we look at Selby v

Whitbread[4] the judge here says the Party Wall Act is not in addition to but in substitution for the common law.

I believe that the Party Wall Act provides for actions such as access that otherwise are not permitted by common law, the Act stands alone from the common law and its rights are unique in their application. The fact that the Act grants them, makes them possible, and it is only then when the actions of the BO step away from the permissible rights that they become unreasonable.

Let me give you an example here. If the building owner wishes to weather the junction between two independent buildings, the Act provides for him to do so, if in order to do that he must erect a scaffold over the boundary to get to that particular area then he is entitled to do so. However, if he does that and then uses the scaffold for another purpose, then that other purpose becomes the unnecessary action or one that is not permitted by the Act.

If we look again at case law, and as I suggested many judges' assert that in respect to access that common law is out when the Act is in. This is again repeated in the case of Louis and Sadiq[5]. This judgement goes a little further to help understand the term unnecessary by suggesting that the works defined by the surveyor's award are the works that are considered necessary in order to perform the actions for which notice is served (in other words the permitted works), and providing the actions of the BO are in accordance with the surveyor's award the building owner is acting lawfully. As his actions are lawful, he has been provided, by the Act, with a defence against an action for trespass.

4 Selby v Whitbread& Co [1917} 1 KB 7 3 6

5 Louis v Sadiq: CA 22 Nov 1996

In summary, if the building owner sticks to the permitted works, provided for in a surveyor's award, and does not use that access for anything else he is in effect utilising a right that only exists under the Act.

Of course, we surveyors need to look at what is presented to us as surveyors and not just award it because the Act says we can, we need to look closely at what is proposed and whether it's suitable, and our right to say no is supported in case law.There are some helpful examples to be found here in the case law for instance, our right to say no is reinforced by the judge in Barry v Minturn[6], even though the case relates to an event under the 1894 Act which dealt with access to undertake works to resolve dampness in a party wall, the judge suggested that 'if the works can be done in an equally effective way at no or modest extra cost, and this would result in less or no inconvenience or entry on to the adjoining land, then the surveyors ought to award those alternative works'. This case is very much under scrutiny at the moment and I, the author, am awaiting the outcome of a current case to see if we surveyors have a right to interfere with the design in the way this case suggested.

I would however, at this juncture, refer back to section 1 and the right to place unreinforced foundations across the boundary.I If the surveyors award it then it becomes necessary and therefore permissible, but is it a case that the only consideration that we as surveyors should have is, whether the cost to the building owner is not dramatically increased, if we were to say no to the placing of those foundations across the boundary?

Of course, there is also guidance on what the surveyors can say no to, in Jolliffe v Woodhouse[7], which is also a very old case, where

6 Barry v Minturn [1913] AC 584

7 Jolliffe v Woodhouse (1894) 10 TLR 553

the Court held that seven months was too long to leave a party wall down, and so in delaying completion of permitted works, in this case, Jolliffe was found to have breached his duty not to cause unreasonable inconvenience, because he was too slow.

So, we do have some power to decide what is reasonable and say no!

On the question of access periods, the case of Crofts v Haldane[8] is a where the judge ruled that we have a right to authorise temporary interference but we have no right to authorise permanent interference. This related to a building and its interference with a right to light.

We, the surveyors, have our work cut out, not only do we need to consider what the access is for and whether it's necessary but (pending the outcome of a current case) we may also have to consider what can be done instead. If an alternative is available, and providing the answer is that it's not too expensive, we surveyors may have to look to seek the alternative design from the Building Owner.

Also, we need to understand whether it fits into the permitted rights under section 2, 1 or 6.

And then we need to consider its reasonableness, is it fair, is the BO taking advantage?

We then need to think, what is the access for? Is it for the permitted works or is it going to be used for something else? I suggest here that we reflect on what an owner might do to take advantage, if say, a scaffolder was to offer an owner an opportunity for other works outside the Act, our award should be clear in what it to be for and if necessary. I think it's even okay for us surveyors to say what it can't be used for!

8 Crofts v.Haldane[1867] LR 2 QB 194;

And then we need to consider how long that trespass or access should reasonably take and award accordingly. Let's not forget that there is nothing here that should prevent us, the surveyors, from making a further award to extend periods, if it's reasonable to do so and if we see fit! So, we can re-visit our awards if the circumstances change, we have to be flexible.

All of this is fine, but, what about this? — (see diagram 1)

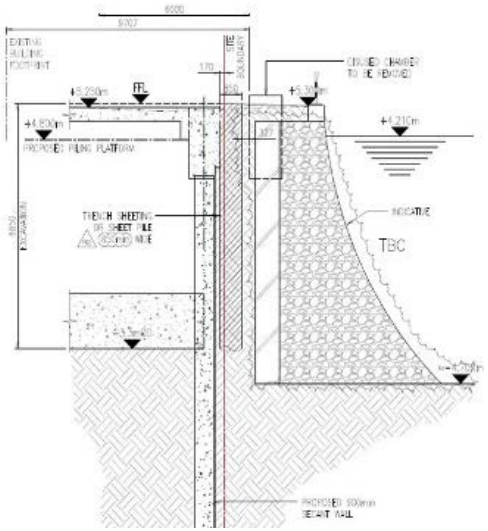


Diagram 1

In this case (Diagram 1), the adjoining owners' structure is a canal, (a canal is as much a structure as a building and the owners are as entitled to notice as if it were a house) the developing owner next door decided they wanted to place a temporary sheet pile on the adjoining owner's land to support the earth whilst the pile caps were formed. The construction is up to the boundary with the temporary sheet being beyond it. The building owner agrees to remove the sheet afterwards.

My view is that it is okay to have the temporary sheets on the adjoining owner's land but it has got to be removed, as leaving it there and leaving a permanent structure on the Adjoining owners land is not a right that we can grant, not least as it is likely to give rise to cost for the AO to remove it later, (and those costs, unlike special foundations can't be recovered under the Act), but more importantly it will cause an unnecessary inconvenience in having to remove it later.

Changing the subject, when researching the access rights of the Act, I thought I would be able to find a lot of helpful guidance on what to do to get access on the web, however, all I found was this rather delightful suggestion on a scaffolders forum where 'chunky' suggests that 'Swifty's' idea is right, 'put the scaffold up and just tell the bloke' (presumably the neighbour) 'to do one, at the end of the day you're only trying to improve your home and the area you live in so it can't be a bad thing can it'.

If only life was that simple, but, I'm afraid it's not that easy and we, 'surveyors', have to consider the implications of awarding access.

I'm often asked by surveyors if we should award compensation, in particular for the sheer inconvenience of works taking up a residential garden, for instance. Let's be clear here, the Act permits the surveyors to award any losses under section 7(2) this includes any damages etc. but can also be any loss associated with the presence of an access interference, but only insofar as those losses can be tangible.

This might mean, for instance, that a business must close for a day, a week or a month and in this case, the compensation can be calculated, it will be the sum demonstrated by reference to previous trading figures for example and based on the lost business profits. It doesn't mean the access shouldn't be permitted, however, I do not think that there is a heavy level of compensation needed for a loss of amenity where there is no tangible financial hardship or tangible

loss, after all the Act affords the right to do the work and permits the access. I also think that this is supported in case law in the recent judgements of Judge Bailey including Eileen Paul Kelliher and Ash Estates Holdings Limited and Norman Developments Limited[9].

Under the Act, the right is there for an interference of an enjoyment say of a private garden and the Act overrides that common law theory of an Englishman's home is his castle, but the owner next door should not be financially burdened by the consequence of the neighbour's actions.

I think the quote that best summarises this is from Andrae v Selfridge and Co Ltd[10], where the judge rightly says that 'we should not throw into the scales against it the loss caused by operations which it is legitimately entitled to carry out', in other words we can't add a penalty where no financial loss exists.

The meaning of the next phrase 'it can be made liable only in respect of matters in which it has crossed the permissible line' (I assume this to mean, in the context of access) where it becomes unreasonable or outside of the Act and is unreasonable, or, for activity that isn't permitted by the Act. As we can't award works outside of the permitted works provided for by the Act if the action is outside of our award, i.e., unnecessary we don't have any authority or jurisdiction to award damages or compensation as this falls into the common laws, including that of trespass.

Remember, our jurisdiction is in 7(2) which specifically includes the words any loss or damage resulting from works pursuant to the Act, not works outside of the act!

9 Case No 2cl20030 In The Central London County Court Technology And Construction List

10 Court Of Appeal Andreae V Selfridge [1938]

So, going back to the beginning — do we have authority to award access?

Yes, categorically yes and section 10 subsection (12) gives us that right — it includes the right to award how the BO is to execute the work and importantly, the time and manner for executing those works. We as surveyors can therefore use this section (section 10(12)) to award access under section 8.

What if the neighbour objects? Well, we can get a police officer to come along and help us get in and yes, the Act has some teeth as it can result in an offence to obstruct those with the right of access amounting to a summary conviction and a fine of up to £1000.

Mind you, I would suggest that trying to convince your local bobby to come along and break a door down just because you have an award to wave under their nose is not a very easy thing to achieve. So, I suggest you prepare for a long day and take a good book to read while you sit in their waiting room waiting for them to decide if you are just a complete nutter or have some kind of tangible claim.

What else can we do to get access?

So, where access isn't afforded by virtue of the works described under the permitted works of the Act what else can we do? Well, there is always the Access to Neighbouring Land Act 1992 but that can prove quite difficult. Easements and rights of way might afford rights to pass and repass but rarely for construction works to take place; a dangerous structure notice, possibly can be used if it's necessary and of course, there is always negotiation.

Taking negotiation — as this is where we normally end up, especially with crane oversail agreements, to be binding, like any agreement, it must be in writing and can be recorded in a simple contract form or for longevity or where there are reciprocal rights for later users as a deed.

However, you dress it up, most people have a point where they will sell their air rights for a temporary period, but it is finding that point and advising on it that's hard, particularly where it's difficult to determine the benefit of providing that use. I'm afraid I can offer no guidance, it's often only experience that will help.

For the record I also don't think that there is such a thing as a standard rate, every case is to be considered on its own merits, commercial thinking needs to come into play on both sides.

I would certainly never recommend trying to get away with it (access without agreement), this can often lead to expensive litigation. It is best to plan to construct without access and then if you get it, it's a bonus.

Finally, and just going back to the access to neighbouring land act, there have been very few cases to base any sense on this Act, it seems to have failed in its intended purpose to some extent. You can apply for an access order where someone doesn't allow access but works must be for preservation of land and only where those works can't be done easily from the other side. The works have to be for maintenance, repair or renewal and it doesn't include for new build.

Interestingly in this Act, as well as the Party Wall Act there is a requirement to pay compensation and the Access to Neighbouring Land Act allows for this compensation by way of consideration for the privilege of entering the servient land in a sum 'fair and reasonable' depending on the degree of inconvenience likely to be caused to the respondent and that compensation can be calculated as the increase in the value of any land or the difference (if it would have been possible to carry out the specified works without entering upon the servient land) of the likely cost of carrying out those works without the access order and the likely cost of carrying them out with the benefit of the access order.

8. SCHEDULES OF CONDITION AND FINAL INSPECTIONS

ARE THEY REQUIRED UNDER THE PARTY WALL ETC. ACT 1996?

Dr Stephen Cornish

Schedules of Condition and Final Inspections are not referred to in the Party Wall etc. Act 1996 ("the Act") and yet the terms are well known to Party Wall Surveyors and are clearly linked: surveyors prepare a Schedule of Condition of the Adjoining Owner's property before the notified work commences and this document is then referred to when inspecting the property after completion of the awarded works. It is the aim of this article to put forward three interrelated propositions:

1) That it is part of the fundamental duties of a Party Wall Surveyor to prepare a Schedule of Condition;

2) That a final inspection should be undertaken after completion of the awarded works and that the costs of this final inspection may be awarded by the Appointed Surveyors.

3) There is a corollary to the final inspection: even if there is a low risk of damage to the Adjoining Owner's property by the awarded works, a final inspection should be undertaken, at the very least as a matter of procedure, avoiding future conveyancing issues and potential complaints from appointing owners.

This intellectual origins of this paper came from the script for the webinar I gave to the Faculty of Party Wall Surveyors on 1 October 2020;[1] this paper is my personal opinion. The Oxford English dictionary defines an opinion as "a view or judgement formed about something not necessarily based on fact or knowledge. This paper draws on my experience, but also places great emphasis on the contribution of fellow surveyors, lawyers and written sources, including the Act. I am particularly indebted to the barrister Stuart Frame of Tanfield Chambers, for directing me towards the Hansard reports, which recorded the House of Lords debates on the drafting of the Act; the two key dates for the debates were the 31 January and 22 May 1996. Stuart Frame's article "Schedules of Condition — How important are they?" produced during the early days of the Covid-19 pandemic of 2020 has also been of great value.[2]

SCHEDULE OF CONDITION — IS IT REQUIRED?

This section of my paper was inspired by an online debate between my colleagues in the Faculty of Party Wall Surveyors: Ambrose

1 I am grateful to Graham North of Anstey Horne for the reading through the script and providing very helpful comments

2 Stuart Frame's, article for the Faculty of Party Wall Surveyors "Schedules of Condition, how important are they" 8 May 2020.

Ceschin, Steve Campbell, Alex Frame and Stuart Frame. The debate largely centred around two points: (1) whether a Schedule of Condition is indeed necessary and (2) if such an inspection is deemed necessary, can the Surveyors force an uncooperative Adjoining Owner to provide access to prepare a Schedule under Section 8(5) of the Act? The result of this debate was Stuart Frame's article, referred to earlier.

Although a Schedule of Condition is not referred to in the Act, research by Stuart Frame has confirmed that it was always the intention of those who drafted the statute for it to be part of an appointed surveyor's duty. This is referred to in the Hansard debate where on Page 942, on 22 May 1996, the Earl of Lytton mentions Schedules of Condition in the context on the rights of access for surveyors: *"This amendment [section 8] provides an extended framework for entry, following notice, on the property of others. There is a vital component here in that surveyors are given rights of entry pursuant to notice, not just the property owners. That is essential if surveyors are to [1] draw up schedules of condition and [2] the adjoining owner's property is to be fully protected by an assessment of necessary precautionary measures. Although access for surveyors is not specifically included in the equivalent provisions of the London Building Acts, it is in fact what happens in any event as a matter of course in inner London. The amendment does no more than put that provision on the face of the Bill. I beg to move."*

You will note that the Earl also mentions a second purpose for surveyors gaining access: "an assessment of the Adjoining Owner's property"; I shall return to this later. The Chairman of the Working Party assisting those drafting the legislation was the late John Anstey. His contribution to the process is referred to and praised in the Hansard debates. John Anstey wrote a seminal book soon after his work on the Act was completed. The book was titled Party Walls, and what to do with them, in which he famously said: *"Whenever you ask a question of a real [party wall] expert, his first action will always be*

to reach for his copy of the Act in order to check its wording precisely".[3] In the absence of other information on the intention of those who drafted the Act, it is safe to say that reference to John Anstey's book is another good guide. I have spoken at length to Graham North, John Anstey's former business partner at Anstey Horne, who updated Anstey's book in 2005. In the Introduction to the subsequent 6th edition, we are told that *"With John [Anstey] never afraid of voicing his views and thoughts, Graham became very familiar with his opinions over the years.*[4] On the matter of revisions, Graham stressed at the time of updating the book that *"John's original words and wisdom have by no means suffered from the passage of time [...] but he has made alterations and additions [where] necessary."*[5]

John Anstey stated that a Schedule of Condition is part of the duties of a Party Wall Surveyor and Graham North has confirmed this was Anstey's view. Anstey informed us that the purpose of a Schedule of Condition was *"[...] to record the state of those parts of an adjoining building which might be affected by the Building Owner's work."*

Stuart Frame has endorsed John Anstey's view by referring us to the Court of Appeal case of Roadrunner Properties Ltd. v Dean. Here, Lord Justice Chadwick emphasised that where a building owner conducts notifiable works without first engaging the Act's procedures by serving notice for those works, then that building owner is denying the adjoining owner the opportunity to have a schedule of condition taken.[6] The Court went on to say that a building owner should not be able to benefit from the consequent lack of evidence caused by such a failure to adhere to the law.

3 John Anstey, *Party Walls and what to do with them* (fourth edition 1996) p.118-119.

4 6th Edition p. ix.

5 Ibid. pp. ix-x)

6 2003] EWCA Civ 1816, at paragraphs 28 and 29.

ACCESS

Having established that a Schedule of Condition is part of a party wall surveyor's duties, what happens if an adjoining owner is not providing access? As noted earlier, Earl Lytton stated in the House of Lords debates that rights of access for surveyors were not provided in the 1939 Act. Section 8(5) of the current Act provides: *"A surveyor appointed or selected under section 10 may during the usual working hours enter and remain on any land or premises for the purposes of carrying out the object of which he is appointed or selected."*

The right, specifically for surveyors acting under section 10 of the Act does not depend upon written consent or an Award being in place but can be exercised at any time after a surveyor has been appointed or selected under section 10.[7] Although in most cases this will occur after an initiating Notice has been served, service of such a Notice is not a prerequisite to the right arising. The prerequisites are merely (1) that a dispute under section 10 has arisen and (2) one or more surveyors have been appointed or selected to deal with that dispute. Surveyors seeking to exercise this right must be careful that they are doing so furtherance of carrying out the object for which they have been appointed or selected. This does not just necessarily mean dealing with a specific disputed item but also enabling a surveyor to **assess** [remembering the Earl of Lytton's words] the proposed works, and the impact that they may have on the Adjoining Owner's property.[8] This is an important point: surveyors sometimes discover, when attending an Appointing Owner's property, there are errors in the drawings and/or the notices, along with other matters which have not been taken into consideration. It is therefore questionable whether surveyors should be referring to this inspection as merely an inspection for a

7 See Nicholas Isaac QC, *The Law and Practice of Party Walls* (second edition), chapter 14.

8 Ibid.

Schedule of Condition, particularly if they are drafting the reasons for the inspection in a section 8 notice.

The inspection should be seen as a process of collecting information and also the opportunity to discuss various aspects of the proposed work with the Adjoining Owner and the other appointed surveyor, which should lead to a clear course in resolving the dispute. Such an inspection would clearly be in accordance with the provision of section 8(5), that is a surveyor carrying out "the object for which he is appointed or selected". The wording of section 8(5) does not expressly permit the surveyor to be accompanied by an assistant or tradesmen, so does this present a problem when the appointed surveyor sends his assistant to prepare the Schedule? John Anstey did not consider this an issue and nor would it seem to the retired judge His Honour Edward Bailey in the case of *Barberini v Weihe*.[9] When considering the quasi-judicial functions of a party wall surveyor, His Honour referred to the taking of a schedule of condition as one of the administrative functions of a party wall surveyor that can in fact be delegated to another, and one that does not need to be conducted by the appointed surveyors themselves.[10] However, Stuart Frame does raise the question whether " that other person to which the taking of a schedule of condition has been delegated, also has a right of access under section 8(5) for that purpose? It would not appear to be the case as section 8(1) only mentions the surveyor who is "appointed or selected under section 10" and not their agents or employees; this clearly requires a persuasive Court case to clarify the matter.

Except in the cases of emergency, and before rights of entry can be exercised under section 8(5) the Building Owner must serve on the Owner and Occupier of the land or premises to which

9 Unreported, Central London County Court, 23 October 2016.

10 Stuart Frame's, article "Schedules of Condition, how important are they" 8 May 2020.

entry is sought and Notice of the intention to enter not less than fourteen days ending with the day of proposed entry. In cases of emergency, the requirement is relaxed as such Notice would be "as may be reasonably practicable". Section 8(6) of the Act states : No land or premises may be entered by a surveyor under sub section (5) unless the building owner [emphasis added] who is a party to dispute concerned serves on the owner and the occupier the land or premises — (a) in cases of emergency, such notice of the intention to enter as may be reasonably practicable; (b) in any other case, such notice of the intention to enter as complied with sub section (4). Subsection (4) states: "Notice complies with this subsection if it is served in a period of not less than fourteen days ending with the day of the proposed entry."

Stephen Bickford-Smith et al inform us that if the surveyor's letter of appointment authorises him to serve notices on behalf of the building owner, then it is quite permissible for the appointed surveyor to serve such notice.[11] There is no prescribed form for a notice, and no specific wording is required. It is suggested, however, that building owners or their authorised and appointed surveyor, should prepare a notice following the wording of the act as set out in section 8(5) as closely as possible. Bickford-Smith et al has provided a template for such a notice.[12]

The Surveyors may well be faced with the problem of an adjoining owner refusing to provide access following the service of notice under section 8(5). Section 16(1) of the Act which states: (1) If — (a) an occupier of land or premises refuses to permit a person to do anything which he is entitled to do with regard to the land or premises under section 8(1) or (5); and b) the occupier knows or

11 Stephen Bickford-Smith, David Nichols and Andrew Smith, *Party Walls: Law and Practice* (4th Edition) p.113

12 Ibid, p. 297

has reasonable cause to believe that the person is so entitled, the occupier is guilty of an offence.

It is important to realise that the occupier may not necessarily be the owner but he, or she, should have received a notice which is under sections 8(3) and 8(6). Nicholas Isaac QC informs us that section 16 of the Act creates two criminal offences intended to give teeth to the rights of entry under sections 8(1) and (5) of the Act.[13] While it is not uncommon to see the threat of criminal sanctions raised when a building or adjoining owner are proving difficult in terms of access, these criminal sanctions are almost never utilised in practice. The lawyer Matthew Hearsum made a Freedom of Information Act requests as to the number of successful prosecutions under the Act; it revealed that there were only a total of 4 successful prosecutions under the Act between it coming into force and the end of 2011.[14] It is interesting to note that during the Hansard debates, the Lords were concerned that the existing criminal justice system would over run by obstructive adjoining owners' cases.

Section 16(3) provides that offences created under Section 16(1) and (2) are liable on a summary conviction to a fine not exceeding level 3 on the standard scale. The offences are therefore summary offences which means that they can only be tried in the Magistrate's court. They are punishable by a fine only, not by imprisonment. A fine on level 3 of the standard scale represents a maximum fine of £1,000.

Notwithstanding the above, it is still a concern for surveyors that they are appointed to resolve a dispute between the owners and not cause one. There is the concern that attempting to enforce a section 8(5) right of entry will produce much aggravation and cause a dispute. Stuart Frame has offered some pragmatic advice:

13 Nicholas Isaac, The Law and Practice, (2nd edition) paragraph 21-01, p. 221

14 Ibid.

"It is suggested that it falls upon the surveyor(s) to clearly explain, in writing, the importance of a schedule of condition and how it protects the adjoining owner (as well as the building owner) in the event that damage is caused to their premises. It may also assist to remind the adjoining owner that to refuse the surveyors access in such circumstances could amount to a criminal offence, as set out in section 16 of the Act, but this 'reminder' should always be made courteously and in an informative manner, rather than in the peremptory and imperious style that is often used by less scrupulous surveyors or those of a less amenable disposition." Stuart Frame advises: "It is, however, certainly not recommended that party wall surveyors or their owners push for a criminal prosecution in the vast majority of situations where access is refused; it is highly unlikely that the Crown Prosecution Service would be interested in bringing such a prosecution except in the clearest of circumstances and where it would be in the public interest to do so, such as where refusing access endangers health and safety."[15]

Stuart Frame concludes: "In the event that all the above has been explained and an adjoining owner still refuses access for a schedule of condition to be taken, then it should further be explained to the owner, again in writing, that in such circumstances the refusal by the adjoining owner to allow access for a schedule of condition to be taken will inevitably go against them in the event that a dispute arises in the future as to whether the works have caused damage. In such a case any doubt over whether the damage was either pre-existing, or caused by factors other than the works themselves, may well be decided in the building owner's favour."[16]

15 Stuart Frame's, article "Schedules of Condition, how important are they" 8 May 2020

16 Ibid

THE FORMAT OF THE SCHEDULE OF CONDITION

There is no standard format for a schedule of condition. The now superseded 6th Edition of RICS Guidance Notes on Party Wall Legislation provided a template for schedule of conditions. The latest RICS *Guidance Notes*[17] on Party Wall Legislation does not. Michael Cooper, the chairman of the Working Party on the latest guide, informed me that they did not want to tell surveyors how to do the obvious, but reference is made to the template in the 6th edition. [18]

Many schedules of condition are arranged over three columns: building element; description and condition. It is the recording of information which is vital. Some schedules are recorded on video with an audio description. For those relying heavily on photographs, it is worth considering the advice that Anstey gave in 1996: "Unless the surveyor is very skilful in taking such photographs, they will not show up the same cracks that need to be recorded." Use photographs as aides memoires by all means, perhaps using modern software to indicate the position of cracks, but for those building surveyors amongst you, sketches are probably just as good if not better."[19] A more modern opinion was given in the superseded 6th edition of the RICS *Guidance Notes*[20] on Party Wall Legislation stated: "Photographs are sometimes used. However, these can be time consuming and costly in reproduction. Furthermore, although capable of showing a general state of dilapidation, they generally provide little assistance in determining whether, for example, a hairline crack has worsened. Sketches may also be useful in identifying areas of damage or patterns of cracking."

17 7th Edition

18 A personal communication

19 Ibid, p118.

20 7th Edition

Digital cameras and videos are clearly highly advanced now, but they are only as good as the surveyor using them. There is also a significant number of schedules which are recorded directly on audio dictating machines; again, they are only as good as the surveyor using them. There is also the occasional problem of adjoining owners becoming alarmed/ aggravated by hearing a less than favourable description of their property. Taking written notes (even on a tablet) is more secure and time is also given for reflection back in the office on what the surveyor has recorded, particularly when referring to sketches. Sketches are still used by my Company's Building Surveyors when carryingout house purchase surveys and they often add greater value when locating the location and size of crack. I have attached to this article an example of the type freehand sketch produced during such an inspection (see appendix).

Graham North has told me that at the top of his list of common Third Surveyor referrals is a dispute between the appointed surveyors over damage. Quite frequently the dispute is exacerbated or difficult to resolve because the schedule of condition is of such poor quality. The extent of the schedule of condition depends upon the likely risk of the notified work: this forms part of the assessment the Earl of Lytton referred to in the Hansard debates. An inspection within a metre or two of a party wall would be sufficient where a chimney breast is being removed from the party wall (and do not forget to note whether an adjoining owner's chimney on the opposite side of the party wall has an open fireplace). An inspection of the whole of the adjoining owner's property may be necessary in the case of a deep basement construction taking place next door. It is the subject of "risk" posed by the notified works which appears to be one determinate in a surveyor undertaking a final inspection. First, however, we must consider whether final inspections and their costs should be awarded?

FINAL INSPECTIONS —ARE THEY NECESSARY?

Final inspections are not referred to in the Act. "Inspections" are, however, referred to in Section 10(13)(b), which states that an Award may determine: "The reasonable costs incurred in: (b) reasonable inspections of work to which the Award relates; [and] shall be paid by such of the parties as the surveyor or surveyors making the Award determine."

The Faculty of Party Wall Surveyors have produced a new template for an award, which states under in clause 9 under the heading of costs: "Where surveyors subsequently determine that if [further] inspections of the works are required or become necessary, the reasonable costs of those inspections shall be paid by such parties as the surveyor(s) making the award determine." In the 7th Edition of the Royal Institution of Chartered Surveyors Guidance Notes "Party Wall Legislation and Procedure" on Party Wall Awards, Section 8.5.1 states: that: "It is usual for the Award to include the Adjoining Owner's Surveyor's fees as a lump sum based on time **incurred** [emphasis added], including allowance for any necessary **subsequent inspections** [emphasis added]." Section 9.1 of the guidance notes refers to "interim and final inspections". The guidance notes state: "It is the responsibility of the owners to comply with the terms of the Award. Within the Award, the Appointed Surveyors may include a provision for reasonable inspections to be carried out by them or their advisers. They may be required to ensure that specific conditions in the Award are being complied with, or to inspect any detail or structure opened up during the works." Appointed surveyors commonly provide for appropriate interim or final inspections in the primary award where surveyors determine them to be necessary."

It has been questioned by some whether it is within the surveyor's jurisdiction to award costs for a surveyor to undertake a future inspection. As already noted, section 10(13) uses the word "**incurred**" (past tense), which is indicative of the relevant work having been

already completed. It does not use the phrase "to be incurred". It is therefore argued by some that the costs which can be awarded or otherwise determined by surveyors are those which have already been ascertained for work already conducted. Effectively, surveyors would appear to be receiving payment for work that has not yet been conducted. Some surveyors apparently doubt the need for a final inspection of works unless circumstances arise where there is an obvious need for an inspection, such as where damage is alleged to have been caused. Other surveyors would say that certain works often need "signing off" to ensure that they had been executed in accordance with the Terms of the Award.

There is anecdotal evidence that some surveyors do not carry out a "final inspection" despite the inspection being included in the final awarded costs. In such circumstances, it is rightly argued that the paying party would be entitled to insist on the inspection taking place or a refund of some of the money already paid. It is therefore suggested by some that perhaps surveyors would do well to avoid reference to a final inspection and adjust their fees accordingly.

In 2016, I was making a Third Surveyor determination on such a dispute between two surveyors on the inclusion of fees for future inspections. I was aware that as long ago as 2014 Nicholas Isaac QC had written an article in the Pyramus & Thisbe Newsletter called 'Whispers'. In that article Nick was critiquing the (then) RICS standard-form of award and he said: "Although there can be no objection to an award dealing with fees incurred down to the date of the award, it is arguably wrong to make provision for the payment now of fees which have not been incurred at the date of the award and may never be incurred. It is suggested that it will normally only be appropriate to make an award of fees in relation to future inspections where the surveyors are confident that such inspections are both necessary and will actually take place."

Nicholas Isaac suggested that the use of the word "incurred" relates to **liability**, not **payment**. He explained; "There are, it seems to me,

two ways of justifying an award for payment for a future inspection: (1)"incurred", whilst in the past tense, can be said, in the context, to include future fees being incurred as well; and/or (perhaps more convincing); (2)Fees are incurred when liability to pay them arises. In the party wall context, if a decision has been made by the appointed surveyors that a final inspection will undoubtedly be necessary and will in the normal course of events take place, liability on the part of the building owner to make that payment has, at least very arguably, already arisen when that decision has been made. Consequently, that fee has been incurred, and can quite properly be included in the award." Isaac concluded: "In all the circumstances, I would suggest that it is quite proper to include a provision for payment of fees for one or more future inspections, provided that the need for it/them is clear, and it is clear that they are likely to take place. To be properly cautious, one might add a sentence into the award providing that in the event such an inspection does not take place, the appropriate owner/ surveyor shall refund that portion of fees representing the costs of the final inspection."

Section 10(13)(b) refers to "reasons for inspections of the **work** [emphasis added] to which the Award relates. It is normal for 'the work' to be specified in the award; this subsection is not referring to specific inspections leading up to the making of the Award but to inspections of "the work". Clearly the work has not commenced at the time the award is served and it can only mean inspections of the work taking place in the future. The Hansard debates do not make any reference to this subsection. I have therefore looked to John Anstey's book, where he makes clear references to interim and final inspections. Graham North spoke to me about his discussions with John Anstey and he confirmed that it was always intended that future inspections and their costs should be awarded.

I would add some footnotes with regards to the importance of final inspections: (a) If the Act recognises it is the statutory duty of building owners to serve notice on adjoining owners for certain

works which could affect their property, then the Act clearly recognises there is a risk; (b) on the premise that preparing a Schedule of Condition is a vital part of the statutory duties of a Party Wall Surveyor, it therefore follows that there is a recognition that there is a risk to the Adjoining Owner's property. A Schedule of Condition is prepared to provide a reference to assess any future damage, and therefore it is incumbent upon surveyors to complete their duty and to check that same Schedule of Condition to establish if damage has occurred, no matter how small the risk may be. (c) The lack of a final inspection could create issues upon the sale of the appointing owners' properties after the completion of the awarded works and may leave the party surveyors open to a complaint.

With regard to the conveyancing issues, the barrister Stephen Bickford-Smith et al inform us that: "The standard [text books] on conveyancing have historically contained no material reference to the party walls legislation, no doubt because of its original local application [to Inner London]. But it is clear from the Act's effects on successors in title that conveyancers will have to pay more attention to it now that its application is countrywide."[21] I would go further than this and say that conveyancing solicitors **are** paying more attention to the Act, not least since they have been issued with up to date guidelines. It is becoming clear within my multi discipline practice, where my colleagues are undertaking building surveys on behalf of purchasers, that works under the Party Wall Act have caused damage which is unbeknown to Adjoining Owners. When presented with copies of awards, my colleagues have found inconsistencies with the completed work, which have not been picked up because a final inspection has not been undertaken. This is raising eyebrows amongst conveyancing solicitors and appointing owners who have called upon surveyors to undertake belated final inspections, to allow for the smooth transfer of sale to property.

21 P*arty Walls: Law and Practice*. On page 197-199

We should look to John Anstey to provide a balance view on Final Inspections: "When the works are completed it is advisable, though no means invariable, for a final inspection to take place, at which the schedule of condition is checked and any damage agreed, to be subsequently, though by no means invariable put right or paid for. Many people recommend positive action from the Building Owner's surveyor to put this in motion so as to secure a positive clearance from the Adjoining Owner for the Building Owner who can, barring any accidents, be sure that he has disposed of any claims from the neighbours"[22] Anstey spoke of a positive end to the job being to the advantage of both surveyors being able to close their files, with one notable caveat: "As the case of *Selby v Whitbread and Brace v SE Regional Housing Association* makes clear, a Building Owner is not relieved of his common law responsibilities, so any latent damage which emerges would still fall to his charge."[23]

CONCLUSION

- It is part of a Party Wall Surveyor's duties to prepare a Schedule of Condition;

- That a final inspection should be undertaken after completion of the awarded works and the costs of this final inspection may be awarded in the primary Award by the Surveyors.

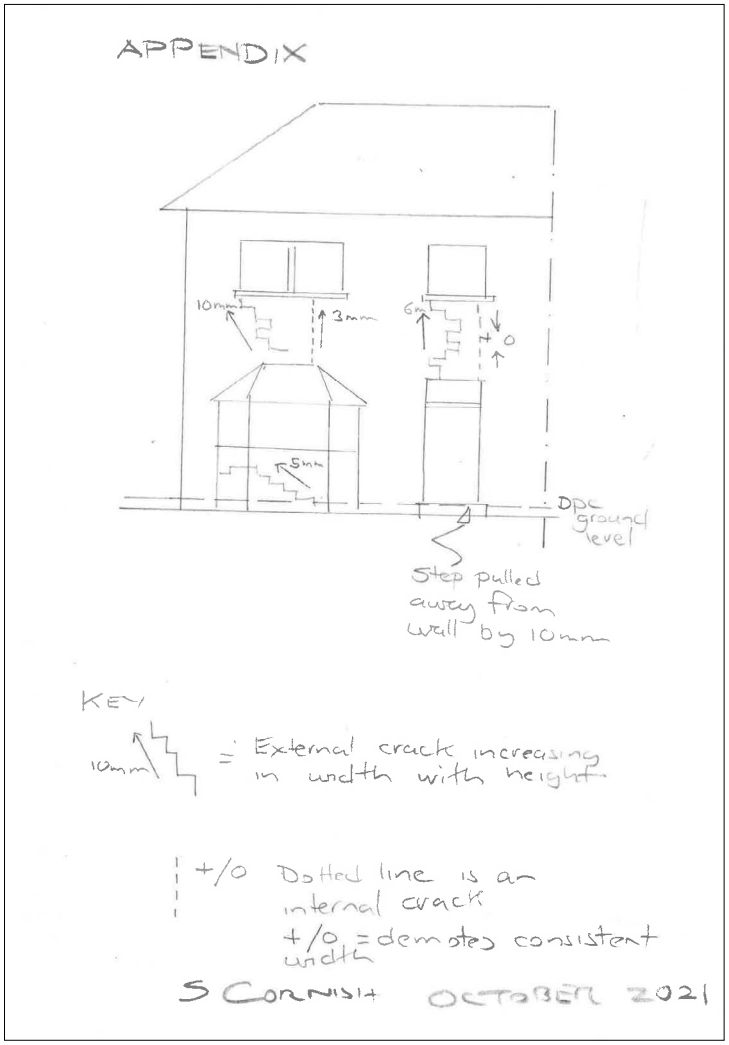
- Even if the risk of damage is considered low, a final inspection should be undertaken, at the very least to conclude procedural matters, avoid future issues in the conveyancing process and, dare I say, avoid complaints and potential Professional Indemnity claims. But let's leave the final word with John Anstey:

22 Anstey, *Party Walls,* p.42.

23 Ibid.

"Try to find out when the works are coming to an end — you'll be extremely lucky if anyone bothers to tell you — and arrange to make a final inspection of your owner's premises. It's much more helpful if any damage at this late stage can be noted and discussed before the contractor leaves the job, even if it is going to be the Building Owner's responsibility towards the Adjoining Owner in the first place."[24]

24 Anstey. 6th Edition, p.61



Appendix

9. THE TROUBLE WITH DRAFT AWARD TEMPLATES

Will Minting

'To all those whom presents shall come, send greeting'

As we all know, a Party Wall award determines a Party Wall DIS-agreement; therefore an Award is anything but a so-called "Party Wall agreement". In order for Surveyors to be appointed, and a Third one selected, the adjoining owners must have dissented (or have been deemed to have dissented by virtue of non-response to the requisite notices). Therefore, the notified neighbours seek an assessment of the prescribed works, and in the vast majority of cases seek a robust safeguarding of their interests.

I've contended for very many years now that the lowest common denominator, race to the bottom approach to serving pro-forma awards without applying the necessary care to provide bespoke facilitating or safeguarding measures is a dereliction of duty to developing and neighbouring owners and occupiers alike, and the waste of a really good opportunity to add value to often foreseeable challenges.

An award by statutory determination is made by appointed, and not instructed, Surveyors enjoying the privilege of quasi-judicial discretion. The jurisdiction of appointed Surveyors, and indeed their *raison d'etre* is to determine the "time and manner of the works" in accordance with section 10(12) of the Party Wall etc. Act 1996, "the Act".

Appointed Surveyors usually try to be careful, perhaps excepting determination of the right to execute work under 10(12)(a), not to "authorise", "agree", "approve" or "allow"; they make a determination following an assessment of particular circumstances; broadly, analysing the balance of convenience between the parties in exercising rights and duties conferred by the Act; striving to ensure fair play between the parties, and not favouring one parties' entitlement over the other.

Those that optimistically contend that the Act is "facilitative, enabling" legislation are correct to the extent that the legislation provides certain entitlements to developing parties, to which they would not otherwise be afforded as of statutory right. However, plainly a primary purpose of appointed Surveyors is to safeguard neighbours from unscrupulous developers seeking to impose their often presumptuous approaches to construction activities at the boundary.

The principal function of appointed Surveyors is to determine "the time and manner of the works". It is for appointed Surveyors to seek to impose a regime that is both commercially viable and logistically practicable, and at the same time certain that such methods involve only "necessary" inconvenience as to opposed unnecessary inconvenience anticipated in section 7(1). The British Standards BS5228, BS6472 and BS7385 refer to "Best Practicable Means" as the test by which operations are to be carried out in a commercially-viable manner whilst exercising all proper and reasonable steps to avoid disturbance where sensibly possible. This is the vital, central content of most awards, and the essence of really worthwhile determinations.

The rationale of party wall legislation, which has been honed in central London since 1189, is a pre-emptive dispute resolution mechanism to deliver a fair and reasonable regime of specific building operations on or near the boundary. The legislation is facilitative to the extent that it recognises the need for unsuspecting and often unwilling adjoining owners to be safeguarded. The Party Wall profession has long prided itself on the infrequency of court cases during its 833 years in practice, and there remain some common thorny issues which to date have escaped High Court judgment.

A Party Wall award is therefore not a free-for-all. Its real benefit — and where appointed Surveyors can add value to the process — is to assess the impact of the work upon adjoining property owners and occupiers to afford the necessary protections to which they are entitled, whilst seeking to ensure that the developer is able to progress his scheme carefully, efficiently and reasonably.

There is a lot of fluff, or "boiler plate" as lawyers say, in generic documents. Appointed Surveyors are duty bound to determine matters in dispute. An Award should not be a recital of the provisions of the legislation (particularly where it is recited incorrectly!), referencing indemnity clauses which purport to determine future disputes which have not yet arisen, or rights of appeal, or even matters which the parties have voluntarily agreed. Such informatives should be contained in a covering letter serving the award.

Having completed the initial statutory formalities, it is appointed Surveyors' first duty to seek to encourage the parties to set out their entitlement to safeguarding from the notifiable works, and thereby establish more particularly the issues in dispute. These vary from scheme to scheme, depending upon the situation and occupancy of premises, and the relativity of specific building operations proposed by the developing party.

In unscrupulous hands, generic draft awards are a weapon capable of causing certain misery and potential loss to innocent lay adjoining property owners and occupiers. Surveyors who merely top and tail a generic draft RICS or other institution "best practice" template are not adding any value. Worse still, such practitioners are surely complicit in offering little or no worthwhile safeguarding to the unsuspecting adjoining owner or occupier by seeking to abrogate the outcome of the meaningful issues to the local authority, or heaven forbid, the builder.

There is no prescribed format stipulated or anticipated by section 10 of the Act as to the appearance of an award. Clearly, one would expect certain content because it makes matters clear, including the recitals arising from the notices, and the terms upon which the works specified in those notices must proceed. The recitals are fundamental to clarifying the parties bound by the determination, and identifying the appointed and selected Surveyors responsible for resolving the dispute.

However, in their aspiration to make awards as efficiently and rapidly as they can to enable the developer to proceed with the notifiable works, appointed Surveyors turn to standard documents, be it those offered by the P&T, the Faculty, RIBA, CIOB, or RICS. There are of course benefits in using templates. The format is familiar, it is easy to locate clauses to which one wishes to refer; they are a helpful aide memoire in avoiding important provisions being overlooked. Such standard form awards, or templates, are readily agreeable offering common ground without need to draft routine provisions from scratch. However, a clause should not be included in an award just because it is in the template. And therein lays the issue — at what point should appointed Surveyors draw the line under a standard draft template, and tailor it to the particular circumstances in hand.

The RICS guidance note, April 2019 edition, makes abundantly clear that the draft award included within their best practice document is

"intended to be for guidance only" and that "it is not definitive nor should it be without careful and thoughtful consideration." However, it seems that some of its members overlook this salient point when churning out documents to avoid time of the essence and critical path anxieties.

Pre-writing, or precedents as lawyers would say, is essential in carefully considering what is to be achieved; what is the real purpose of the document, and what facets need to be covered to ensure it delivers the necessary expectations? All too often, following ratification or "no further comment" recommendations by an advising structural engineer, or a project structural engineer providing a duty of care letter to the appointed Surveyors, the Building Owner's Surveyor will insist on rushing to prepare awards for engrossment, yet the time and manner of the works may not even have been discussed. That would be missing the point of the appointed Surveyors' involvement.

Striking the balance in the competing interests of the parties is Party Wall Surveyors calling. By merely regurgitating generic provisions no value is being added. Neither should Party Wall Awards contain legalese which cannot be explained. When I joined Wilks Head & Eve as a Partner in 2006, I promptly removed their then well-known salutation *'To all those whom presents shall come, send greeting'* because I couldn't establish from Partners or staff past or present as to what value it added. Plain English and clarity of drafting undoubtedly assist the parties in managing expectations.

Even almost 25 years following the introduction of the latest Party Wall legislation, I still receive draft awards — and in the case of Third Surveyor referrals, made awards — which seem to have little relevance to the particular circumstances of that case, and add nothing which is useful to the parties.

There are a number of old chestnuts which remain common but ought to be excised from standard form templates — the sly

introduction of "material" to the section 7(5) stipulation for no deviation; the often misunderstood provision for the award to be valid "for 12 months from the date of the notice" whereas the expiratory period of an award is usually extended to 12 months from the date of the award; to seek to abrogate responsibilities under the CDM Regulations (which I am advised is legally ineffective anyway), even where no such responsibility is relevant; to seek to impose contractual arrangements between the Building Owner and his contractor in the form of insurance arrangements, on which the adjoining owner cannot contractually rely; or to propose that it is any way appropriate for a builder to self-police his own monitoring regimes, be it ground movement, structural/crack monitoring, vibration, noise or dust.

On the other hand, draft award templates may helpfully remind practitioners that provision needs to be made for security alarms or tremor alarms, potentially activated by vibration arising from the notifiable works; and what about any increased insurance premiums to be borne by the adjoining owner or occupier, or even refusal of insurance cover on an existing multi-million pounds policy due to imminent adjoining construction works?

There are also some often inappropriately retained clauses in draft award templates, which appointed Surveyors like to leave "just in case" or as a "catch-all". One such recurring clause is for as-yet unanticipated access provision, which I am told by our legal colleagues is invalid. How often does one receive a draft award seeking to determine piling operations, providing for the "removal of scaffolding or screens" from the adjoining owner's land? The scaffolding or screens, supposedly necessarily situated on the adjoining owners land, has usually not been introduced in order to be withdrawn. You might feel inclined to enquire of your opposite number as to whether his or her appointing owner have a very long spade for which he needs to dig from scaffolding on the neighbouring land.

Instead, draft Award templates ought to routinely and usefully determine the provision for a Building Owner to maintain a log book, or detailed site diary, of notifiable works activities and potentially disruptive logistics operations. All too often we seek to assess complaints or claims for damage and regrettably the Building Owner's contractor cannot evidence what activities or logistics occurred on a certain date. I wonder why, and especially during the increasingly uncertain times of the last few years, is Security for Expenses still absent as a prompt in a boiler-plate draft award.

Possibly the most notable shortcoming of a draft award template is the peculiar omission of any worthwhile vibration and noise controls. So very often, draft awards seek to lazily fall back on local authority Control of Pollution Act 1974 arrangements, under section 60 or section 61. Plainly it is a nonsense for Surveyors to be seeking to abrogate vital acoustic safeguarding by merely relying upon the local authority environmental health officer. Surely by seeking to do so, appointed Surveyors are missing the point of their involvement, and of the opportunity afforded by a private property determination over and above the by-laws or conditions in an invariable poorly considered town planning consent? Such a "two hours on, two hours off" regime is archaic. Two hours on, two hours off; of what, exactly? One man's subjective assessment over another? Are such draftsmen suggesting that in "two hours off", the Building Owner should not be carrying out any vibratory or noisy work? And why does a generic draft award refer only to "noisy" work as opposed to "vibratory" work, which, according to the British Standards, is recognised as accentuating concerns as to structural collapse? As a rule of thumb, occupiers of buildings will often be far more sensitive to noise and vibration than the plaster, tiles or painted finishes in those buildings" depending upon the occupiers, occupational use and the fragility of the cosmetic finishes.

Notwithstanding the lack of any mention of safeguarding from the effects of vibration, draft award clauses proposing that "in particular noisy works which are the subject of this award shall be restricted

to 8am to 6pm Monday to Friday, and 8am to 1pm on Saturdays." As these are on the most part the maximum allowable construction hours audible at the site boundary in accordance with local authority by-laws, clearly such hours are not a "restriction" within the award determination at all.

The old-fashioned provision for so-called "Section 61" two hours on, two hours off certainly became an anachronism in many cases following the lessons in Hiscox -v- Pinnacle, 2008, often cited as one of the leading construction nuisance cases since Andreae -v- Selfridge of 1937. Where it is appropriate and proportionate, draft awards should routinely provide for the monitoring of noise and vibration. Referring to generic local authority by-laws will not afford the necessary safeguarding for many adjoining owners, nor is it appropriate to seek to abrogate responsibility of the time and manner of the work outside the jurisdiction of the award. It's always struck me as odd that template awards provide for "as-built" drawings where variations to the award appendices are constructed because under the provisions of section 7(5) any variations without agreement of the parties or further determination by the Surveyors are not allowable anyway. There is of course much more besides but the aim of this article is to stimulate food for thought, and debate at professional functions.

A Party Wall Award is therefore not a free-for-all. It's real benefit — and where we can add value to the due diligence process — is to assess the impact of the work upon adjoining property owners and occupiers to afford the necessary protections to which they are entitled, whilst seeking to ensure that the developer is able to progress his or her scheme carefully, efficiently and reasonably.

Nor is a Party Wall Award a panacea for all of the parties' concerns. Jurisdiction is of course limited to the notified works, and it is not a document into which additional issues between the parties concerning non-notifiable works can be shoe-horned.

It does not take a lot more time to do a worthwhile job than a poor one. Experience shows that a good, well considered award will be of at least as much benefit to the developer as to his neighbour. Party Wall Surveyors should take real pride in what they do, offering adjoining owners and occupiers the protection to which they are entitled, and concurrently helping conscientious developers form a springboard from which they have a clear and solid basis upon which to proceed with their scheme.

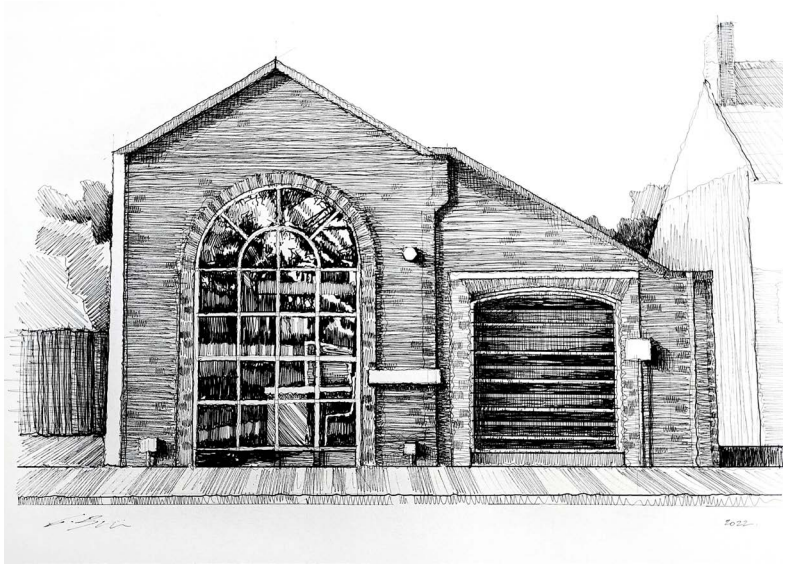


Image credit: Joseph Birnie

10. GETTING TO GRIPS WITH THE DIFFICULT ISSUE OF SECTION 11(11)

'MAKING USE OF'

Mike Harry

INTRODUCTION

Section 11(11) of the Party Wall etc. Act 1996 appears relatively straight forward as drafted. Rooted within the legal principle of equity the intention of the provision appears deceptively clear; it is simply that where subsequent use is made by the adjoining owner of work carried out solely at the expense of the building owner the adjoining owner shall pay a due proportion of the expenses incurred by the building owner in the carrying out of the work.

However, straight forward as it may seem the section 11(11) '*making use of*' provision continues to form the subject of much uncertainty and consternation among those charged with administering the Act. This article seeks to lift the veil on some of the some of the uncertainties that plague the topic and to

provide some practical tips and pointers to assist practitioners in discharging their role.

In considering the subject it seems that the natural starting point should be to consider the history of what the author expeditiously refers to as the *'making use of'* provision.

THE HISTORY OF SECTION 11(11) 'MAKING USE OF'

The seed of the provision was planted as far back as rein of the Metropolitan Building Act 1855 (the 1855 Act). The 1855 Act actually contained no provisions pertaining to the payment of compensation to a building owner where the adjoining owner makes subsequent use of works carried out at the sole expense of the building owner. However, it was under that very Act that the issue was first recorded to have raised its head in what would prove to be a landmark legal case and would ultimately be responsible for the section 11(11) '*Making use of*' provision that is present within the current 1996 Act. The case was '***Williams v Bull [1890]***';

Williams v Bull

Williams & Bull were both freehold owners of their respective properties. The properties comprised a pair of adjoining terrace houses separated by a wall that was not initially recognised as a party wall under the 1855 Act, but what we now know as a 'type A' party wall. During the course of 1884 Williams served notice on Bull under the 1855 Act in connection with the demolition and re-building of his house to an increased height. On completion of the works Williams' property projected one storey higher than Bull's and therefore included the raising of the party wall to enclose that additional storey, all at Williams' sole cost.

Some time later Bull served notice on Williams advising of his intention to increase the height of his own property. However, upon completion of Bull's work Williams noted that Bull had not built an independent wall against the party wall that Williams had previously raised, but had instead enclosed upon and therefore made use of the raised party wall that Williams had raised.

Williams felt that this was not at all fair. He felt that if Bull was making use of the party wall which Williams' had previously built at his sole cost, then Bull should contribute to the cost of building that wall by way of a payment of compensation to Williams. Bull refused to make any such payment and Williams issued proceedings for recovery of a proportion of the cost of building the wall.

The court examined the various provisions of the 1855 Act and found that notwithstanding the fact that Williams had built the party wall at his own cost, the Act contained no provisions that required an adjoining owner to pay any compensation to the building owner where the adjoining owner subsequently makes use of work undertaken at the sole cost of the building owner. The court accordingly found in Bull's favour and no compensation was payable to Williams.

The legislature's response to the case of Williams v Bull

The legislature found the judgment in 'Williams v Bull' to be of public interest and that judgment appeared to undermine the legal principle of equity. The legislature accordingly resolved to address the matter by adding a provision within the first of the London Building Acts; (London Building Act 1894) (the 1894 Act) which would for the first time in party wall matters require the adjoining owner to compensate the building owner where the adjoining owner makes subsequent use of work undertaken at the sole cost of the building owner.

The provision was included under section 95 of the 1894 Act which outlined the *"rules as to expenses in respect of party structures";* and set out as follows;

"If at any time the adjoining owner make use of any party structure or external wall (or any part thereof) raised or underpinned as aforesaid or of any party fence wall pulled down and built as a party wall (or any part thereof) beyond the use thereof made by him before the alteration there shall be borne by the adjoining owner from time to time a due proportion of the expenses (having regard to the use that the adjoining owner may make thereof)"

The provision remained unchanged as it was carried over to form section 120(3) of the London Building Act 1930 (the 1930 Act), before subsequently forming section 56(4) of the London Building Act 1939 (the 1939 Act). However, the 1939 Act saw a significant addition to the provision. Section 56(6) of the 1939 Act required that where *'making use of'* expenses were to be defrayed in due proportion by the adjoining owner, regard should be had to the cost of labour and materials prevailing at the time when that use is made.

That requirement within the 1939 Act was accordingly to shape the provision as set out at section 11(11) of the current day 1996 Act which sets out as follows;

"Where use is subsequently made by the adjoining owner of work carried out solely at the expense of the building owner the adjoining owner shall pay a due proportion of the expenses incurred by the building owner in carrying out that work; and for this purpose he shall be taken to have incurred expenses calculated by reference to what the cost of the work would be if it were carried out at the time when that subsequent use is made".

Thus the question begs; given the evolution through the Acts of the *'making use of'* provision and given the clear terms in which the provision is now presented within the 1996 Act, why does the

provision still give rise to such controversy. It is submitted that the reason is because there still remain a number of unanswered questions on the topic. The following issues are increasingly referred to the author in the role of third surveyor;

Where the original work was carried out by a former owner, who is actually entitled to receive the payment, the current owner or the former; Where there is a long leaseholder and a freeholder, who out of them is entitled to receive the payment; How is the payment calculated and what is included; What constitutes *'making use of'*; and what constitutes a 'due proportion';

This article goes on to address the above questions as follows;

Where work was carried out by a former owner, who is entitled to receive the payment

The argument is often put that the work of which subsequent use is made was carried out by a former owner, not the current building owner and therefore either no payment is due at all from the adjoining owner or others have suggested that the payment is due to the former owner at who's expense the work was actually undertaken.

It should be noted that each of the above propositions are quite incorrect. The issue of who is entitled to receive payment in circumstances where there has been a change of ownership after the works were carried out was considered by the court of appeal in 'Mason v Fulham Corporation 1910'.

In that case the building owner who carried out the work later sold the property to a new owner. After the sale the adjoining owner made use of the work previously carried out by the former owner and all at the former owner's expense. The surveyors Awarded that the new owner was entitled to receive the due proportion of expenses from the adjoining owner. The former owner issued proceedings claiming

that the sum should have been paid to him as it was he who carried out the work.

The court did not agree. The court found that that the words *"the building owner at whose expense the same was built"* meant the building owner or his assignee as the case may be, and that where the building owner has after carrying out the work sold his house, the purchaser who is in possession of the house at the time when the adjoining owner makes use of the party wall is the person who is entitled to receive the contribution.

It is accordingly the current owner of the property who is entitled to receive payment of the due contribution.

It is worth mentioning that in any case, an Award under the Act can only Award payments to parties to the Award. Given that a former owner would not be a party to an Award, the latter of the two arguments above would have failed for lack of jurisdiction.

Who is entitled to receive the contribution where there is a leaseholder and a freeholder?

Practitioners will be familiar with the common circumstances in which notice is to be served on both freeholder and leaseholder of the same property. In those circumstances, both freeholder and leaseholder are owners within the meaning of the Act and both are entitled to Awards.

However, if the freeholder undertakes work at their sole expense and then subsequently grants a long lease to a leaseholder, who out of the two is entitled to receive the payment of the due proportion of the cost of the works?

It is submitted that the answer to the above is clear. The purpose of the section 11(11) making use provision is to remunerate the

building owner for sums spent. In the instance set out above, both the leaseholder and the freeholder are building owners. It is submitted that the payment that is due must go to the building owner at who's expense the works were undertaken. In this case that would be the freeholder.

By the same token, if the works were undertaken after occupation of the property by the leaseholder at the leaseholder's expense, it is submitted that the payment of the due proportion would be due to the leaseholder.

It is further submitted that the above is consistent with the ruling in the court of appeal in the case of 'Re Stone And Hastie [1903]' in which the freehold owner of a property undertook works at his sole cost. He then granted a lease of 21 years to Hastie. Stone (the adjoining owner) later made use of the work carried out by the freeholder. An Award was served requiring Stone to make payment of the due proportion for making use of the work to Hastie (the leaseholder).

In setting aside the Award as invalid, the court found that the relevant section of the 1894 Act under which the case was heard, contemplated that payment of the due contribution would be by way of recoupment by the owner who undertook the work and originally bore the whole expense of doing so. The court went on to say that there was no reason that the appellant who did not become the tenant till after the work was done should receive the payment.

How is the payment calculated and what is included?

Having established the requirement for payment and identified the appropriate recipient, it is necessary to consider what sum should be paid and how to arrive at that sum.

This is the single question that in the author's experience tends to gives rise to the majority of the disputes between practitioners on

the matter of *'making use of'*. It is submitted that the reason for this is the lack of legislative and judicial guidance provided on the matter.

The duty of arriving at the sum to be paid by the adjoining owner falls to the practitioners of the Act. It is submitted that an appropriate starting point is to consider the cost of the construction of the whole of the work, part or all of which is to be made use of. Section 11(11) sets out that those costs should be considered at rates that are current at the time that the works are to be made use of.

In assessing the costs of the works practitioners should consider the full extent of the operational costs such as the physical construction of the element, any scaffolding that may have been necessary for the works, any temporary works, etc. However, it should not be forgotten that relevant professional costs and preliminaries costs should also be taken into account.

Having assessed the overall costs of the work it is then necessary to consider the aspect of *'due proportion'* as required by the Act's provision. Practitioners will need to determine the most practicable route of arriving at the due proportion of the expenses to be paid by the adjoining owner. Examples include where an adjoining owner makes use of only a part of a parapet wall previously raised at the sole cost of the building owner. In such circumstances it would be appropriate to measure the area of the parapet wall that is made use of and then to convert that area to a percentage of the whole and to take the resulting percentage of the overall cost of the works as the sum due. However, practitioners would in such circumstance also have to consider those parts of the costs that would not in reality be subject to that percentage reduction. E.G, access arrangements such as scaffolding may have been required in equal proportion whether for erecting the smaller area of the wall that use has been made or as would have been required for erecting the total area of the wall. An equal sum of coping treatment may have been required for the protection of the wall

irrespective of whether it was the smaller area or total area of the wall that was previously erected. A careful consideration of these inelastic items should be undertaken in order to ensures that the final sum is not understated.

An alternative scenario would be where an adjoining owner builds partially on the top face of the building owner's foundation. In such circumstances it is unlikely that a percentage calculation would derive a suitably proportionate sum. Practitioners in those circumstances would be better advised to consider the amount of use the adjoining owner has made of the work as a ratio of the use made of the work by the building owner and to determine the sum due in a sum commensurate with the use ratio.

There is a final aspect of determining the sum to be paid which the author has on occasion had to address as third surveyor on referral and accordingly warrants a mention. The issue concerns the quality of the original works undertaken by the building owner and the extent to which the adjoining owner is required to pay for a particular level of quality when the sum of the due proportion of expenses are determined.

A typical scenario may be where in a terrace of rendered block built properties the building owner raises a parapet wall using expensive reclaimed stock bricks. The cost of carrying out the works is considerably higher than had the works been undertaken in rendered blockwork to match the existing terrace. In such circumstances it is submitted that the practitioner must apply the doctrine of reasonableness. As such it is submitted that in the aforementioned scenario it would be unreasonable for the adjoining owner to be required to pay a premium to accommodate the building owner's aberration which lead to a much higher cost in producing the works. There will however be occasions on which excessive adornments may have been added as a requirement of planning conditions or other constraint. In such circumstances the quality of the work should be considered reasonable and the adjoining owner

should therefore be required to pay a due proportion of the expenses of the full cost of the works at current day rates.

What constitutes 'making use of'

It may be considered that in most circumstances the answer to this question is that it is quite obvious. If the adjoining owner has either enclosed upon a raised party wall or a basement retaining wall the adjoining owner has made use of works carried out at the sole expense of the building owner. So common are the aforementioned examples that many practitioners loosely refer to the contribution required by section 11(11) as *'enclosure costs'*. However, it should be noted that the provision extends further than just matters of enclosure. An example is where a building owner erects an extension on the line of junction on a concentrically loaded foundation which projects partly onto the adjoining owner's side. The adjoining owner subsequently builds their own extension wall on the line of junction against the building owner's extension and the new wall bears on the building owner's projecting foundation. The adjoining owner has those circumstances made subsequent use of works carried out at the sole expense of the building owner. Accordingly, practitioners should consider the adjoining owner's proposed works in detail to establish whether use is to be made of work undertaken by the building owner in any of its forms.

However, what about in circumstances where the adjoining owner builds an independent wall adjacent to the raised party wall or retaining wall previously built by the building owner. The author submits that in such circumstances, the adjoining owner cannot be said to have made use of the work carried out by the building owner. Section 11(11) sets out as follows; *'Where use is subsequently made by the adjoining owner of work carried out solely at the expense of the building owner...'*, It is submitted that the words *'Where use is subsequently made'* denotes the act of making use. If an adjoining owner encloses upon a wall raised by the building owner and

proceeds to make use of that wall as part of their property it is clear that the adjoining owner has engaged in the act of making use of the work carried out by the building owner. However, where an independent wall has been built adjacent to the wall built by the building owner the adjoining owner makes use of his independent wall as part of his property, not the wall raised by the building owner.

It is submitted however that a 'fact & degree' assessment must apply to the above. The author suggests that it is not enough to put in place a mere artifice or a sham purporting to be an independent wall. The author suggests the following tests should apply; is the wall structural in its make-up, is the wall self-supporting without taking any support from the wall raised by the building owner, if the wall raised by the building owner is removed would the independent wall remain in place unaffected. If the answers to all of the foregoing is in the affirmative, it is submitted that the independent wall could reasonably be considered as an independent wall as a matter of fact & degree, with no use having been made of the building owner's work.

It is acknowledged that the above points continue to give rise to debate and it is the author's view that the issue would benefit from some further clarification by the courts.

CONCLUSION

The provisions of the Party Wall etc. Act 1996 are important and far-reaching. Parliament has taken the administration of the Act out of the hands of legal professionals and has instead placed that role in the hands of what Fletcher Moulton LJ in the celebrated appeal court case 'Adams v Marylebone [1907]' described as a 'Practical Tribunal'.

In order to properly administer the Act practitioners are charged with developing a competent understanding of the principles and

questions surrounding provisions such as the section 11(11) *'making use of'* provision within the Act. It is intended that this article should contribute to that further understanding.

11. SECURITY FOR EXPENSES – WHATEVER FOR?

Graham North

The proliferation of basement construction in central London gave rise to ever increasing requests for security for expenses under section 12 of the Act. These requests for security would be made for reasons such as the possibility of works starting and not being finished — leaving the adjoining property temporarily propped or exposed in some way — the possibility of damage arising and on some occasions for any other reason that the adjoining owner's surveyor could think of. The sums requested ranged from a few thousand pounds to one case that I dealt with leading to a request of £3 million.

Nowadays, there hardly seems to be a job with any kind of significant work that does not have security for expenses attached to it.

When the Party Wall Act was being considered for legislation and when the Act was passed in 1997, I gave a number of talks/lectures to fellow Surveyors, Architects, Structural Engineers and frankly anyone else who had nothing better to do in an evening. I would

deliberately avoid mentioning or explaining security for expenses and section 12. The reason being that under the old legislation (the London Building Acts (Amendment) Act 1939) there were very few requests for security and party wall matters had progressed very nicely without it (even though it could be requested under the London Procedure) so I did not want to let this particularly genie out of the bottle sooner than it needed to be.

Also, under the old London procedure if the owners couldn't agree then the dispute was referred to a judge of the County Court, so there was little appetite for owners to escalate the issue to the Courts.

I shouldn't have worried because with the increased number of basement excavations and the joy that is the internet, surveyors soon learnt that security should be requested on just about anything!

As I say, there doesn't seem to be a job now which involves semi-serious work where security is not requested even when the neighbours know each other well. Sometimes large sums are requested, sometimes much smaller sums and because of the potential risk of damage due to the discovery of anticipated movement calculations and a whole ranch of geotechnical studies which used to be academic and are now very significant — security for expenses can't be avoided.

And when you look at section 12 you can see why. It says :

Section 12.(1) An adjoining owner may serve a notice requiring the building owner before he begins any work in the exercise of the rights conferred by this Act to give such security as may be agreed between the owners or in the event of a dispute determined in accordance with section 10.

Section 12 (2) refers to such security required by a building owner when asked to do work by an adjoining owner, but we do not need to trouble ourselves with that here. I am concentrating on section 12(1).

s12.(1) is very wide ranging. The building owner is to give "*such security as may be agreed between the owners or in the event of dispute determined in accordance with section 10"*. In other words, if not agreed, then there has to be an award.

This security has to be provided when he is exercising rights although *Kaye v Lawrence* made it clear that it is not just "exercising rights" after all, digging a big hole on your land isn't exercising a right — you have that right, but it is subject to serving notice under section 6. *Kaye v Lawrence* made it clear that if you are under the Act you are under the Act — not just exercising a right — so there you have it… but… hold on… if you look at the contents page of the Act, sections 11, 12, 13 and 14 come under the heading ***Expenses***. It's set out like this:

EXPENSES

11. Expenses

12. Security for expenses

13. Account for work carried out

14. Settlement of account

If you look at the contents page of the Act for Section 10 it is headed up *Resolution of disputes*. Sections 15 to 21 are headed up *Miscellaneous*. Sections 11 to 14 are headed up *Expenses*. So, shouldn't section 12 be read in the context of Section 11 namely *Expenses*?

Section 11 itself is headed up *Expenses* and goes on to explain what those expenses are (and I have summarised these below). Bear with me, it is a bit boring to read but it is important :

s11(3) — for work in section 1(3)(b) — if a party wall is built — who pays?

s11(4) — where repairs are required and who pays for them under section 2(2)(a).

s11(5) — repairs to a party structure or party fence wall — based upon who makes use of the wall and who has caused the defect.

s11(6) — if a building is laid open, a fair allowance for disturbance and inconvenience to be paid by the building owner to the adjoining owner or occupier.

s11(7) — where a party wall or party fence wall is to be reduced in height under 2(2)(m) the adjoining owner can serve a counter notice requiring the wall to be kept to a greater height.

s11(8) — where a building owner is required to make good damage — namely sections 2(2)(a)(e)(f)(g)(h) and (j) — all other works are covered by compensation.

S11(9) — for works carried out at the request of the adjoining owner.

s11(10) — where the existence of special foundations have increased the costs to an adjoining owner (when they build).

s11(11) — where subsequent use is made by the adjoining owner of work carried out by a building owner.

Most of these clauses use the word *expense* in their wording.

If we then move to section 12(1) it states that an adjoining owner may serve a notice requiring the building owner "to give such security as may be agreed between the owners etc." but does not mention expenses. The word *expense* is mentioned in 12(2) but as I said I am concentrating on an adjoining owner's right to request security from a building owner, not the other way around.

Surely under 12(1) an adjoining owner can only request security for expenses if those expenses relate to anything within section 11? The security must relate to *expenses* and then what *expenses* could an adjoining owner be put to? It can only mean those expenses that are referred to in Section 11.

It would follow that an adjoining owner could request security for potential damage if that damage could be reasonably anticipated — s11(8). Some damage such as the trampling of a garden to demolish and re-build a party wall or party fence wall might be self-evident — other damage less so such as the anticipated movement that may or may not occur as the consequence of a deep excavation. Section 11 provides for making good provisions when carrying out certain works so that seems fair enough but what about for works that may be started and not finished?

Security could also be requested where the existence of special foundations may lead to increased costs for the adjoining owner, but those "expenses" will only be known much later so it can't be reasonable to have a sum held as security indefinitely.

It can also be requested for subsequent use being made by the adjoining owner. Well that's in theory, but the wording of the Act is out of kilter here because it's the adjoining owner who's making subsequent use so he can't ask for security because he's the one who's going to be paying!

On many occasions I have received requests for security for works that may start and not be finished — and indeed I have requested security for adjoining owners for such an eventuality. Fortunately, such an eventuality is rare — although one development that I was involved with where I was acting for an adjoining owner the developer went seriously bust and despite the protestations from the building owner's surveyor when I made a request for Security that "do you not know who the building owners are? — they'll never go bust". I insisted that such security should be provided regardless of who the building

owner is… and it's a good job I did because the building owner went pop… and that building owner was Barings Bank!

Anyway, back to the matter in hand. Security under section 12 should only be requested by an adjoining owner for those matters that arise under section 11. Anything else — unless agreed between the owners — cannot be determined by the appointed surveyors in an Award. They would be acting outside of their jurisdiction/ authority in making an award for security if the amount for the security includes matters outside of section 11.

And even then, only for those things which may actually arise, namely s.11(8) — damage under s.2(2)(a)(e)(f)(g)(h) and (j).

There's no provision in s.11 for security for works under section 6. Now that's put the cat amongst the pigeons! I appreciate that this might not be what adjoining owners or indeed surveyors will want to hear. Until there is some higher legal authority on the matter I will continue as we have but I urge surveyors to proceed with caution when dealing with security, not to request ridiculously large sums which bear no reflection on the extent of the works or the risks involved, and to remember that security for expenses is not to be used as a means by which an adjoining owner may inhibit or even prohibit a building owner's ability to carry out the works.

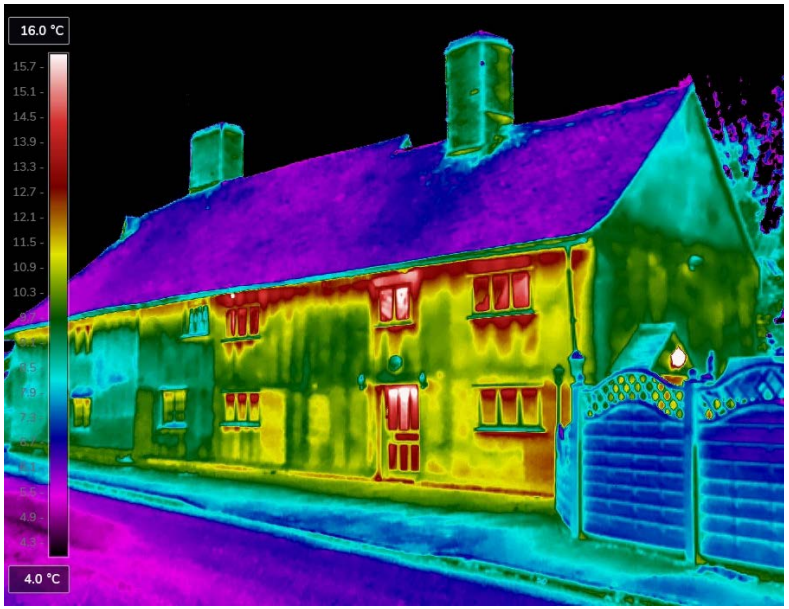


Image credit: Richard Bedford

12. LIMITATION AND THE PARTY WALL ETC. ACT 1996

Cecily Crampin

This chapter is about limitation and the Party Wall etc. Act 1996. There are a number of causes of action which may arise related to breach of the Act. There are thus a number of different scenarios which need to be considered when seeking to answer the question: what is the limitation period for a cause of action under the Act? The scenarios range from the simple, where the Act applies and yet a building owner has done works without serving notice, to the much more complicated question of when any limitation period starts for a claim in relation to damage done by the building owner in carrying out works under an award when determination of the compensation payable is within the jurisdiction of the party wall surveyors and if no award has yet been made. A common theme for each analysis of each scenario is the importance of identifying the relevant cause of action, since the limitation period depends upon the cause of action relied on. This chapter will consider each scenario in turn.

LIMITATION

First, it is worth summarising what causes of action and limitation are. If person A is to make a claim against person B for any remedy, whether an injunction to stop person B carrying out building works, or damages from person B for harm caused to person A or his land during person B's building works, then person A must have a cause of action. The law has developed a number of different causes of action.

The most relevant causes of action to this chapter, are various of the causes of action in tort: for example trespass, when person B enters onto person A's land without A's permission, and without any other justification, such as statutory authority, recognised in law; and nuisance, when person B by actions on land neighbouring to A's land, interferes with A's enjoyment of A's land. Some statutes impose statutory duties whose breach is a further tort. The Party Wall Act 1996 is an example of such a statute. There is an obligation on a building owner intending to do notifiable works to serve notice on adjoining owners and occupiers, and to follow the process set out in the Act, usually obtaining a party wall award under s10, before undertaking works.

The idea of limitation of causes of action is longstanding. If person A does not make a claim for many years after he says B has inflicted a wrong on him, it becomes much harder for a fair trial of the claim, once brought to court. Memories fade, and the facts of the case become more difficult to ascertain; evidence, such as the relevant documents to a case may cease to be available. Thus person B, once a claim is made against him, may wish to be able to defend that claim not only substantively but by saying "this claim is too old now". It is for this reason that there are limitation periods for various causes of action now set out in the Limitation Act 1980. The Act gives defendants, at their election, an available defence to a claim where the claim is made after the limitation period for the cause of action has expired. Thus, s2 of the Limitation Act 1980

imposes a 6 year limitation period for tort, thus for trespass and nuisance for example. Under s9, the limitation period for a claim for a sum recoverable under statute is also 6 years. The 1980 Act gives limited possibilities for extending limitation time periods in certain situations, for example where person A is under a disability, under s28, or in a case of fraud, concealment, or mistake, under s32. Moreover, the limitation period relates to the claim by A for a debt or other liquidated pecuniary claim, then under s29(5), the cause of action is treated as accruing afresh if person B acknowledges the claim or makes part payment.

For the idea of a limitation period to work one must be able to say when the period starts. What s2 says is this: "an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued". Thus the limitation period starts at the date of the accrual of the cause of action. That is the date when all the elements of the cause of action relied on occur. For each cause of action one needs to know what the elements are.

For nuisance to A to occur by B undertaking works on neighbouring land to A's land, not only must B have undertaken those works, but the works must have caused damage to A's enjoyment of his land. On a claim for damages, or an injunction to reinstate works, it is not enough that A fears damage (cracking for example, or damage to a newly exposed wall where there has been inadequate protection against the weather). There must be damage. That is unless A seeks an injunction for fear of that damage; with good evidence that damage is likely if works continue, such an injunction may be available. A claim in trespass, however, requires no damage to A or his land. Thus the cause of action accrues simply on the date of a trespass. Similarly, a statutory duty to serve a notice, for example under the 1996 Act, is likely actionable without damage. Thus the cause of action will accrue when notifiable works are done without. notice having been served.

IF NO PARTY WALL NOTICE HAS BEEN SERVED

We now turn to the scenarios in party wall litigation where limitation may be relevant. The first scenario is when a building owner does party wall notifiable works without serving notice.

Thus, first, consider the situation of a building owner building on a line of junction which has not been built on, or has only been built on to the extent of a boundary wall not being a party fence wall or the external wall of a building. Suppose the building owner served no notice under s1 of the Act, or served notice but the adjoining owner gave no consent. In that case, there are a number of possible causes of action which might apply.

The first, and most obvious cause of action, is in trespass. The act of building on the adjoining owner's side of the boundary line is an act of trespass. What is the limitation period for a claim for the removal of the wall? Trespass is a tort, and the limitation period for an action founded on tort is 6 years from the date on which the cause of action accrued, under s2 of the Limitation Act 1980. That is, if the claim is founded on the act of building, the limitation period will be 6 years from the date the building was carried out.

In addition, since the Act requires service of notice by the building owner, the building owner in building the wall is in breach of statutory duty. That too is a tort, with a limitation period 6 years from the date of construction, under s2 of the 1980 Act.

That isn't the end of the limitation story for this scenario however. The wall will likely continue to sit on the adjoining owner's land far beyond that 6 year period, until taken down by the building or adjoining owner, or their successors in title. Does the adjoining owner have another cause of action not from the act of building of the wall, but from its continued presence, and if so, what is the limitation period for that second cause of action?

The answer to that question may be fact specific. Suppose, for the purposes of explanation of this point, that the building owner had come onto the adjoining owner's land and built the wall wholly on the adjoining owner's side of the boundary line, the act of building would have been a trespass, but the wall would then become part of the adjoining owner's land, since it would be fixed to it and, unlike if a chattel such as say a wheelbarrow or skip were placed on the adjoining owner's land, could not be removed without demolishing the wall. Unless the building owner did further possessory acts in relation to the wall, perhaps repairing it on both sides, it is hard to see what new wrong the building owner would be committing against the adjoining owner, after the original building works. The adjoining owner could simply take the wall down.

If the building owner continued to maintain the wall however, then one might conclude that he was seeking to possess the land on which the wall stood. In that case, the trespass would continue whilst those acts continued, and the limitation period would start afresh on each such act. Moreover, the adjoining owner might be at risk of a successful adverse possession application under the Land Registration Act 2002 s97 schedule 6, if the wall remained so used by the building owner for 10 years, in particular if the building owner could make out the para 5(4) condition for registration with title despite resistance by the true owner. That condition might well apply because the wall would be on adjacent land to that of the building owner, if for at least 10 years to the date of the application the building owner reasonably believed that the land on which the wall stood belonged to him.

How does this relate to a wall built, wrongly, across the boundary? The question will be what use of the wall is made, by the building and adjoining owners, after it has been built, and whether that use could be said to be further acts of trespass by the building owner or not. That may be possible, simply from the impossibility of removing the adjoining owner's side of the wall without damaging the building owner's side. The point is not entirely straightforward however.

What if the building owner builds entirely on his side of the boundary line, without serving notice under s1(5) of the 1996 Act? If he does so without building footings on the adjoining owner's land, and there is no damage to the adjoining owner, then though there is a breach of statutory duty, since the Act requires notice to be served, there is no loss to the building owner, and though an action may be properly constituted, a court would unlikely grant anything more than a nominal remedy. The limitation period is 6 years, under s2, as above.

If footings are built, then that is a trespass, as well as a breach of statutory duty. If there are no footings, and damage is caused by the building of the wall, then that is likely a nuisance (sometimes negligence is also pleaded in such a claim, though it is not obvious that the building owner or his contractor owes a duty of care beyond that under the 1996 Act or that encompassed in the tort of nuisance in carrying out building works to the building owner's land). The statutory duty may be useful in the case of damage since the damage may be by the contractor, not within the instruction of the building owner so as to make him liable. Since s1, once notice is served, imposes a duty to compensate for damage on the building owner himself, it may be the breach of statutory duty in not serving notice which allows the adjoining owner to recover from the building owner. The limitation period is 6 years under s2 of the 1980 Act, for any of these torts.

The next scenario is where the building owner does s2 works without serving notice. Now some of the rights of a building owner under s2, if notice is served and the Act otherwise complied with, are acts which would otherwise be trespass on the adjoining owner's land. Underpinning a party structure under s2(2)(a), where the wall is a party wall built across the boundary will involve building on the adjoining owner's land. Likewise works under the other sections may involve a trespass. In that case, the adjoining owner's claim will be in trespass and breach of statutory duty, and perhaps in nuisance if the works cause damage.

Some of the works envisaged in s2 may however be on the building owner's own land, on his part of a party wall, for example under s2(2)(f) if the cutting into the party structure required were only to the building owner's part of the party structure. In that case, the cause of action will be breach of statutory duty, and perhaps in nuisance if damage is caused.

The position is similar with works under s6 of the 1996 Act. There the works are to the building owner's land. There is unlikely to be any trespass. The works might consist of a nuisance, though that is not as obvious as it might seem, even if damage is caused, since there is no general right of support of one piece of land from another. Thus if a building owner excavates for a basement in what was a garden, and the garden of the adjoining owner falls in, it does not necessarily follow that that is a nuisance. Here, the breach of statutory duty claim is more useful. The building owner should have served notice. Had he served it, an award would have been made (if the works were not agreed), and compensation would be payable under the 1996 Act.

ENFORCING AN AWARD

We now move to a scenario in which the building owner served the required party wall notices, and an award was made, but some requirement of that award has not been complied with by him.

Once the Party Wall Act 1996 has been followed, the common law causes of action in trespass, nuisance, and negligence if it applies, no longer arise, at least in relation to the party wall notified works. The adjoining owner's claim will be in breach of statutory duty, where the building owner has not complied with the terms of the award.

That is save where the works carried out, even if in compliance with an award, interfere with an easement of light, or in or relating to a party wall. In that case, since s9 prevents interference with

such easements being authorised, a common law right of action in nuisance just may continue. The effect of s9 on the existence of such a right is unclear, especially in relation to for example damage caused by the removal of support from a party wall to another building. That may be a nuisance as an interference with an easement of support, if such an easement can be established. Since compensation would be payable under s7 of the 1996 Act, one might think that damages for that nuisance would not also be available. Yet compensation under s7 is not necessarily the same legally as damages for interference with an easement. One might thus argue that s9 prevents the right to those common law damages being turned into s7 compensation to be determined by surveyors rather than a court.

What is the limitation period for an action to enforce an award? S7 of the 1980 Act is a time limit "for actions to enforce certain awards", though the wording is "where the submission is not by an instrument under seal". Does this time limit apply? That seems unlikely. The parties' rights under a party wall award arise because that award is legitimated by statute. It has been said that the trend in limitation is to categorise actions based on statute as falling within the specific limitation provisions applicable to statutory claims. See *Bhattacharya v Omni Capital Partners Ltd* [2020] EWHC 1644 (Ch) for example. S7 appears to relate to arbitration awards.

Where the award makes provision for the payment of sums by one of the building owner or the adjoining owner, for example compensation or costs, then the limitation period likely will be 6 years under s9 of the 1980 Act, since the sums are recoverable by virtue of the 1996 Act. That is more obvious in relation to compensation payable under s7(2) of the 1996 Act for example. The statute there directly requires the building owner to pay compensation, even though the level of that compensation is to be determined by the party wall surveyors under s10.

An adjoining or building owner's right to the costs involved in making a party wall award is indirect. The statute does not directly

require payment. It makes the incidence of costs something which the surveyors can determine by award, under s10(12)(c). S10(16) then makes the award conclusive, save if appealed under s10(17). The requirement on the parties to comply with any award made (if there is a dispute or deemed dispute) is implicit from the construction of s2, s3, and s5, with s10, and similarly s6 and s10. Thus one might well say that the requirement to pay costs in the award makes those sums recoverable by statute. Alternatively, and perhaps more clearly, the 1996 Act makes compliance with it, and hence with any award resolving a dispute, a statutory duty. Thus the payment of costs under an award will have a limitation period of 6 years from the date of the award under s2 of the 1980 Act since non-payment would be a breach of statutory duty, even if s9 does not apply.

The limitation period for any payment is likely extended under s29(5)(a) by a written and signed acknowledgment of the claim or part payment of the debt. Thus an acknowledgment that the award is valid and a debt is owed under it likely starts the limitation period running again. A respondent to an appeal might do that during an appeal process, for example, or a party might rely on the award in other litigation.

Compliance with any non-monetary provision in an award, as to the timing of works or the manner in which they are to be carried out, will likewise be a statutory duty, so that the limitation period will be 6 years from the award under s2 of the 1980 Act. It is likely, similarly, that the following are statutory duties: the direct statutory obligation on a building owner not to exercise any right so as to cause unnecessary inconvenience, under s7(1) (though in *Bridgland v Earlsmead* [2015] EWHC B8 (TCC), a no notice case, HHJ David Grant concluded that s7(1) does not impose a free-standing duty, but only a qualification of the right to do party wall works, once notice is served there is a well arguable statutory duty to do works in accordance with s7(1)), the requirement to put up proper hoarding, shoring, or fans, for example under s7(3), the requirement to execute works in accordance with plans specified in the award, are all statutory

duties. On the adjoining owner's side, the adjoining owner likely has an obligation to permit entry on the terms set out in s8. A failure to permit entry will be a breach of statutory duty.

Of course, if what is sought is an injunction to require works to be carried out in a particular way, or for access, an injunction sought as long after an award as 6 years would have few prospects of success, save for very long and complicated works. The grant of an injunction by the court is an equitable remedy, and delay in seeking that remedy will often lead to the court refusing it.

WHEN RELIEF IS CONTINGENT ON AN AWARD BEING MADE

The final scenario of interest is this. Suppose that a party wall notice is served, an award made, and works done. Suppose during those works damage is done to the adjoining owner's premises, but that no award is made dealing with the issue of what if any compensation is payable. Is there a limitation period after which the adjoining owner could not recover any compensation, even if it were awarded under a new award made after the end of the limitation period, or does the limitation period run from the date of an award of compensation?

This was an issue in *K Group Holdings Inc v Saidco International SA* (unreported, 19 July 2021, County Court at Central London, HHJ Parfitt). There an award permitting works had been made in 2009. The alleged damage to Saidco's property had occurred by 2013. A purported award was made in November 2020 giving compensation of over €400,000. One of the successful grounds of appeal of this award was that it was invalidly made or should not have been made because a limitation period of 6 years from the date of damage applied to Saidco's right to compensation under s7 of the 1996 Act, even though the level of compensation had not been determined by Award. Either no award can be made after the end of the limitation

period, or no surveyor should make such an award because there is no purpose in making an award for the payment of compensation which cannot be enforced because of limitation.

There is case law, in other contexts, about limitation where a sum recoverable by statute must be determined by a specific body. In *Hillingdon London Borough Council v ARC Ltd* [1998] 3 WLR 754, the limitation period of 6 years under s9 of the 1980 Act for recovery of compensation for compulsory purchase under the then in force s11 of the Compulsory Purchase Act 1965 ran from the date the local authority entered onto the compulsorily acquired land, even though the amount of compensation had to be determined by the then Lands Tribunal. Thus the Court of Appeal decided that an application to determine the level of compensation made more than 6 years after the local authority's entry should be dismissed. The decision as to the level of compensation was administrative, allowing enforcement. No new right would come into existence by the decision as to the level of compensation payable. Thus the cause of action arose at the date of the local authority's entry, not the later date of a decision about the quantum of compensation.

S9, similarly to the other provisions of the 1980 Act, applies its time limit to "an action to recover any sum recoverable by virtue of any enactment"; the Limitation Act 1980 applies to actions. S38 of the 1980 Act gives the following definition of "action" as "includ[ing] any proceeding in a court of law, including an ecclesiastical court…" Cases referred to in *Hillingdon v ARC* emphasise the width of the Limitation Act 1980 and its predecessor statutes.

The decision in *K Group* thus applies this reasoning. As emphasised by HHJ Parfitt, this conclusion makes sense; it echoes the common law position on a claim in nuisance or negligence for example, arising out of the same works. It seems odd if the 1996 Act allows an adjoining owner to stand by indefinitely and not pursue his compensation claim once damage has occurred, putting the onus on the building owner to call for an award to be made for

compensation he likely does not want to pay, or risk the claim for compensation becoming stale and hard to determine. That would put the adjoining owner into a better position than he would have had under common law if works had been done without a notice being served.

13. KNOWING YOUR LIMITATIONS

Howard Smith

Legal systems need to be able to dispose of stale claims. In England and Wales, the rules are contained in the Limitation Act 1980 or, in relation to equitable relief, by analogy with the provisions of the Limitation Act 1980 (see s.36(1)) or by applying the doctrine of laches. None of these, however, sits comfortably with the party wall legislation.

In *K Group Holdings Inc v Saidco International SA* (19 July 2021, CLCC), HHJ Parfitt held that s.9 of the Limitation Act 1980 applies to claims under s.7(2) of the Party Walls etc Act 1996 (the 1996 Act), and so an award of compensation under the 1996 Act should not have been made more than 6 years after the damage has been suffered. HHJ Parfitt heard argument from one side only and he gave his reasoning and conclusions on limitation in a single paragraph of the judgment (paragraph 33). The analysis is concise and does not set out each step of the reasoning — which is unsurprising as limitation was only one of various grounds of appeal against an award which had numerous failings and it was not necessary to go into great detail. There are undoubtedly strong practical reasons in favour of HHJ Parfitt's conclusion, particularly the need to ensure that stale claims

can be disposed of. However, there are also powerful arguments to the contrary and it cannot be assumed that a court, with the benefit of submissions on both sides, would follow the same reasoning or reach the same conclusion.

Section 9 of the Limitation Act 1980 provides as follows:

> *9. (1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.*

The 1996 Act gives various rights of compensation. Clearly, sums recoverable under, say, s.7(2), are sums recoverable by virtue of an enactment. Therefore section 9 of the Limitation Act 1980 would prevent an action being brought more than 6 years after the date on which the cause of action accrued. But s.9 only bars the bringing of an action to recover compensation, not the underlying right, and so the issue arises of what constitutes an action and the bringing of an action. This question was not addressed in *Saidco*.

By s.38 (1) Limitation Act 1980,

> *'action' includes any proceeding in a court of law, including an ecclesiastical court.*

The reference to "includes" suggests that an "action" may not be restricted to a proceeding in a court of law, but it is difficult to identify what else might be intended[1]. A determination by a surveyor or surveyors under s.10 of the 1996 Act does not appear to be a proceeding in a court of law. Nonetheless, it seems that the Judge must have concluded either that a determination by surveyors

1 It is not apparent from the authorities that an action extends beyond such proceedings, other than to arbitrations by express provision in the Arbitration Act 1996 — see below.

under s.10 amounts to an action, and/or that a subsequent attempt to enforce an award would amount to an action[2]. He referred to *Hillingdon London Borough Council v ARC* [1999] 1 Ch 139, where the issue related to the recoverability of compensation following a compulsory purchase order. It was held that the right to compensation arose when the local authority entered property the subject of the compulsory purchase order, notwithstanding that the compensation was payable only once it had been assessed by the Lands Tribunal. As a result, an action for compensation might be time-barred before the Lands Tribunal had assessed the amount of compensation. It is a short step from that to the Judge's conclusion in *Saidco* that any cause of action under s.7(2) of the 1996 Act accrued when damage was suffered notwithstanding that the loss was only quantified by the award, and so the claim was time-barred before the award was made.

However, given that s.9 Limitation Act 1980 bars the bringing of actions, it is necessary to consider what constitutes the bringing of an action barred by s.9 and, in particular, whether a determination under s.10 of the 1996 Act can be said to be a proceeding in a court of law. In *Hillingdon*, the Court of Appeal held that the Lands Tribunal amounted to a court of law for the purposes of s.38 Limitation Act 1980. In doing so, the court referred to the decision of the House of Lords in *Attorney General v British Broadcasting Corporation* [1981] A.C. 303, where Lord Scarman distinguished between judicial bodies and bodies with an administrative function:

> "I would identify a court in (or "of ") law, ie a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and

2 Although in this latter case, it is not clear why he regarded the award as liable to be set aside — it would be enforcement of the award that would be barred by s.9.

> executive (ie administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court in law. I would add that the judicial system is not limited to the courts of the civil power. Courts-martial and consistory courts (the latter since 1540) are as truly entrusted with the exercise of the judicial power of the state as are civil courts.".

Having concluded that the Lands Tribunal was a court of law for the purposes of s.38 Limitation Act 1980, the Court of Appeal in *Hillingdon* held that an application to the Lands Tribunal was barred by the Act[3].

It is difficult to see that the surveyors exercising their jurisdiction under s.10 of the 1996 Act can be a "court" in this sense. Whilst there is no unmistakable hallmark of a "court" and the issue is one of impression (*per* Lord Edmond-Davies in *AG v BBC* p.351), it would seem surprising if surveyors making a determination under s.10 were to amount to a court. For example, they are appointed by the parties (or, in the case of a third surveyor, selected by the appointed surveyors); anyone, regardless of qualifications or experience, may be appointed; they are not bound by rules of evidence; they can rely on their own experience as well as evidence presented;

3 Although even if were not, subsequent court proceedings for the sum determined by the Lands Tribunal would be an action barred by the Limitation Act.

they need not give reasons (*Zissis v Lukomski* [2016] 1WLR 2778); they are not bound by rules of procedure but can substantially decide for themselves how they deal with a dispute; they probably do not have immunity from suit; and much of their role under s.10 is simply to determine the time and manner of carrying out works. To adopt the terminology of *AG v BBC*, the role of surveyors under s.10, even in determining compensation, seems to be the administrative role of carrying into effect code created by the 1996 Act for the administration of party walls, rather than forming part of the judicial system of England & Wales. It is true that surveyors acting under s.10 have a quasi-judicial role and are required to act judicially, but it does not follow that they are a court: *Royal Aquarium and Summer and Winter Garden Society Ltd v. D Parkinson* [1892] 1 QB 431. It is also true that surveyors making a determination under s.10 are a "lower court" for the purposes of a statutory appeal (*Zissis v Lukomski* above) but a right of appeal to a court does not mean that the body under appeal is a court (*Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* [1931] AC 275), and CPR 52.1 defines "lower court" as encompassing more than courts of law and includes "the court, tribunal or other person or body from whose decision an appeal is brought…".

An analogy can be drawn with arbitrations. Arbitrators, although exercising a quasi-judicial function, are not a court and therefore ss 13 & 14 of the Arbitration Act 1996 makes express provision that the Limitation Act 1980 is to apply to arbitral proceedings as it applies to legal proceedings. There is no such provision in the 1996 Act.

If *Saidco* is correct and s.9 of the Limitation Act 1980 does apply to awards of compensation under the 1996 Act, there are difficult questions of when time will cease to run. A claimant in legal proceedings knows that if he or she issues a claim within the limitation period, the claim will not be barred by limitation. This is because the Limitation Act 1980 bars the bringing of actions, and so a claim brought within the limitation period will be in time even though there may be a delay in the giving of judgment and

enforcement. As regards party walls, however, it is unclear what in the award process under s.10 of the 1996 Act would amount to bringing a claim for the purpose of s.9 or, to put it another way, what would stop time running for the purpose of a claim to compensation under 1996 Act. Does a reference to surveyors amount to bringing a claim? That seems unlikely in view of the fact that the parties' surveyors may make an award under s.10 of the 1996 Act whenever the right to compensation is in dispute. The owner entitled to compensation may not have initiated any reference to the surveyors: the surveyors may have decided to determine the dispute, or the paying party may have requested a determination, or a surveyor may have requested the third surveyor to make a determination. It would be odd if a party entitled to compensation could be treated as bringing an action when he or she may have taken no steps seek a determination.

Nor does it seem that an appeal is likely to amount to the bringing of an action to enforce a claim to compensation. An appeal might be brought by the paying party and is in any event simply a challenge to an award.

It could be said that an action brought to enforce an award amounts to the bringing of a claim within s.9 of the Limitation Act and would be time-barred if issued more than 6 years after the damage was suffered. But that raises further difficulties. First, if the reference to "award" in s.7 of the Limitation Act 1980 includes awards under s.10 of the 1996 Act[4], s.7 provides for a 6-year limitation period from the date of the award (ie the date on which the cause of action to enforce the award accrued). The action is to enforce the award rather than a claim under s.9 of the Limitation Act 1980. Secondly, it would mean that a claim could become time-barred by reason of the time taken

4 For the purpose of the now-repealed s.34 Limitation Act 1980, "award" meant an award within the meaning of Part 1 of the Arbitration Act 1950, but that definition was limited to s.34.

by surveyors to produce an award: the party seeking compensation would need to have an award in his or her favour and apply to court to enforce the award within 6 years of the damage. Thirdly, it would mean that a claim could become time-barred by the time taken to appeal an award.

There is a further difficulty if a 6-year limitation period runs from the date of damage because damage may not become apparent until long after the event. The nature of work subject the Act often means that work will take place from the building owner's side and may be covered up and so will not be discoverable until a later date. For example, overspill in basement construction may not be discovered for many years, but the damage may occur when the overspill takes place. Claims could become time-barred before the party entitled to compensation is aware of them — although in those cases s.32(1) Limitation Act 1980 may extend the period in cases of deliberate concealment.

Of course, if s.9 of the Limitation Act does not operate as a bar to the determination of compensation under s.10, building owners would be at risk of stale claims made long after the works in question. That could operate very unfairly. Laches would not appear to be an answer because the doctrine of laches relates to the pursuit of equitable relief (*FMX Food Merchants Import Export Co Ltd v Revenue and Customs Commissioners* [2020] 1WLR 757 para 39). Therefore, as suggested at the start of this article, there are sound policy reasons in favour of the conclusion reached in *Saidco*. But it is not easy to reach that conclusion on a natural reading of the Limitation Act 1980 and the 1996 Act. The brevity of the analysis of limitation in *Saidco*, where limitation was simply one ground among many others, means that the issue cannot be said to be settled yet.

Image credit: Benjamin Mackie

14. SUCCESSORS IN TITLE & THE PARTY WALL ETC. ACT 1996

Matthew Hearsum

The question of what rights or obligations under the Party Wall etc Act 1996 ("1996 Act") are transferred on the sale of land is a difficult question for there is no clear answer; at least until some brave soul undertakes the difficult and expensive pilgrimage to the Court of Appeal.

What follows is my view of what is likely (but not certain) to be encountered on that journey.

1. Successors in Title under the 1996 Act

1.1 Most surveyors will be aware that the 1996 Act already deals with the sale of land to a limited extent. The definition of "owner" in section 20 is not limited to the current owners of a property, but also expressly includes later purchasers:

"owner " includes

...

(c) a purchaser of an interest in land under a contract for purchase or under an agreement for a lease, otherwise than under an agreement for a tenancy from year to year or for a lesser term"

1.2. There is no definition of "land" in the 1996 Act, and so one must look to the Interpretation Act 1978, which explains that use of the word "land" in a statute (unless the context otherwise requires) includes:

"...building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land"

2. What is an "Interest in Land"?

2.1. Prior to 1926 there were many different "estates in land"[1]. However, since the *Law of Property Act 1925* there have been only two estates in land; The "fee simple absolute in possession" and the "term of years absolute"; colloquially known "freehold" and "leasehold" respectively.

2.2. The concept of an "interest in land" is much broader. It includes not just the freehold and leasehold estates in land, but other rights in or over property as well, such as a mortgage or other charge over land; easements such as rights of way or rights of subj; the grant of an option to purchase or a right of preemption

1 You may have heard of the "Fee Tail" that was the antagonist in the first season of Downton Abbey, or the "Superior Copyhold" that was an answer to a quiz question at the lawyers' dinner in Bridget Jones' Diary.

over the land[2]; as well as more unusual rights such as such as an agreement to grant shooting rights[3] and the creation by debenture of a floating charge over land[4].

3. What is a Valid Contract?

3.1. In England and Wales, a contract or agreement for the transfer or creation of an interest land — which include the freehold and leasehold estates in land — must comply with the *Law of Property (Miscellaneous Provisions) Act 1989* which requires three conditions to be met:

3.1.1. The contract be in writing;

3.1.2. It must be signed by or on behalf of each party to the contract; and

3.1.3. It must incorporate all the terms expressly agreed between the parties, either in the document itself, or by reference to another document (for example, the Law Society's Standard Conditions of Sale)

3.2. An oral agreement for the sale or transfer of land, or a sale agreed in principle but "subject to contract", will not be enough to bring a prospective purchaser within the definition of "owner".

4. Building Owners

4.1 Section 20 defines "building owner" as *"...an owner of land who is desirous of exercising rights under this Act"*.

2 *Birmingham Canal Co v Cartwright (1879) 11 ChD 421*

3 *Webber v Lee (1882) 9 QBD 315*

4 *Driver v Broad [1893] 1 QB 744*

4.2 A building owner must therefore possess two qualifications. First, they must be an "owner of land". This includes not just the owners of the freehold and leasehold estates in land, but also owners of other interests in land[5], as well as purchasers under a contract of those estates or interests in land. Second, they must possess a desire to exercise rights under the 1996 Act.

4.3 It is therefore permissible, for example, for a purchaser who has exchanged contracts to serve a notice in respect of works they intend to undertake once the sale completes.

5. Adjoining Owners

5.1. Section 20 defines an "adjoining owner" as *"...any owner of land, buildings, storeys or rooms adjoining those of the building owner and for the purposes only of section 6 within the distances specified in that section".* Again, this includes not just the current owners of the freehold and leasehold estates in land, but also owners of other interests in land[6], as well as purchasers under a contract of those estates or interests in land.

5.2. In most cases rights that already burden land — for example, a right of way, or any kind of charge — should be recorded by HM Land Registry in the charges register of the title.

5.3. Although there is no express requirement to register a contract for the creation or transfer of an interest in land, in almost all cases solicitors acting for a buyer of land will usually apply for a "Office Search" against the land immediately before they exchange contracts. The office search provides a "priority period", usually 28 days, during which the buyer's application will

5 See Paragraph 1.2 above

6 See Paragraph 1.2 above

have priority over any other transactions that may happen after it. It is intended to prevent people selling the same land twice, as the later buyer would have notice of the earlier buyer when they looked the property up at HM Land Registry, but will also be useful to party wall surveyors to identify land that may be subject to a purchase contract.

5.4. In any case, surveyors appointed under the 1996 Act would be very well advised to obtain the register of title for both the building owner's land and any adjoining land, and to review them carefully, with the assistance of a lawyer if necessary.

6. Are Notices and/or Awards Binding on Successors in Title?

6.1. The simplest solution would be for the current building owner and adjoining owner, and the purchaser, to enter into a deed of assignment in which the rights and liabilities arising out of a notice or an award are expressly transferred to the purchaser.

6.2. Where such agreement is not possible, the 1996 Act contains no express provision as to whether a notice or an award is binding on successors in title. We must, therefore, look to the position under general property law, which focusses on whether rights and liabilities are capable of "assignment" (i.e. being transferred) to a subsequent owner.

6.3. The first issue to consider is whether the rights or liabilities in issue are "real" or "personal". Real rights and liabilities run with the land automatically and are binding on all subsequent owners without express assignment; for example, the right to enforce, and the obligation to comply with, a restrictive covenant. Personal rights and liabilities do not run with the land automatically, although some rights — including rights under a statute — are capable of being assigned expressly under *section 136 of the Law of Property Act 1925.*

6.4. It is, in my view, unlikely that a notice or an award gives rise to rights and liabilities that are real. It is more likely that they are personal.

6.5. The right to undertake works that arise both from a notice and from an award are, in my view, rights that are capable of assignment. This means that a building owner could assign the rights arising out of a notice or an award to a later owner. Indeed, it could be strongly argued that such an assignment is deemed to be included in a transfer of land by section 62 of the *Law of Property Act 1925*[7], which provides that:

"A [transfer] of land shall be deemed to include… with the land all… liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof…"

6.6. This is subject to the "benefit and burden principle", which provides that a purchaser may not take the benefit of a right granted without accepting the corresponding burden which goes with that right. The principle was most recently summarised by the Court of Appeal in *Davies v Jones*[8], and will apply where:

(1) The benefit and burden must be conferred in the same transaction;

(2) The benefit must be conditional upon (and relevant to) the burden; and

(3) The successor in title must have been afforded the opportunity to renounce the benefit (and in doing so be released from the burden).

7 As was the case in *Mason v Fulham Corporation* [1910] 1 KB 631, albeit under earlier legislation

8 [2009] EWCA Civ 1164

6.7. A building owner may therefore take the benefit of a notice or an award under the 1996 Act, but only if they accept the corresponding burden; for example, the obligation to compensate for losses that are caused by the works that they undertake. Alternatively, they may choose to disclaim the notice or award, preferring to start proceedings under the 1996 Act afresh.

A building owner could not be liable for works undertaken by their predecessor and over which they had no control[9]. Such a successor could not be said to be "desirous of exercising rights" because those rights had already been exercised, and so are no rights capable of assignment. An adjoining owner would, however, still have a claim against the original building owner that exercised those rights.

6.8. The position with an adjoining owner is more difficult to resolve. There are compelling arguments both ways. It might be considered unjust that an adjoining owner is burdened by a notice and/or award into which they or a surveyor appointed by them had no input. It might also be considered unjust that a building owner is forced to incur the delay and financial cost of reserving notices, and all that follows, because of a change in ownership. This is particularly where this might be abused by a difficult adjoining owner intent on frustrating the works.

6.9. The most likely solution is that a notice or award will only be binding on the adjoining owner if they have had notice of it. An adjoining owner who is aware of the notice or award before the exchange of contracts, and decides to proceed in that knowledge,

9 Although it is possible a successor in title may become liable for a private nuisance created by a predecessor if they have continued or adopted the nuisance.

is likely to take on the rights and obligations (benefits and burdens) of their predecessor. After all, they always had the option of not exchanging contracts. After exchange of contracts the purchaser is themselves an adjoining owner within the meaning of section 20 of the 1996 Act and entitled to notice in any event.

6.10. If the adjoining owner exchanges contracts in ignorance of the notice and/or award then it is likely that a Court would consider it unjust to burden the adjoining owner with obligations they knew nothing about, even if they have corresponding rights. Such purchasers will in practice be very rare; the standard properties enquiries made by the buyer's solicitors[10] include specific questions as to whether any notices under the 1996 Act have been served, and whether an award has been made.

10 Question 1.6 in the Property Information Form TA6 for residential properties, question 2 in the Commercial Properties Standard Enquiries 1 form for commercial properties.

15. WHAT MAKES A GOOD THIRD SURVEYOR?

Nicholas Isaac QC

I spend a good deal of my time criticising third surveyor's awards, sometimes merely in writing, sometimes in court. If the criticism entails an appeal against a particular third surveyor's award, the third surveyor will get to read those criticisms[1]. In recent times, and despite being a barrister, I have myself been selected as a third surveyor, and have made third surveyor awards. After all, it is a well known quirk of the Act that one can be a surveyor without actually being a surveyor[2].

So, how can a third surveyor avoid such criticisms, or having their awards appealed? Or in other words, what makes a good third surveyor?

This article examines the issue both from a legal perspective, and from a more practical or philosophical one.

1 It is a requirement of issuing an appeal against an award that a copy of the Appellant's notice and grounds of appeal are served on the surveyor(s) who made the award.

2 See the definition of "surveyor" in section 20 of the Act.

Perhaps the most important legal quality of a third surveyor is their independence, both from the parties and from the party-appointed surveyors. The test in law is that in the well-known case of *Porter v Magill* [2001] UKHL 67, namely "whether a fair-and informed observer, having considered the facts, would conclude that there was a real possibility of bias".

Contrary to what many believe — and I include both appointing owners and surveyors in "people" — knowing, having previously worked at the same firm as, or even being friends with the third surveyor in question is not sufficient to disqualify the third surveyor from acting. However, being in the same firm as, or having some other financial connection with the third surveyor which means that the person in question may benefit financially from the third surveyor's selection or award, no matter how indirectly, is likely to preclude that third surveyor from acting. Ultimately it is for the third surveyor to consider the circumstances and decide whether they can properly accept the selection.

However, independence is not limited merely to the selection of the third surveyor, it is important to maintain that independence when conducting oneself as a third surveyor. What does that mean in practice?

I have known many surveyors over the years telephone the third surveyor, or buttonhole the third surveyor at an event, to "brief them on the background" or "seek their preliminary view informally". Indeed, I recall third surveyors suggesting that this was a common and helpful practice, since it avoided unnecessary referrals to the third surveyor — in other words, if the third surveyor expressed his view informally, the party-appointed surveyors could follow that view in a section 10(10) award without the need for a formal referral under section 10(11).

Surveyors, particularly third surveyors need to be very careful indeed in relation to any such communications. A conversation

between only one of the party-appointed surveyors and the third surveyor about the matter in which the third surveyor is selected would undoubtedly be inappropriate, regardless of the reason for or content of the conversation. Indeed, such a conversation would potentially give an owner unhappy with the third surveyor's subsequent award a good ground of appeal against that award.

Once selected, a third surveyor should be scrupulous about ensuring that communication between themself and the party-appointed surveyors and/or the owners remains both fair and transparent. Often the easiest way of ensuring this is to communicate primarily via email. Phone calls, where necessary should ideally involve both parties' surveyors. If it is necessary to speak separately to one side only in the dispute, the third surveyor should take a written attendance note of the content of that conversation, and send it to both surveyors and/or parties as soon as possible after the conversation has finished.

There is no set procedure a third surveyor must follow in resolving a section 10(11) reference. However, whatever procedure they adopt, this must give both parties a fair opportunity to make their case.

If a third surveyor follows the traditional approach — an invitation to the party-appointed surveyors to make submissions and counter-submissions on the subject matter of the reference — it is important to consider whether this has given the parties themselves any or any adequate opportunity to address the issue referred. It is certainly dangerous for the third surveyor to simply assume that the party-appointed surveyor for each party has authority to make submissions on their behalf. Whilst it is possible that an appointed surveyor's letter of appointment may include such authority, this is quite rare. Thus, the third surveyor will generally be wise to either obtain confirmation from the relevant owner that their appointed surveyor is authorised to make submissions on their behalf on the referred matter, or to give the owners themselves a reasonable opportunity to make their own submissions. Such submissions,

when made, may well be significantly different from those made by the party-appointed surveyor.

In every third surveyor referral it is important for the third surveyor to have regard to the value and complexity of the matter referred when deciding what procedure to adopt for its resolution.

In a relatively complicated and/or high-value matter, the "standard" procedure will no doubt be justified. Such procedure normally involves the referring party making submissions supported by evidence, the other party responding with their own submissions and evidence, and a final right of reply being given to the referring party.

In a particularly complex or high-value matter, this standard procedure might be added to or enhanced, for example by the third surveyor inviting the parties and/or their surveyors to attend a meeting at which the third surveyor will listen to oral submissions on behalf of the owners, or at which the owners and/or surveyors may be questioned about their written submissions.

In a simple or lower value matter, however, the third surveyor should consider providing for a more curtailed procedure, perhaps with the parties being restricted to submissions and counter-submissions of no more than 250 words, with no more than 10 pages of supporting evidence (or something similar).

The important thing to remember is that the procedure in each referral should be appropriate and proportionate to the value and complexity of the matter which has been referred to the third surveyor.

As for the procedure, so for the award. Other than that, as with all other awards under the Act, an award needs to be in writing, there is no particular requirement of an award. However, whilst the following are not legal requirements of a third surveyor's award, it is suggested that they do represent good practice:

(1) The award should set out the extent of the dispute referred to the third surveyor — whilst sometimes a party or their surveyor refers a matter to the third surveyor in a single letter or email, it is equally common for the matter originally referred to be varied or expanded, whether after discussion between the parties, or in subsequent correspondence. Indeed, where there is any lack of clarity about the extent of the matter referred to the third surveyor, it can be a good idea to seek confirmation as to the extent of the referral from both parties and/or their surveyors before starting to write an award at all;

(2) The award should, where possible, differentiate between findings of fact made by the third surveyor and which are necessary to support the award made, from the matters awarded themselves. This is easier to illustrate by example than to explain: "I find that the adjoining owner's kitchen floor is 15mm out of level and that this was caused by the building owner's notifiable works. I consequently award that the building owner shall forthwith pay the adjoining owner £5,000 by way of compensation in respect of that damage, such sum representing what I find to be the reasonable cost of repairing the same."

(3) The award should give reasons for the decisions contained in it. The reasons given do not need to be lengthy, but should suffice to explain to the reader why the third surveyor has made the decision they have, whether this is by reason of preferring one party's evidence over another's, or by reason of a legal determination. Hence, and by way of example following on from the previous paragraph: "In reaching this decision, I rejected the building owner's evidence suggesting that the uneven kitchen floor had been caused by seasonal movement, and preferred the adjoining owner's evidence that the floor had become uneven within a month or two of the mass excavation for the building owner's new basement."

Turning to the thorny issue of fees, a good third surveyor should ensure that their fees for the making of the award are themselves reasonable and proportionate to the dispute they have been asked

to resolve. This may sometimes mean that the third surveyor cannot charge what they would consider to be their normal hourly rate for making a particular award. However, I would suggest that this modest sacrifice is an important factor in maintaining public trust in the party wall dispute resolution process.

Whilst section 10(15) of the Act allows the third surveyor to be paid his costs of making the award before serving it on the parties, it is sometimes the case that neither party (and neither party-appointed surveyor) is prepared to pay the third surveyor's fees. My personal view — not necessarily shared by all or many third surveyors — is that one should nonetheless serve the award in such circumstances, and thereafter rely, if necessary, upon the ability to enforce payments due under an award in the courts.

Thus far I have dealt with legal and practical requirements for a third surveyor. Are there other qualities which they should have?

It is widely suggested that a person should be a very experienced party wall surveyor before they can really be considered or selected as a third surveyor. Whilst it is difficult to argue against the proposition that, all things being equal, a third surveyor with years of experience is likely to produce a better award, it is worth remembering that there are other skills which are potentially even more important for a third surveyor.

First, and given that the role of third surveyor is — more so than a party-appointed surveyor in a section 10(10) award — quasi-judicial and requires the third surveyor to make a decision in favour of one party, and against another party, a good third surveyor needs to have good analytical skills, combined with an ability to express themselves well and clearly in writing.

Secondly, and since circumstances which lead to matters being referred to the third surveyor often arise from fractious communications between parties or their appointed surveyors, a

good third surveyor should ideally have excellent interpersonal and communication skills. Such skills, within which I would also include active listening skills, can serve to lower the temperature of a dispute between parties or their surveyors, and may also allow disputes to be narrowed rather than unnecessarily widened.

Finally, I would suggest that a good third surveyor needs to be aware of their own limits, whether in terms of knowledge or experience. It is both sensible and perfectly acceptable for a third surveyor to seek such external advice as may be necessary for them to make their award. Depending on the particular case, such advice may be sought from an engineer, a contractor, or even a specialist lawyer. Since such advice inevitably comes at a cost, however, it is also important for the good third surveyor to seek such advice only when it is reasonable and proportionate to do so.

Image credit: Ian Woodley

16. THE IMPARTIALITY MYTH

Benjamin Mackie

There is a general misconception that party wall surveyors are required to act impartially, at all times. This position is untenable, and the sooner this is realised, the better it will be for the industry.

To act impartially is to treat parties in dispute equally and fairly. On the face of it, this is a noble ambition for surveyors administering the Act. Party wall surveyors like to dramatically and heroically state 'I act for the wall!' They seem prepared to die for this wall, in the name of a greater good. Such honourable endeavours ensure that party wall surveyors are held in high esteem by the grateful public and applauded in the streets.

This article looks at the damage done to confidence in the Party Wall Act by the misguided belief that party wall surveyors are impartial saints.

A dispute can be resolved by surveyors, either where one surveyor is appointed as an 'agreed surveyor' or where there are two party-appointed surveyors who form a tribunal.

An agreed surveyor should act impartially. A third surveyor too, selected by the two party-appointed surveyors, should act impartially. However, where parties appoint their own surveyors, these 'party-appointed surveyors' need not act impartially.

The Party Wall Act places no obligations on surveyors to act impartially, save for the fact that a surveyor cannot be 'party to the matter' as per section 20. You can literally appoint any person to act as your surveyor, and the Act makes no attempt to oblige a surveyor to be suitably qualified or ethical. The Act, in sections 10(3), 10(6) and 10(7) does attempt to regulate surveyor's behaviour. An agreed surveyor, for example, can be removed from the process if he 'neglects' or 'refuses' to act. There is a degree of accountability here, and sections 10(6) and 10(7) take this even further with the introduction of the word 'effectively'. This significantly widens the scope, as a refusal to act 'effectively' is easier to prove than an outright refusal to act. Other than this, surveyor's conduct is not mentioned any further, and so we are left to case law and literature to assess the requirement to act impartially.

In 'The Law and Practice of Party Walls' (2nd edition) Nicholas Isaac QC confirms that agreed and third surveyors must be 'independent of the parties' though he concedes that this is 'less clear in relation to surveyors appointed by the parties as building owner's surveyor and adjoining owner's surveyor respectively.' This concession does not bode well when placed in the context of impartiality.

The article that most aligns with my view is written by Paul Chynoweth titled 'Impartiality and the Party Wall Surveyor'. He concludes 'that party-appointed surveyors are primarily responsible to their own appointing owners. Unlike the agreed surveyor and the third surveyor they do not therefore appear, as individuals, to be subject to an obligation to act impartially between the parties.'

In the case of Welter v McKeeve [2018], which involved party-appointed surveyors, Judge Bailey was primarily concerned with the duty to mitigate losses:

> *"It is unreasonable to expect either a party wall surveyor to make an award, or an adjoining owner to foot the bill, where (a) no competing quotations have been obtained and (b) no detail is given as to how the price is made up of the one quotation that is presented for agreement, so that it may be analysed for reasonableness".*

Judge Bailey then does something that whilst well-meaning, may have been unhelpful. He added a commentary section titled 'the approach to their task of the party wall surveyors' where he stated 'the party wall surveyor must act impartially and professionally. He is not an agent of or mouthpiece for the owner who appointed him. Acting impartially requires the party wall surveyor (whether an owner-appointed surveyor or a third surveyor selected by the owner appointed surveyors) not to favour either owner over the other.'

These comments have been seized upon by many surveyors who use it to confirm that impartiality applies to all surveyors in all circumstances. However, upon reading the case, this is not a matter of impartiality being brought into question, but more a case of surveyors refusing or neglecting to act effectively within the meaning of sections 10(6) and 10(7) of the Party Wall Act. This is illustrated throughout the judgement with numerous referrals to one surveyor 'ignoring' another, and even a clear case of refusal to act (paragraph 31):

'[the surveyor] was not prepared to take the question of a detailed breakdown further.'

There are certainly cases that point to the idea that surveyors are not required to act impartially:

In McCardie, J. Selby v Whitbread & Co.: "the primary function of the surveyors is to safeguard the interests of the AO…".

In Chartered Society of Physiotherapy v Simmonds Church Smiles: 'a party-appointed surveyor while no doubt retaining his professional

independence is not obliged to act without regard to the interests of the party who appointed him'.

In the case of Gray v Elite Town Management [2017] we again have Judge Bailey commenting on the conduct of surveyors. Mr Hopps was appointed under section 10(4) to act on behalf of Mr Gray for a party wall matter, after Mr Gray had not responded to a notice. Mr Bailey acknowledges that the court 'readily accepts' that the building owner 'would have had to have searched far and wide to find a surveyor who shared Mr Gray's views, but it would have been better, very much better, had a surveyor been selected who was prepared to show some sympathy for those views.'

Section 10(4) is fundamentally flawed, in that any building owner and his surveyor will likely proceed with an appointment that will ensure a swift agreement of an award with little fuss. Judge Bailey's idea that a specific surveyor be appointed for a unique appointing owner may not be realistic. The Act does not incentivise the building owner taking any actions that make the process more difficult, and costly.

One of Mr Gray's neighbours noted of him 'he's quite a bumptious character… he brought a tank (a Soviet T-34 tank) in a fit of pique when Southwark council wouldn't let him build on the land and then trained its gun on the council offices'.

Mr Hopps, appointed to act on behalf of Mr Gray, made a mistake — he acted impartially. He did not agree with Mr Gray's views, and he agreed an award despite knowing that Mr Gray wouldn't be happy. That should be the definition of impartiality. If we go back to Judge Bailey's comments in Welter v McKeeve, we remember he said 'a surveyor is not an agent of or mouthpiece for the owner who appointed him. Acting impartially requires the party wall surveyor not to favour either owner over the other.' Yet in Gray v Elite Town Management Mr Hopps was chastised by Judge Bailey: 'Mr Hopps did not explain the essential party wall law to Mr Gray.

Worse than that, Mr Hopps joined with Mr Williams to make the First Award in favour of ETML, on 21 August 2012, which authorised the use of special foundations. Mr Gray's consent was not sought let alone obtained. For Mr Hopps to proceed to join in the making of a special foundation award without having obtained Mr Gray's consent in writing to the special foundation element of the award is reprehensible.'

What is interesting is that at one point Mr Gray had appointed a surveyor called Nithya Murthy and he 'knew her to be conscientious, intelligent, open and honest — qualities that I had dearly missed in my previous party wall surveyors. She had of course no direct experience of the Party Wall Act but this was easily remediable as I could direct her to specialists for any legal guidance she might need'.

Judge Bailey was 'satisfied that, on a strong balance of probabilities, Nithya Murthy was Mr Gray's alter ego.' Her conduct was not criticised, though she was found not to have been a surveyor within the meaning of the Party Wall Act:

'I accept… that "not being a party" in the definition of "surveyor" requires there to be an independent appointment to the extent that… it involves a degree of independence from the party. It excludes any person who is a mere cypher or alter ego of a party. Such a person cannot properly be a party wall surveyor within the 1996 Act definition.'

This is all relevant because Mr Hopps was criticised for not explaining the law to Mr Gray (though he maintains he did) and yet, Mr Gray was clearly happy to have a surveyor with no experience in party wall matters.

Mr Hopps was not invited to give evidence, had he been, he would have countered that he had communicated with Mr Gray, explained the party wall process, and explained his understanding

of special foundations. The third surveyor had agreed that special foundations were not being used, and Mr Hopps awarded in what he believed was a fair and impartial way. Had Mr Hopps acted as a party-appointed surveyor, dismissing the widely held notion that a surveyor needed to act impartially, he may very well have come under less criticism.

Acting as a party-appointed surveyor does not mean being an alter ego to the appointing owner, as quite rightly, this precludes that person from being defined as a surveyor under the Act. A surveyor must act 'effectively' and sections 10(6) and (7) are vital as they are defence mechanisms to be used if a surveyor neglects or refuses to act effectively. Perhaps these clauses are there *because* surveyors are not required to act impartially, and a counterbalance is required to ensure the appropriate resolution of a dispute. Remember, the burden to remove a party-appointed surveyor is significantly less than that of the agreed surveyor, with the introduction of the word 'effectively'. Section 10(3) is considerably more stringent precisely because it applies to an agreed surveyor, and the agreed surveyor is expected to act impartially. The stringency of 10(3) is the protection of impartiality.

Moving on, the Act allows for the building owner and the adjoining owner to appoint a surveyor each. If, as is often touted, party wall surveyors are truly impartial, why would there be a need to allow for the appointment of more than one surveyor? Theoretically, the appointment of two surveyors would only serve to increase the fees that the building owner would be expected to pay. This seems inherently unfair, and unnecessarily burdensome, particularly if surveyors are prohibited from representing their client's interests (using the term 'client' is often frowned upon by party wall surveyors who believe they should be impartial regardless of their role). It makes very little sense, appointing two impartial surveyors to agree and serve a document when this can be done using one impartial surveyor.

There must be a fundamental difference when using two surveyors instead of one. It is well established that the building owner must pay the adjoining owner's surveyor's fees, though in the case of Amir-Siddique v Kowaliw, Judge Bailey seems to offer a contradictory view to that found in Welter v Mckeeve. Here, he found that the adjoining owner should pay the building owner's surveyor's fees because the adjoining owner had unfairly rejected the agreed surveyor route. Is there ever a reason to reject the appointment of an agreed surveyor if he is obliged to act impartially?

Many people elect to appoint their own surveyor for a variety of reasons including, as Matthew Hearsum of Morrisons Solicitors LLP says, 'parties wanting (mistakenly) someone "on their side".' Should the building owner be obliged to pay for the adjoining owner's mistaken views? Or perhaps, the expectation that you can have a surveyor 'on your side' is perfectly acceptable.

A good party-appointed party wall surveyor can be like a good solicitor, advising their appointing owner on legal matters so that their appointing owner can make informed decisions. The surveyor can then act on those decisions if they are legal. It can also be acceptable for a surveyor to take instructions — it is a dispute after all. A surveyor should communicate with his appointing owner and understand his limitations and jurisdiction. In Evans v Paterson [2021] the surveyors were found to have served an award dealing with damage, but the building owner was not involved or aware of a dispute, and the award was set aside on appeal. In serving the award, the surveyors may have felt that they were acting impartially and carrying out their duties, but the building owner was entitled to have someone 'on her side'.

CONCLUSION

Impartiality is a requirement where a surveyor is appointed to act as the agreed surveyor or selected as the third surveyor. However, it is a myth that impartiality must be applied to all appointments. This interpretation is unhelpful and puts surveyors in an untenable position. Paul Chynoweth gets it right in his article 'Impartiality and the Party Wall Surveyor' and he provides some helpful historical context: 'Surveyors have traditionally undertaken negotiating roles on behalf of clients in property and construction contexts. The statutory role of party wall surveyor, which first appeared under the 1724 London legislation, originally involved no suggestion of impartiality. Surveyors were appointed by neighbouring owners and were required to represent their client's interests before the justices in the event of their failure to negotiate an agreement.'

By ignoring the concept that surveyors can liaise with and negotiate on behalf of their appointing owners, surveyors are absolving themselves of their responsibilities to act 'effectively', a term which the Act refers to. The Act does not refer to 'impartiality,' quite deliberately. The existence too, of the three-surveyor tribunal, is deliberate, and is formed to allow surveyors to represent their respective parties. Sections 10(6) and 10(7) are a safety net, requiring surveyors to act 'effectively'. Had the surveyors in Welter v McKeeve acted effectively, Judge Bailey would have had no need to hear the case, let alone comment on impartiality. There was a clear refusal to act effectively by a surveyor, and the Party Wall Act has a mechanism in place that could have dealt with that refusal, avoiding litigation.

The Party Wall Act can work very well, but blanket descriptions can be damaging, and whilst the idea that surveyors must act impartially at all times is nice, it is unhelpful, and it hinders the finer workings of the Act. The agreed surveyor appointment is completely different from the two-surveyor appointment, and the sooner the public and the surveyors who administer the Act realise this, the sooner we can all have realistic expectations as to how the section 10 dispute resolution process should work.

17. DOING WITHOUT SURVEYORS

Mikael Rust

This is an extract from my forthcoming "The Great Party Wall etc Scam".

It is possible, though rare in practice, to carry out notifiable works without involving surveyors. This is most likely to be in cases of work to private residential properties where the Parties are on very good terms and the work is relatively straightforward.

In very simple cases involving only works under section 2, the Building Owner can proceed without serving notice provided she has "the consent in writing of the Adjoining Owners and of the adjoining occupiers".[1] An oral agreement over a drink, dinner or the garden fence will not suffice if the Adjoining Owner gets cold feet when the fun starts. Note too the requirement for agreement in writing from the adjoining occupiers.

This statutory opt-out is not available to Building Owners undertaking work on the Line of Junction (Section 1) or adjacent

1 Party Wall etc. Act 1996 section 3(3)(a)

excavations (Section 6) but in 2014 the High Court confirmed that it is open to the Building Owner and Adjoining Owner to contract out of all or part of the Act.[2] In order to be effective this will need a carefully drafted, legally binding agreement between the Parties and could prove more costly than following the procedures under the Act. Where lawyers are already involved in complicated projects, however, this could be a useful alternative.

The simplest way of avoiding statutorily appointed surveyors is to serve the required notices yourself after careful and meticulous preparation. Notices are often somewhat perfunctory documents served with the intention of "getting the ball rolling" and triggering the statutory notice periods of one or two months. They do not always meet the basic requirements set out in the Act and are usually served without expectation or even encouragement of consent by the Adjoining Owner.

When surveyors are appointed and the statutory process followed the surveyors will usually require quite detailed information such as engineers' reports and method statements to give assurance that the design and execution of the work has been thought through fully. Much of the surveyors' time will be spent in procuring and examining this information. Building Owners with small projects are frequently of the view that much of this is quite unnecessary and it is not unusual for the design engineer not to have inspected the property. Foundations and structural steelwork can often be designed on certain assumptions without leaving the office.

In one recent case, the unfortunate Building Owner suffered months of delay and unnecessarily high surveyors' fees largely because the structural engineer's extraordinary design involved the underpinning first in concrete and then in brickwork of the

2 Dillard v F&C Commercial Property Holdings Ltd [2014] EWHC 1219 (QB) (1)

party wall of a small house in North London. When, eventually, a trial hole was dug they discovered that no underpinning was required and party wall matters were then resolved in a matter of days.

If the Building Owner ensures that comprehensive information is provided with the notice, the Adjoining Owner is in a much better position to assess the risks involved and to give an informed consent to the works. The Act does not require consent to be unconditional and it would be quite in order to attach conditions requiring, for example, a schedule of condition or record photographs to be taken before work starts.

Put yourself in the position of your neighbours. They do not want building work next door, who does? What would help to ease your mind if the roles were reversed? The likelihood of consent is greatly increased if included with the notice are:

(1) Contact details and background information on your architect, structural engineer and other members of your team.

(2) Confirmation of whether you are using Local Authority Building Control or an Approved Inspector. If you are using Full Plans Approval rather than proceeding on a Building Notice, say so. Full Plans Approval tells the Adjoining Owner that the project has been fully designed and then approved by the Building Inspector.

(3) Graphic illustrations of anything that directly impacts on the Adjoining Owner's building. Most product manufacturers publish technical sheets and fixing guides and the Lead Sheet Association publishes excellent diagrams of most kinds of flashing detail. Do not overwhelm your neighbours with lots of irrelevant design drawings but some of the architectural drawings will help them to understand what you are doing. Three dimensional views can be produced by

most CAD (computer aided design) programs today showing exactly what is proposed in a very clear way.

(4) Method statements explaining how the work is to be carried out and what precautions are to be taken to prevent damage to the Adjoining Owner's property.

(5) Details of what access may be needed onto the Adjoining Owner's property, for how long and with what protection measures. This is especially fraught when it comes to building on the Line of Junction or going onto next door's roof in order to build a loft conversion.

(6) Acknowledgement that the neighbour may be entitled to payment under section 11(11) if you are making use of part of the building that he has built.

(7) A letter from the structural engineer confirming that account has been taken of the age, construction and condition of both properties, the local ground conditions and the implications of the proposals and there is no need to underpin or otherwise strengthen or safeguard the foundations of any buildings or structures of the Adjoining Owner The engineer may need to visit next door which is no bad thing in itself.

Sometimes, it will be wise to engage an experienced party wall Surveyor to assist in drafting the notice and collating the information but explain that the intention is to give the Adjoining Owner as little reason as possible to dissent from the notice. This might be a novel approach to the Surveyor whose livelihood depends on dissent and dispute.

The main difficulty here is that much of the detailed construction information is not available until after a contractor has been appointed so a Building Owner will have to weigh up the relative

pros and cons of the earliest start on site and avoiding or minimising Adjoining Owners' Surveyors' fees.

Any affirmation that "the builder knows what he is doing and everything can safely be left in his hands" is about as good a way as any of ensuring dissent.

18. GETTING OUR ACT TOGETHER

Michael White

The Party Wall Act has been in operation throughout England & Wales for over twenty years. It aims to provide an efficient mechanism for resolving disputes and enabling building owners to carry out works. It was introduced with the best of intentions but public perception appears to be at an all time low. It is also clear that there are irregularities allowing the less ethical surveyors to abuse the statutory position for their own gain. There is a need for change and there is an appetite for change. Here, **Michael White**, considers the underlying factors and the business case for an amendment to the Act.

THE BEST OF INTENTIONS

The Act was introduced with the best of intentions. It is, after all, an enabling Act. It is there to allow works that would otherwise be prohibited. It provides rights to repair defective structures, underpin party walls, demolish and rebuild a party wall and, perhaps most enabling of all, access adjoining owners land to carry out works pursuant to the Act. All these actions would, in the absence of The

Party Wall Act, be considered trespass, criminal damage or worse.

The Act also intends to create a mechanism for neighbourly agreement. The requirement to serve a notice intends to instigate communication. The ability for the adjoining owner to respond with a consent or an informal agreement provides a means for neighbours to agree a resolution between themselves. The ability to appoint an agreed surveyor intends to provide a low cost and efficient means of resolving disputes.

When introducing the 1996 Act in the House of Lords, the Earl of Lytton set out the following intentions:

- To encourage a principle of voluntary agreement between parties.
- To provide for notice to be given where works are proposed.
- To provide an opportunity to respond and comment.
- To protect existing structures.
- To provide liability for damage and making good.
- To provide a mechanism for the resolution of disputes, other than by going to law.
- To set out how costs of works and fees arising from them shall be dealt with.

> *"I hope that it will be seen that the Bill is worthwhile and uncontroversial. I hope that it will be seen as something which will encourage good order and create a framework for dealing with disputes."*
> ***The Earl of Lytton, 31 Jan 1996,***
> ***Introducing the Bill to the House of Lords***

It is a regrettable fact that the usual party wall dispute now works in an adversarial "us versus them" manner. All in contradiction to the spirit in which the Act is intended.

PUBLIC PERCEPTION

> *The profession is viewed with a distain usually reserved for traffic wardens, estate agents and politicians, and all the while working in a profession that is supposed to pride itself on its ethics and professional standards. The irony is almost overwhelming.*

I recently published my first book, "How To Be A Party Wall Surveyor" (available in frustratingly few bookshops other than Amazon). The book is aimed at students and new surveyors and it focuses fairly heavily on how, as a profession, we can improve. As part of writing the book, I carried out a small amount of research into public opinion on the Act and its surveyors. It was nothing more sophisticated than a google search on "party wall reviews" and a conversation with a range of appointing owners. It is acknowledged that the survey size is unscientifically small and that Google will generally provide a one sided view (not many people take to Mumsnet when they are entirely satisfied about something). However, as basic as the methods may have been, the results are best described as alarming.

It is perceived that The Party Wall Act exists for the sole benefit of the surveyors acting under its name. Rightly or wrongly, the common view of those that have come into contact with the Act for the first time is that it was written by surveyors, for the benefit of surveyors.

A brief snapshot of the public opinion supports this point. What follows are genuine reviews, all available online for anyone that cares to look:

> "**They have you by the balls** I'm afraid. It really stinks how this legislation affects neighbours rights"

"**The vultures have descended** and, as I and previous posters know, you will be the prey/loser."

"The party wall act has been designed by party wall surveyors for party wall surveyors. **It is actually fairly corrupt**."

"One particular company, who I cannot name here for legal reasons**, behave in a most unscrupulous way**."

"There seems to be no organisation to protect this **daylight robbery**. Hate my neighbour as a consequence. Nothing we can do that won't incur even further costs."

This is just the tip of the iceberg. I could go on for several pages, but the word count prevents me. The general consensus is clear, appointing owners (and building owners in particular) view the party wall process as an additional hurdle to overcome. The perception is that the Act adds a cost to their project in terms of both time and money, and they receive very little value in return for this cost.

We know this is the tip of the iceberg, what is not entirely clear is the size of the iceberg. Either way, party wall surveyors are now often portrayed as ethically dubious, taking a sometimes substantial fee without adding a great deal of value in return. The result is the profession is viewed with a disdain usually reserved for traffic wardens, estate agents and politicians, and all the while working in a profession that is supposed to pride itself on its ethics and professional standards. The irony is almost overwhelming.

THE PROBLEM OF ROGUE SURVEYORS

A surveyor practising under the Act for any period of time will almost certainly come across at least one surveyor who is not operating as the Act intended. The degree of unprofessional behaviour varies wildly from one surveyor to the next, from delay tactics to

unreasonable fees to acting beyond the remit, there appears to be a sliding scale of poor ethics emerging.

> *The more you look at it, the more it becomes clear that a well intentioned Act is sometimes used as a tool by disgruntled adjoining owners to delay works, add a cost or frustrate the process.*

At the more roguish end of the scale is the ambulance chasing fraternity. The practice of trawling the planning sites before generating a dispute (and with it some fairly generous fees) is ethically dubious and against the principles of the Act and the profession.

I imagine most surveyors are aware of the tactics involved, but just in case there is any doubt, the ambulance chasing involves:

- Finding a notifiable project on the planning sites
- Writing to the adjoining owners, highlighting risks to their property
- Encouraging adjoining owners to sign a letter of appointment despite the fact that notices have not yet been served
- The adjoining owners are not advised of their right to consent
- Once appointed, the building owner is then contacted and fees are outlined. A discounted rate is offered to secure the Agreed Surveyor appointment
- A dispute is generated where one may not exist. The only beneficiary seems to be the surveyor.

The more you look at it, the more it becomes clear that a well intentioned Act is sometimes used as a tool by disgruntled adjoining owners to:

- Delay works
- Add a cost
- Frustrate the building process

Perhaps more worryingly, it is also used as a tool by "unscrupulous surveyors" to:

- Create a dispute
- Generate inflated fees

AN APPETITE FOR IMPROVEMENT

Most surveyors you speak to have a view on an amendment. I have spoken to interested parties across the board and what comes back is a wide range of opinions on what an amendment should contain. What never comes back is the view: "it's fine as it is, we should leave it alone".

The flaws within the current process are there for all to see. There are sections of the Act that are obsolete or incomplete. The language of "dissent" and "dispute" is misleading to the general public. The opportunity remains for incompetent or unethical 'surveyors' to become appointed and escalate a dispute for their own gain.

There appears to be a unanimous view that an amendment would be positive, so the argument moves away from whether or not we should pursue an amendment and moves towards what an amendment should look like.

This is a hot topic. I could put forward anything up to one hundred different suggestions on the subject. Some are more dramatic than

others, but most would provide clarity or improvement. Again, the word count must be protected when considering this issue, but what follows is a small snapshot of well considered improvements from interested parties:

Alistair Redler:

"I would make several changes. Firstly the removal of special foundations restrictions. They are obsolete."

James Lewis:

"I would probably suggest the introduction of penalties (currently none) imposed on building owners for not adhering to their statutory obligations. "

Stuart Frame:

"I'd most like to see a definition of 'dispute' inserted into s.20, limiting a surveyor's jurisdiction strictly to those scenarios when the Act has been invoked properly. This would prevent [unscrupulous] surveyors 'policing' the Act, forcing retrospective action, escalating the dispute and then charging excessive fees in the process."

My Own View:

The surveyor is appointed under statute, and given statutory authority to:

- Administer the rights of the building owner.
- Resolve the dispute to enable work to begin.

- Apportion costs of the dispute.
- Set their own "reasonable" fee.
- Receive an appointment that cannot be rescinded.
- Produce a legally binding Award that, after the appeal period has lapsed, cannot be overturned in any court.

The ONLY qualifying criteria to achieve this level of responsibility is that the surveyor is not "a party to the matter". Surely we should expect a minimum standard of competence to those that are provided such responsibility.

POTENTIAL AMENDMENTS:

With the above views in mind, and as a starter for ten, the following amendments seem like a sensible starting point:

- Remove / reword 7(4) to scrap special foundations consent
- Extension of s.16 to make failure to comply with the statutory obligations set out in s.1, s.2 & s.6 an offence, punishable by a fine.
- Extension to s.20 to insert a definition of a dispute, and one which would confirm once and for all that a dispute about works to which the Act relates can only arise from the service of an initiating notice thus limiting a surveyor's jurisdiction strictly to those scenarios when the Act has been invoked properly.
- Extension to s.20 to further define a "surveyor" as a person "not a party to the dispute" and also a member of an approved accrediting organisation.

I can almost hear keyboards rattling as those with an interest hurry to put forward their own personal gripes with the current legislation. Such a conversation should be encouraged. LinkedIn groups contain various threads discussing preferred amendments and it seems sensible to formalise these conversations to the point where we, as a profession, have a comprehensive list of amendments to be discussed and debated.

If we can agree there is both a need and an appetite for an amendment, then it should not be beyond the wit of man to progress this to a workable, feasible list of the key areas for change.

All fairly straightforward really.

THE BUSINESS CASE FOR AN AMENDMENT

My day job is running a construction consultancy. We have an unwritten rule that, when we are considering a change of direction or a significant alteration to our processes, we are required to put the business case forward to set out the expected impact and, ultimately, how it improves the bottom line.

Old habits die hard, so here we go.

> *Minimum standards of competence must surely go along the lines of membership of an approved organisation.*

Firstly, if we do nothing, the public perception discussed earlier is likely to worsen as more unethical, unqualified or unscrupulous people jump on the bandwagon. Where there is the potential to earn an easy buck then there is an inevitability that it will be exploited by anyone with the intelligence to do so. The definition of madness, to carry on doing the same thing while expecting different results, springs to mind. If we do not act to improve things ourselves then it is only a matter of time until regulation or greater controls are forced upon us.

Secondly, we have an opportunity and, it seems, an appetite to improve. We have all been working with the 96 Act for several years (some of us have been working with the 39 Act for many more). The result of such experience is that we are aware of the issues and we know the potential answers. A failure to act on this knowledge can only be put down to lethargy, inertia or a "stuck in our ways" attitude.

Thirdly, and finally, the matter of self regulation and minimum standards of competence creates an opportunity for greater control by the existing accrediting organisations capable of regulating its members. Minimum standards of competence must surely go along the lines of membership of an approved organisation. The increase in membership, and the subscription fees that will no doubt follow, will raise revenue that can then be invested in training, disciplinary committees and effective regulation.

As an industry I am sure we would be prepared to get behind one or two bodies if it means the profession gains the ability to insist on high standards of its surveyors and the ability to act decisively if those standards are not met.

CONCLUSION

There is a compelling case for an amendment. There is a need for it. There is a reason for it. There is an appetite for it.

Clearly this conversation is just the beginning of the process and, while the conversation is welcome, it will not make a difference on its own. All significant change needs to involve firstly, a conversation and, secondly, meaningful action.

This action is where the challenges lay. The depth of varying opinions on the scale of any amendment is vast. There is a genuine challenge in filtering through each suggestion to ensure we focus on

improvement and clarity while avoiding unnecessary complication and unintended consequences.

Further challenges lie in the ability (or lack of) to turn a well intended conversation into a parliamentary amendment to existing legislation. There have been many conversations on the topic, and more than one previous attempt to secure an amendment. Several years ago a working party set up by P&T held meetings with the office of the Deputy Prime Minister.

It seemed as though progress was being made towards a statutory instrument with which to make changes but, a lack of government time, meant the amendment never saw the light of day.

Government time remains at a premium, perhaps more so in the current climate than at any other time in parliamentary history. However, we cannot assume this will always be the case and we have a duty to put ourselves in a position whereby we are ready to act when an opportunity arises.

The next logical steps seem clear. There is a need for the profession to come together to form a concise view as to how an amendment should look. With this first hurdle overcome, the final hurdle of a means of making it happen can be addressed.

The existing organisations associated with party wall surveying can, and should, become key players in this process. The depth of knowledge, the experience of the members, the respected professionalism of ethical surveyors, all put our profession in a position to make this improvement happen.

If we are serious about the future of our profession then we now have a duty to act. If we fail to do so then the next generation of surveyors face difficult times ahead.

Progress thrives on conversation. For any significant change to take place it must begin with an open and honest gathering of views. Opinions will need to be shared, considered and acted upon.

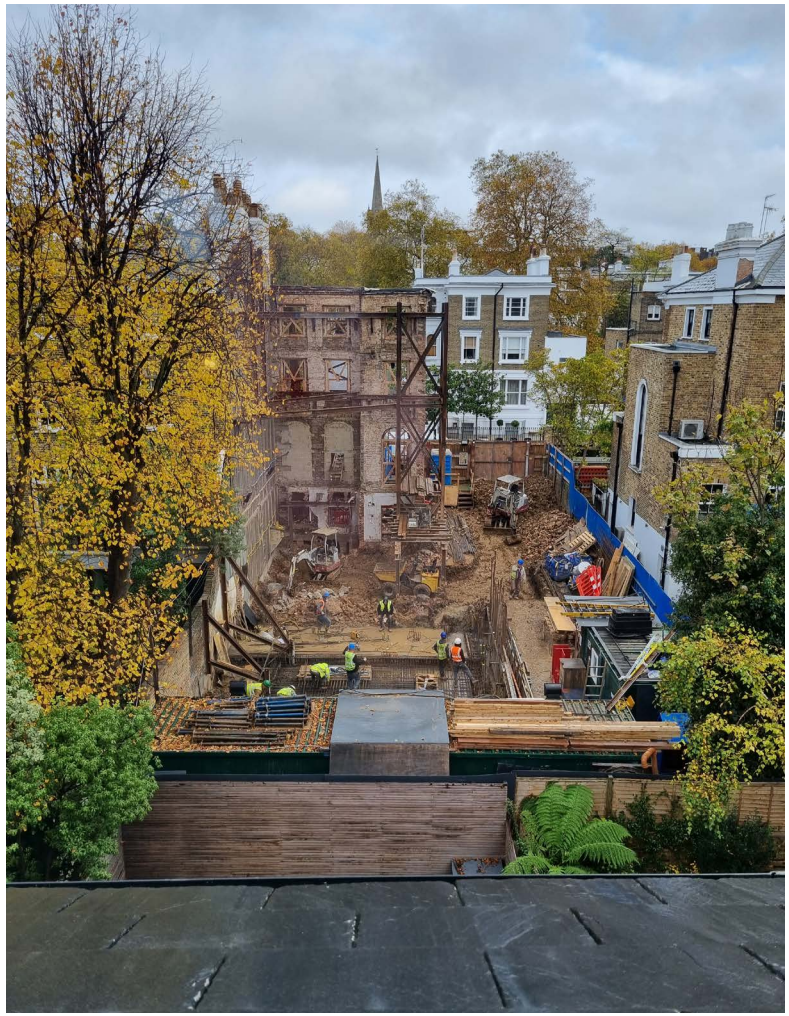


Image credit: Holly Harris

19. IS IT TIME FOR TRANSPARENCY AND EFFICIENCY IN PARTY WALLS?

Philippe Weyland

One of the last demos I did in person before we all moved over to Zoom was a real eye-opener.

I was meeting with one of the leading consultancy companies advising on Party Walls and Rights of Light issues to show them an app that considerably reduces the time it takes to produce party wall schedules of condition.

After listening to where their pain points were and what they expected for a schedule of condition app, I showed them how powerful it was.

They were impressed, or at least pretended they were, and started discussing amongst themselves how they could use the tool to their advantage.

Then, the dreaded moment happened. A senior figure mentioned a sticking point: "*if we use your tool and it takes half the time to do a schedule, we won't be able to charge as much*."

I have a list of answers to common objections but I wasn't prepared for that one...

The fact that efficiencies brought on by technological innovation can actually hinder a business is a concept that I struggled to grasp at first... until I realised that it doesn't and never will.

When a business focuses more on its billable hours than on delivering value to its customers, clients will go elsewhere and if this is a reflection of a whole industry, it means it is ripe for disruption, which is something none of the surveyors specialising in party walls want.

The party wall industry is sadly falling victim to a race to the bottom in terms of pricing and quality of service. Whether this is due to a flaw in the Party Wall etc... Act 1996 or an inherent malaise of the broader industry is debatable but the reality is that it is not sustainable.

It is therefore time for the industry to take a good look at how to deliver better value in less time and with more transparency because this is what owners, whether corporates or individuals, ultimately want. And they are actively looking for it.

The efficiency conundrum

I can already hear people chuckle at the thought of the party wall industry being "disrupted" but some lawyers in high-street firms took the same arrogant approach until their business model was taken over by lawyers-on-demand offerings like Axiom Law or LOD legal.

What these lawyers-on-demand companies offer their recruits is a suite of technology products enabling their lawyers to hit the ground running. These include libraries of templates, billing software, emails and other admin tools necessary to help them focus on their job and deliver maximum value as quickly and efficiently as possible. This reduces overheads and increases margins for their lawyers.

When I had a schedule done on my house, the building owner surveyor took nearly three hours. My house is no castle. The clumsy juggling of pen, clipboard, digital camera and dictaphone didn't inspire confidence nor trust. My suspicion was confirmed when it took four weeks to see the paper version of the schedule.

People want to get on with their building works, so why not deliver what is most precious to a building owner, speed?

Speed doesn't mean that fees need to be lowered as a consequence, quite the contrary. A marketing "guru" recently told me "fast beats free" which I think is very relevant to the party wall process because it is time-sensitive.

People will pay a premium for speed and the only way you can speed things up is through technology.

If you don't, someone else will

The advantage of running a software , like Party Wall PRO, is that we have a bird's eye view of the state of the Party Wall market.

We noticed the pandemic has had a very positive impact on the residential market and the biggest winners were the practices embracing technology, whether it is in the delivery of their services, back office or in their marketing efforts. The old school practices seem to lag behind.

As a consequence, consolidation is happening whereby bigger firms, often specialising in commercial party wall matters, are now looking at incorporating residential practices that are lean and often use technology to their advantage.

When two firms using the same technology join forces, that's when the magic happens: a merger without the admin headaches.

We also noticed new one-man-bands focusing on technology from the outset to free up time to develop their practice. These are people that take market share away from practices that still resist technological advancement.

Of course, technology will not replace quality and these one-man-bands sometimes think that software can replace the skillsets needed. This will be their downfall once the skilled start competing using the same technological tools.

Owners want transparency

My poor neighbour had five adjoining owners to deal with and, according to him, spent far too much time and money on awards. According to his wife, that money could have been used to fit a whole new kitchen. Of course, that was meant to make me feel guilty for dissenting…

The opacity of the whole process got him so frustrated that he started the works without having even seen our draft award. My intention was certainly not to stop the works because I didn't want to be one of those neighbours but I took a risk. Neither my surveyor nor my neighbour knew what was happening on the building owner's surveyor's side.

It seemed that ill health was the issue. A simple email would have done the trick but the assistant surveyor was unable to even do that because of lack of process.

Owners want transparency and an understanding of their job's progress otherwise they will bombard their surveyor with emails and phone calls. This transparency and accountability can easily be achieved through technological means.

A smart firm of surveyors now offers their owners a client portal giving them the information they need to understand the progress of their project. This gives owners comfort, peace of mind and a sense of control but even better, it gives surveyors more time to do their work without having to update their owners of progress over email or phone.

This is on Party Wall PRO's pipeline of new functionalities, but when I mention that idea to surveyors the majority seem to prefer the opaqueness of how we do things today.

Again, these outdated ways of thinking will only lead to losing out to better equipped competitors or a radical disruption of the way we deliver our services.

Since starting Party Wall PRO six years ago, adoption of technology has been slow. It was accelerated by the pandemic but this increased adoption was out of necessity rather than design.

Having said that, new users quickly realise that they can focus on quality whilst increasing the quantity of work. As a consequence, their fees remain the same or increase but better yet, their profit margins grow. With inflation hitting businesses, it is time to look at margins and how to weather the coming storm and technology is certainly one of them.

APPENDIX 1:
PARTY WALL ETC. ACT 1996

1996 CHAPTER 40

An Act to make provision in respect of party walls, and excavation and construction in proximity to certain buildings or structures; and for connected purposes.

[18th July 1996]

1. NEW BUILDING ON LINE OF JUNCTION.

(1) This section shall have effect where lands of different owners adjoin and—

(a) are not built on at the line of junction; or

(b) are built on at the line of junction only to the extent of a boundary wall (not being a party fence wall or the external wall of a building),

and either owner is about to build on any part of the line of junction.

(2) If a building owner desires to build a party wall or party fence wall on the line of junction he shall, at least one month before he intends the building work to start, serve on any adjoining owner a notice which indicates his desire to build and describes the intended wall.

(3) If, having been served with notice described in subsection (2), an adjoining owner serves on the building owner a notice indicating his consent to the building of a party wall or party fence wall—

(a) the wall shall be built half on the land of each of the two owners or in such other position as may be agreed between the two owners; and

(b) the expense of building the wall shall be from time to time defrayed by the two owners in such proportion as has regard to the use made or to be made of the wall by each of them and to the cost of labour and materials prevailing at the time when that use is made by each owner respectively.

(4) If, having been served with notice described in subsection (2), an adjoining owner does not consent under this subsection to the building of a party wall or party fence wall, the building owner may only build the wall—

(a) at his own expense; and

(b) as an external wall or a fence wall, as the case may be, placed wholly on his own land,

and consent under this subsection is consent by a notice served within the period of fourteen days beginning with the day on which the notice described in subsection (2) is served.

(5) If the building owner desires to build on the line of junction a wall placed wholly on his own land he shall, at least one month before he intends the building work to start, serve on any adjoining owner a notice which indicates his desire to build and describes the intended wall.

(6) Where the building owner builds a wall wholly on his own land in accordance with subsection (4) or (5) he shall have the right, at any time in the period which—

(a) begins one month after the day on which the notice mentioned in the subsection concerned was served, and

(b) ends twelve months after that day,

to place below the level of the land of the adjoining owner such projecting footings and foundations as are necessary for the construction of the wall.

(7) Where the building owner builds a wall wholly on his own land in accordance with subsection (4) or (5) he shall do so at his own expense and shall compensate any adjoining owner and any adjoining occupier for any damage to his property occasioned by—

(a) the building of the wall;

(b) the placing of any footings or foundations placed in accordance with subsection (6).

(8) Where any dispute arises under this section between the building owner and any adjoining owner or occupier it is to be determined in accordance with section 10.

2. REPAIR ETC. OF PARTY WALL: RIGHTS OF OWNER.

(1) This section applies where lands of different owners adjoin and at the line of junction the said lands are built on or a boundary wall, being a party fence wall or the external wall of a building, has been erected.

(2) A building owner shall have the following rights—

(a) to underpin, thicken or raise a party structure, a party fence wall, or an external wall which belongs to the building owner and is built against a party structure or party fence wall;

(b) to make good, repair, or demolish and rebuild, a party structure or party fence wall in a case where such work is necessary on account of defect or want of repair of the structure or wall;

(c) to demolish a partition which separates buildings belonging to different owners but does not conform with statutory requirements and to build instead a party wall which does so conform;

(d) in the case of buildings connected by arches or structures over public ways or over passages belonging to other persons, to demolish the whole or part of such buildings, arches or structures which do not conform with statutory requirements and to rebuild them so that they do so conform;

(e) to demolish a party structure which is of insufficient strength or height for the purposes of any intended building of the building owner and to rebuild it of sufficient strength or height for the said purposes (including rebuilding to a lesser height or thickness where the rebuilt structure is of sufficient strength and height for the purposes of any adjoining owner);

(f) to cut into a party structure for any purpose (which may be or include the purpose of inserting a damp proof course);

(g) to cut away from a party wall, party fence wall, external wall or boundary wall any footing or any projecting chimney breast, jamb or flue, or other projection on or over the land of the building owner in order to erect, raise or underpin any such wall or for any other purpose;

(h) to cut away or demolish parts of any wall or building of an adjoining owner overhanging the land of the building owner or

overhanging a party wall, to the extent that it is necessary to cut away or demolish the parts to enable a vertical wall to be erected or raised against the wall or building of the adjoining owner;

(j) to cut into the wall of an adjoining owner's building in order to insert a flashing or other weather-proofing of a wall erected against that wall;

(k) to execute any other necessary works incidental to the connection of a party structure with the premises adjoining it;

(l) to raise a party fence wall, or to raise such a wall for use as a party wall, and to demolish a party fence wall and rebuild it as a party fence wall or as a party wall;

(m) subject to the provisions of section 11(7), to reduce, or to demolish and rebuild, a party wall or party fence wall to—

(i) a height of not less than two metres where the wall is not used by an adjoining owner to any greater extent than a boundary wall; or

(ii) a height currently enclosed upon by the building of an adjoining owner;

(n) to expose a party wall or party structure hitherto enclosed subject to providing adequate weathering.

(3) Where work mentioned in paragraph (a) of subsection (2) is not necessary on account of defect or want of repair of the structure or wall concerned, the right falling within that paragraph is exercisable—

(a) subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations; and

(b) where the work is to a party structure or external wall, subject to carrying any relevant flues and chimney stacks up to such a height

and in such materials as may be agreed between the building owner and the adjoining owner concerned or, in the event of dispute, determined in accordance with section 10;

and relevant flues and chimney stacks are those which belong to an adjoining owner and either form part of or rest on or against the party structure or external wall.

(4) The right falling within subsection (2)(e) is exercisable subject to—

(a) making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations; and

(b) carrying any relevant flues and chimney stacks up to such a height and in such materials as may be agreed between the building owner and the adjoining owner concerned or, in the event of dispute, determined in accordance with section 10;

and relevant flues and chimney stacks are those which belong to an adjoining owner and either form part of or rest on or against the party structure.

(5) Any right falling within subsection (2)(f), (g) or (h) is exercisable subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations.

(6) The right falling within subsection (2)(j) is exercisable subject to making good all damage occasioned by the work to the wall of the adjoining owner's building.

(7) The right falling within subsection (2)(m) is exercisable subject to—

(a) reconstructing any parapet or replacing an existing parapet with another one; or

(b) constructing a parapet where one is needed but did not exist before.

(8) For the purposes of this section a building or structure which was erected before the day on which this Act was passed shall be deemed to conform with statutory requirements if it conforms with the statutes regulating buildings or structures on the date on which it was erected.

3. PARTY STRUCTURE NOTICES.

(1) Before exercising any right conferred on him by section 2 a building owner shall serve on any adjoining owner a notice (in this Act referred to as a "party structure notice") stating—

(a) the name and address of the building owner;

(b) the nature and particulars of the proposed work including, in cases where the building owner proposes to construct special foundations, plans, sections and details of construction of the special foundations together with reasonable particulars of the loads to be carried thereby; and

(c) the date on which the proposed work will begin.

(2) A party structure notice shall—

(a) be served at least two months before the date on which the proposed work will begin;

(b) cease to have effect if the work to which it relates—

(i) has not begun within the period of twelve months beginning with the day on which the notice is served; and

(ii) is not prosecuted with due diligence.

(3) Nothing in this section shall—

(a) prevent a building owner from exercising with the consent in writing of the adjoining owners and of the adjoining occupiers any right conferred on him by section 2; or

(b) require a building owner to serve any party structure notice before complying with any notice served under any statutory provisions relating to dangerous or neglected structures.

4. COUNTER NOTICES.

(1) An adjoining owner may, having been served with a party structure notice serve on the building owner a notice (in this Act referred to as a "counter notice") setting out—

(a) in respect of a party fence wall or party structure, a requirement that the building owner build in or on the wall or structure to which the notice relates such chimney copings, breasts, jambs or flues, or such piers or recesses or other like works, as may reasonably be required for the convenience of the adjoining owner;

(b) in respect of special foundations to which the adjoining owner consents under section 7(4) below, a requirement that the special foundations—

(i) be placed at a specified greater depth than that proposed by the building owner; or

(ii) be constructed of sufficient strength to bear the load to be carried by columns of any intended building of the adjoining owner,

or both.

(2) A counter notice shall—

(a) specify the works required by the notice to be executed and shall be accompanied by plans, sections and particulars of such works; and

(b) be served within the period of one month beginning with the day on which the party structure notice is served.

(3) A building owner on whom a counter notice has been served shall comply with the requirements of the counter notice unless the execution of the works required by the counter notice would—

(a) be injurious to him;

(b) cause unnecessary inconvenience to him; or

(c) cause unnecessary delay in the execution of the works pursuant to the party structure notice.

5. DISPUTES ARISING UNDER SECTIONS 3 AND 4.

If an owner on whom a party structure notice or a counter notice has been served does not serve a notice indicating his consent to it within the period of fourteen days beginning with the day on which the party structure notice or counter notice was served, he shall be deemed to have dissented from the notice and a dispute shall be deemed to have arisen between the parties.

Adjacent excavation and construction

6. ADJACENT EXCAVATION AND CONSTRUCTION.

(1) This section applies where—

(a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured

horizontally from any part of a building or structure of an adjoining owner; and

(b) any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations of the building or structure of the adjoining owner.

(2) This section also applies where—

(a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of six metres measured horizontally from any part of a building or structure of an adjoining owner; and

(b) any part of the proposed excavation, building or structure will within those six metres meet a plane drawn downwards in the direction of the excavation, building or structure of the building owner at an angle of forty-five degrees to the horizontal from the line formed by the intersection of the plane of the level of the bottom of the foundations of the building or structure of the adjoining owner with the plane of the external face of the external wall of the building or structure of the adjoining owner.

(3) The building owner may, and if required by the adjoining owner shall, at his own expense underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner so far as may be necessary.

(4) Where the buildings or structures of different owners are within the respective distances mentioned in subsections (1) and (2) the owners of those buildings or structures shall be deemed to be adjoining owners for the purposes of this section.

(5) In any case where this section applies the building owner shall, at least one month before beginning to excavate, or excavate for

and erect a building or structure, serve on the adjoining owner a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner.

(6) The notice referred to in subsection (5) shall be accompanied by plans and sections showing—

(a) the site and depth of any excavation the building owner proposes to make;

(b) if he proposes to erect a building or structure, its site.

(7) If an owner on whom a notice referred to in subsection (5) has been served does not serve a notice indicating his consent to it within the period of fourteen days beginning with the day on which the notice referred to in subsection (5) was served, he shall be deemed to have dissented from the notice and a dispute shall be deemed to have arisen between the parties.

(8) The notice referred to in subsection (5) shall cease to have effect if the work to which the notice relates—

(a) has not begun within the period of twelve months beginning with the day on which the notice was served; and

(b) is not prosecuted with due diligence.

(9) On completion of any work executed in pursuance of this section the building owner shall if so requested by the adjoining owner supply him with particulars including plans and sections of the work.

(10) Nothing in this section shall relieve the building owner from any liability to which he would otherwise be subject for injury to any adjoining owner or any adjoining occupier by reason of work executed by him.

7. COMPENSATION ETC.

(1) A building owner shall not exercise any right conferred on him by this Act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier.

(2) The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act.

(3) Where a building owner in exercising any right conferred on him by this Act lays open any part of the adjoining land or building he shall at his own expense make and maintain so long as may be necessary a proper hoarding, shoring or fans or temporary construction for the protection of the adjoining land or building and the security of any adjoining occupier.

(4) Nothing in this Act shall authorise the building owner to place special foundations on land of an adjoining owner without his previous consent in writing.

(5) Any works executed in pursuance of this Act shall—

(a) comply with the provisions of statutory requirements; and

(b) be executed in accordance with such plans, sections and particulars as may be agreed between the owners or in the event of dispute determined in accordance with section 10;

and no deviation shall be made from those plans, sections and particulars except such as may be agreed between the owners (or surveyors acting on their behalf) or in the event of dispute determined in accordance with section 10.

8. RIGHTS OF ENTRY.

(1) A building owner, his servants, agents and workmen may during usual working hours enter and remain on any land or premises for the purpose of executing any work in pursuance of this Act and may remove any furniture or fittings or take any other action necessary for that purpose.

(2) If the premises are closed, the building owner, his agents and workmen may, if accompanied by a constable or other police officer, break open any fences or doors in order to enter the premises.

(3) No land or premises may be entered by any person under subsection (1) unless the building owner serves on the owner and the occupier of the land or premises—

(a) in case of emergency, such notice of the intention to enter as may be reasonably practicable;

(b) in any other case, such notice of the intention to enter as complies with subsection (4).

(4) Notice complies with this subsection if it is served in a period of not less than fourteen days ending with the day of the proposed entry.

(5) A surveyor appointed or selected under section 10 may during usual working hours enter and remain on any land or premises for the purpose of carrying out the object for which he is appointed or selected.

(6) No land or premises may be entered by a surveyor under subsection (5) unless the building owner who is a party to the dispute concerned serves on the owner and the occupier of the land or premises—

(a) in case of emergency, such notice of the intention to enter as may be reasonably practicable;

(b) in any other case, such notice of the intention to enter as complies with subsection (4).

9. EASEMENTS.

Nothing in this Act shall—

(a) authorise any interference with an easement of light or other easements in or relating to a party wall; or

(b) prejudicially affect any right of any person to preserve or restore any right or other thing in or connected with a party wall in case of the party wall being pulled down or rebuilt.

10. RESOLUTION OF DISPUTES.

(1) Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either—

(a) both parties shall concur in the appointment of one surveyor (in this section referred to as an "agreed surveyor"); or

(b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as "the three surveyors").

(2) All appointments and selections made under this section shall be in writing and shall not be rescinded by either party.

(3) If an agreed surveyor—

(a) refuses to act;

(b) neglects to act for a period of ten days beginning with the day on which either party serves a request on him;

(c) dies before the dispute is settled; or

(d) becomes or deems himself incapable of acting,

the proceedings for settling such dispute shall begin *de novo*.

(4) If either party to the dispute—

(a) refuses to appoint a surveyor under subsection (1)(b), or

(b) neglects to appoint a surveyor under subsection (1)(b) for a period of ten days beginning with the day on which the other party serves a request on him,

the other party may make the appointment on his behalf.

(5) If, before the dispute is settled, a surveyor appointed under paragraph (b) of subsection (1) by a party to the dispute dies, or becomes or deems himself incapable of acting, the party who appointed him may appoint another surveyor in his place with the same power and authority.

(6) If a surveyor—

(a) appointed under paragraph (b) of subsection (1) by a party to the dispute; or

(b) appointed under subsection (4) or (5),

refuses to act effectively, the surveyor of the other party may proceed to act *ex parte* and anything so done by him shall be as effectual as if he had been an agreed surveyor.

(7) If a surveyor—

(a) appointed under paragraph (b) of subsection (1) by a party to the dispute; or

(b) appointed under subsection (4) or (5),

neglects to act effectively for a period of ten days beginning with the day on which either party or the surveyor of the other party serves a request on him, the surveyor of the other party may proceed to act *ex parte* in respect of the subject matter of the request and anything so done by him shall be as effectual as if he had been an agreed surveyor.

(8) If either surveyor appointed under subsection (1)(b) by a party to the dispute refuses to select a third surveyor under subsection (1) or (9), or neglects to do so for a period of ten days beginning with the day on which the other surveyor serves a request on him—

(a) the appointing officer; or

(b) in cases where the relevant appointing officer or his employer is a party to the dispute, the Secretary of State,

may on the application of either surveyor select a third surveyor who shall have the same power and authority as if he had been selected under subsection (1) or subsection (9).

(9) If a third surveyor selected under subsection (1)(b)—

(a) refuses to act;

(b) neglects to act for a period of ten days beginning with the day on which either party or the surveyor appointed by either party serves a request on him; or

(c) dies, or becomes or deems himself incapable of acting, before the dispute is settled,

the other two of the three surveyors shall forthwith select another surveyor in his place with the same power and authority.

(10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter—

(a) which is connected with any work to which this Act relates, and

(b) which is in dispute between the building owner and the adjoining owner.

(11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary award.

(12) An award may determine—

(a) the right to execute any work;

(b) the time and manner of executing any work; and

(c) any other matter arising out of or incidental to the dispute including the costs of making the award;

but any period appointed by the award for executing any work shall not unless otherwise agreed between the building owner and the adjoining owner begin to run until after the expiration of the period prescribed by this Act for service of the notice in respect of which the dispute arises or is deemed to have arisen.

(13) The reasonable costs incurred in—

(a) making or obtaining an award under this section;

(b) reasonable inspections of work to which the award relates; and

(c) any other matter arising out of the dispute,

shall be paid by such of the parties as the surveyor or surveyors making the award determine.

(14) Where the surveyors appointed by the parties make an award the surveyors shall serve it forthwith on the parties.

(15) Where an award is made by the third surveyor—

(a) he shall, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors; and

(b) if it is served on their appointed surveyors, they shall serve it forthwith on the parties.

(16) The award shall be conclusive and shall not except as provided by this section be questioned in any court.

(17) Either of the parties to the dispute may, within the period of fourteen days beginning with the day on which an award made under this section is served on him, appeal to the county court against the award and the county court may—

(a) rescind the award or modify it in such manner as the court thinks fit; and

(b) make such order as to costs as the court thinks fit.

11. EXPENSES.

(1) Except as provided under this section expenses of work under this Act shall be defrayed by the building owner.

(2) Any dispute as to responsibility for expenses shall be settled as provided in section 10.

(3) An expense mentioned in section 1(3)(b) shall be defrayed as there mentioned.

(4) Where work is carried out in exercise of the right mentioned in section 2(2)(a), and the work is necessary on account of defect or want of repair of the structure or wall concerned, the expenses shall be defrayed by the building owner and the adjoining owner in such proportion as has regard to—

(a) the use which the owners respectively make or may make of the structure or wall concerned; and

(b) responsibility for the defect or want of repair concerned, if more than one owner makes use of the structure or wall concerned.

(5) Where work is carried out in exercise of the right mentioned in section 2(2)(b) the expenses shall be defrayed by the building owner and the adjoining owner in such proportion as has regard to—

(a) the use which the owners respectively make or may make of the structure or wall concerned; and

(b) responsibility for the defect or want of repair concerned, if more than one owner makes use of the structure or wall concerned.

(6) Where the adjoining premises are laid open in exercise of the right mentioned in section 2(2)(e) a fair allowance in respect of disturbance and inconvenience shall be paid by the building owner

to the adjoining owner or occupier.

(7) Where a building owner proposes to reduce the height of a party wall or party fence wall under section 2(2)(m) the adjoining owner may serve a counter notice under section 4 requiring the building owner to maintain the existing height of the wall, and in such case the adjoining owner shall pay to the building owner a due proportion of the cost of the wall so far as it exceeds—

(a) two metres in height; or

(b) the height currently enclosed upon by the building of the adjoining owner.

(8) Where the building owner is required to make good damage under this Act the adjoining owner has a right to require that the expenses of such making good be determined in accordance with section 10 and paid to him in lieu of the carrying out of work to make the damage good.

(9) Where—

(a) works are carried out, and

(b) some of the works are carried out at the request of the adjoining owner or in pursuance of a requirement made by him,

he shall defray the expenses of carrying out the works requested or required by him.

(10) Where—

(a) consent in writing has been given to the construction of special foundations on land of an adjoining owner; and

(b) the adjoining owner erects any building or structure and its

cost is found to be increased by reason of the existence of the said foundations,

the owner of the building to which the said foundations belong shall, on receiving an account with any necessary invoices and other supporting documents within the period of two months beginning with the day of the completion of the work by the adjoining owner, repay to the adjoining owner so much of the cost as is due to the existence of the said foundations.

(11) Where use is subsequently made by the adjoining owner of work carried out solely at the expense of the building owner the adjoining owner shall pay a due proportion of the expenses incurred by the building owner in carrying out that work; and for this purpose he shall be taken to have incurred expenses calculated by reference to what the cost of the work would be if it were carried out at the time when that subsequent use is made.

12. SECURITY FOR EXPENSES.

(1) An adjoining owner may serve a notice requiring the building owner before he begins any work in the exercise of the rights conferred by this Act to give such security as may be agreed between the owners or in the event of dispute determined in accordance with section 10.

(2) Where—

(a) in the exercise of the rights conferred by this Act an adjoining owner requires the building owner to carry out any work the expenses of which are to be defrayed in whole or in part by the adjoining owner; or

(b) an adjoining owner serves a notice on the building owner under subsection (1),

the building owner may before beginning the work to which the requirement or notice relates serve a notice on the adjoining owner requiring him to give such security as may be agreed between the owners or in the event of dispute determined in accordance with section 10.

(3) If within the period of one month beginning with—

(a) the day on which a notice is served under subsection (2); or

(b) in the event of dispute, the date of the determination by the surveyor or surveyors,

the adjoining owner does not comply with the notice or the determination, the requirement or notice by him to which the building owner's notice under that subsection relates shall cease to have effect.

13. ACCOUNT FOR WORK CARRIED OUT.

(1) Within the period of two months beginning with the day of the completion of any work executed by a building owner of which the expenses are to be wholly or partially defrayed by an adjoining owner in accordance with section 11 the building owner shall serve on the adjoining owner an account in writing showing—

(a) particulars and expenses of the work; and

(b) any deductions to which the adjoining owner or any other person is entitled in respect of old materials or otherwise;

and in preparing the account the work shall be estimated and valued at fair average rates and prices according to the nature of the work, the locality and the cost of labour and materials prevailing at the time when the work is executed.

(2) Within the period of one month beginning with the day of service of the said account the adjoining owner may serve on the building owner a notice stating any objection he may have thereto and thereupon a dispute shall be deemed to have arisen between the parties.

(3) If within that period of one month the adjoining owner does not serve notice under subsection (2) he shall be deemed to have no objection to the account.

14. SETTLEMENT OF ACCOUNT.

(1) All expenses to be defrayed by an adjoining owner in accordance with an account served under section 13 shall be paid by the adjoining owner.

(2) Until an adjoining owner pays to the building owner such expenses as aforesaid the property in any works executed under this Act to which the expenses relate shall be vested solely in the building owner.

15. SERVICE OF NOTICES ETC.

(1) A notice or other document required or authorised to be served under this Act may be served on a person—

(a) by delivering it to him in person;

(b) by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom; or

(c) in the case of a body corporate, by delivering it to the secretary or clerk of the body corporate at its registered or principal office or sending it by post to the secretary or clerk of that body corporate at that office.

(1A) A notice or other document required or authorised to be served under this Act may also be served on a person ("the recipient") by means of an electronic communication, but only if—

(a) the recipient has stated a willingness to receive the notice or document by means of an electronic communication,

(b) the statement has not been withdrawn, and

(c) the notice or document was transmitted to an electronic address specified by the recipient.

(1B) A statement under subsection (1A) may be withdrawn by giving a notice to the person to whom the statement was made.

(1C) For the purposes of subsection (1A)—

- "electronic address" includes any number or address used for the purposes of receiving electronic communications;
- "electronic communication" means an electronic communication within the meaning of the Electronic Communications Act 2000; and
- "specified" means specified in a statement made for the purposes of subsection (1A).**]**

(2) In the case of a notice or other document required or authorised to be served under this Act on a person as owner of premises, it may alternatively be served by—

(a) addressing it "the owner" of the premises (naming them), and

(b) delivering it to a person on the premises or, if no person to whom it can be delivered is found there, fixing it to a conspicuous part of the premises.

16. OFFENCES.

(1) If—

(a) an occupier of land or premises refuses to permit a person to do anything which he is entitled to do with regard to the land or premises under section 8(1) or (5); and

(b) the occupier knows or has reasonable cause to believe that the person is so entitled,

the occupier is guilty of an offence.

(2) If—

(a) a person hinders or obstructs a person in attempting to do anything which he is entitled to do with regard to land or premises under section 8(1) or (5); and

(b) the first-mentioned person knows or has reasonable cause to believe that the other person is so entitled,

the first-mentioned person is guilty of an offence.

(3) A person guilty of an offence under subsection (1) or (2) is liable on summary conviction to a fine of an amount not exceeding level 3 on the standard scale.

17 RECOVERY OF SUMS.

Any sum payable in pursuance of this Act (otherwise than by way of fine) shall be recoverable summarily as a civil debt.

18. EXCEPTION IN CASE OF TEMPLES ETC.

(1) This Act shall not apply to land which is situated in inner London and in which there is an interest belonging to—

(a) the Honourable Society of the Inner Temple,

(b) the Honourable Society of the Middle Temple,

(c) the Honourable Society of Lincoln's Inn, or

(d) the Honourable Society of Gray's Inn.

(2) The reference in subsection (1) to inner London is to Greater London other than the outer London boroughs.

19. THE CROWN.

(1) This Act shall apply to land in which there is—

(a) an interest belonging to Her Majesty in right of the Crown,

(b) an interest belonging to a government department, or

(c) an interest held in trust for Her Majesty for the purposes of any such department.

(2) This Act shall apply to—

(a) land which is vested in, but not occupied by, Her Majesty in right of the Duchy of Lancaster;

(b) land which is vested in, but not occupied by, the possessor for the time being of the Duchy of Cornwall.

20. INTERPRETATION.

In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them—

- "adjoining owner" and "adjoining occupier" respectively mean any owner and any occupier of land, buildings, storeys or rooms adjoining those of the building owner and for the purposes only of section 6 within the distances specified in that section;

- "appointing officer" means the person appointed under this Act by the local authority to make such appointments as are required under section 10(8);

- "building owner" means an owner of land who is desirous of exercising rights under this Act;

- "foundation", in relation to a wall, means the solid ground or artificially formed support resting on solid ground on which the wall rests;

- "owner" includes—

(a)

a person in receipt of, or entitled to receive, the whole or part of the rents or profits of land;

(b)

a person in possession of land, otherwise than as a mortgagee or as a tenant from year to year or for a lesser term or as a tenant at will;

(c)

a purchaser of an interest in land under a contract for purchase or under an agreement for a lease, otherwise than under an agreement for a tenancy from year to year or for a lesser term;

- "party fence wall" means a wall (not being part of a building) which stands on lands of different owners and is used or constructed to be used for separating such adjoining lands, but does not include a wall constructed on the land of one owner the artificially formed support of which projects into the land of another owner;

- "party structure" means a party wall and also a floor partition or other structure separating buildings or parts of buildings approached solely by separate staircases or separate entrances;

- "party wall" means—

(a)

a wall which forms part of a building and stands on lands of different owners to a greater extent than the projection of any artificially formed support on which the wall rests; and

(b)

so much of a wall not being a wall referred to in paragraph (a) above as separates buildings belonging to different owners;

- "special foundations" means foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load; and

- "surveyor" means any person not being a party to the matter appointed or selected under section 10 to determine disputes in accordance with the procedures set out in this Act.

21. OTHER STATUTORY PROVISIONS.

(1) The Secretary of State may by order amend or repeal any provision of a private or local Act passed before or in the same session as this Act, if it appears to him necessary or expedient to do so in consequence of this Act.

(2) An order under subsection (1) may—

(a) contain such savings or transitional provisions as the Secretary of State thinks fit;

(b) make different provision for different purposes.

(3) The power to make an order under subsection (1) shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

22. SHORT TITLE, COMMENCEMENT AND EXTENT.

(1) This Act may be cited as the Party Wall etc. Act 1996.

(2) This Act shall come into force in accordance with provision made by the Secretary of State by order made by statutory instrument.

(3) An order under subsection (2) may—

(a) contain such savings or transitional provisions as the Secretary of State thinks fit;

(b) make different provision for different purposes.

(4) This Act extends to England and Wales only.

PARTY WALLS

A collection of articles concerning the law and practice of the Party Wall etc. Act 1996.

Written by a retired Judge, Queen's Counsellor, the President of the Faculty of Party Wall Surveyors, along with the best party wall surveyors, and solicitors around, this book gives the reader an insight into how different people view the Party Wall Act. With views from a checking engineer and a software developer, we really have some outstanding material from a great mix of people with different skillsets.

This book is essential reading for those who want to get different perspectives on the Act. The authors have written freely, and it is likely that the material contained within this book will be debated for years to come.