Party wall disputes: in on the Act?

Jamie Sutherland & **Imogen Dodds** consider the respective scope of the Party Wall etc Act 1996 & the common law

IN BRIEF

- An owner cannot use a statutory dispute resolution procedure where their neighbour has carried out works without serving a statutory party wall notice.
- Their recourse is to the courts and common law when the statutory scheme has not been followed or does not apply.
- Time and costs can be saved by both parties following proper procedures.

In the recent Court of Appeal case of *Shah and another v Power* [2023] EWCA Civ 239, [2023] All ER (D) 29 (Mar), Mr Shah had carried out works to his semi-detached house. Rightly or wrongly, his planning consultant had advised that the Party Wall etc Act 1996 (PWA 1996) did not apply to his works, and that there was consequently no need for him to serve prior notice of the works on the adjoining owners under s 3, PWA 1996. The adjoining owners subsequently claimed to have suffered damage as a result of the works, which allegedly included the removal of a chimney breast from the party wall.

Rather than bring a county court claim against Mr Shah in nuisance or trespass, the adjoining owners purported to appoint a surveyor, Mr Kyson, to act for them under the dispute resolution procedure in s 10, PWA 1996. When Mr Shah refused to appoint his own surveyor under s 10, Mr Kyson invoked the statutory default procedure to appoint another surveyor, Mr Lee, to act on Mr Shah's behalf. The two surveyors proceeded to make an award under s 10, determining that Mr Shah should have served a party structure notice under s 3, and that he must pay £4,223.49 in compensation to the adjoining owners for damage caused by his works, and £4,630 in fees to the surveyors. When Mr Shah did not pay, the surveyors commenced proceedings against him in the magistrates' court, under s 17, PWA 1996, for non-payment of their fees.

Mr Shah then commenced his own CPR Part 8 claim against the surveyors in the county court, contending that PWA 1996 did not apply, the statutory dispute resolution procedure had not been engaged, and that the award was therefore null and void. Mr Shah succeeded at first instance before Judge Parfitt, and again on the surveyors' first appeal before Mr Justice Eyre in the High Court ([2022] EWHC 209 (QB), [2022] All ER (D) 68 (Feb)). The surveyors brought a second appeal, and the Court of Appeal recently gave judgment on the 'novel but important issue' of whether an adjoining owner can seek to rely on the dispute resolution procedure under s 10, PWA 1996 in circumstances where the building owner, who wishes to carry out or who has carried out building works, has served no notice under PWA 1996 in respect of the works and maintains that PWA 1996 does not apply.

Breaking up: the rival contentions

The parties' submissions in the Court of Appeal were a re-run of their arguments in the lower courts. For the appellant surveyors, it was argued that the purpose of PWA 1996 was to resolve disputes between neighbouring owners without the parties needing to go to court. It would be contrary to that purpose to allow building owners unilaterally to deprive adjoining owners of the benefit of the s 10 procedure, by refusing to acknowledge the applicability of PWA 1996 and thus refusing to serve notice of works under it. This would leave adjoining owners with no other option but to bring a court claim in respect of the works.

For Mr Shah, it was argued that PWA 1996 did not replace the common law. PWA 1996 provided the building owner with new rights in respect of party walls which he would not have had at common law, but these were only available to him if he triggered PWA 1996's processes by serving prior notice of his works under it. If there was no notice, PWA 1996 simply did not apply, and the position was governed by the common law: the adjoining owners could not proceed as though PWA 1996 applied, because on their case the building owner *should* have served a notice and triggered the statutory mechanisms; and they could not force a surveyors' award on the building owner, when his consistent position had been that PWA 1996 did not apply. If the adjoining owners were aggrieved by the works, and no notice had been served under PWA 1996, then they could bring a claim in court.

The construction of PWA 1996

The Court of Appeal (Lords Justice Coulson and Lewison and Lady Justice Elisabeth Laing) dismissed the surveyors' appeal unanimously, upholding the courts below in deciding that the s 10 procedure was not engaged in the absence of a s 3 notice from the building owner, and that accordingly the award was null and void.

The starting point was to look at the purpose and wording of PWA 1996. Section 2, PWA 1996 applies to situations where buildings sit over the boundary line (eg as in the case of semi-detached houses), or where a free-standing boundary wall or the external wall of a building sits on the boundary line. In such situations, a building owner may exercise various rights under s 2(2), PWA 1996, including underpinning, thickening, or raising the party structure, and repairing, demolishing and rebuilding the party structure. The potentially relevant entitlement in *Shah v Power* was to cut away a chimney breast, under s 2(2)(g), PWA 1996.

Section 3, PWA 1996 provides that, before exercising any s 2 rights, a building owner 'shall serve' a party structure notice on the adjoining owners, at least two months before the proposed start date of the works, giving details of the works. An adjoining owner can then serve a counter-notice under s 4, which may, among other matters, specify works which they requires the building owner to execute as part of their project. Section 5 provides that if the recipient of a s 3 party structure notice or a s 4 counter-notice does not serve a notice indicating their consent to it within 14 days, then a dispute shall be deemed to have arisen between the parties.

Section 10 contains PWA 1996's dispute resolution procedure. Section 10(1) provides that 'where a dispute arises or is deemed to have arisen between a building owner and adjoining owner in respect of any matter connected with any work to which this Act relates', then either both parties shall concur in the appointment of a single surveyor (an agreed surveyor), or each party shall appoint their own surveyor, with those two surveyors then jointly appointing a third surveyor (together, the three surveyors). Section 10(4) provides that if either party refuses to engage, then the other may appoint a surveyor on their behalf. Section 10(10) provides that an agreed surveyor, or the three surveyors or any two of them, may by award settle any matter 'which is connected with any work to which this Act relates'.

The Court of Appeal held, as a matter of statutory interpretation, that the s 10 procedure was only engaged when the building owner had served prior notice of their intention to do works under PWA 1996:

- A building owner's rights under s 2 are expressly subject to and conditional upon serving a party structure notice under s 3. Such notice is mandatory—'the building *shall* serve'—and its service is fundamental to the scheme of PWA 1996, including the dispute resolution procedure.
- While one of the purposes of PWA 1996 is to provide a dispute resolution procedure without the need to go to court, that is not its only purpose. Equally important is the requirement for a s 3 notice to be served before the works, so that the parties can consider and agree the scope of the works.
- There is nothing in PWA 1996 which allows an adjoining owner unilaterally to impose the s 10 procedure on the building owner: if this had been intended, it would have required clear words in PWA 1996.
- An adjoining owner is not left without remedy if a building owner carries out works without serving a s 3 notice: they can bring claims in trespass, nuisance and negligence as appropriate, and seek damages. Conversely, if an adjoining owner could compulsorily impose the s 10 procedure on a building owner, they could obstruct the building owner's access to the courts: in this case, Mr Shah had missed the strict 14-day deadline for appealing a s 10 award.

Before PWA 1996 came into force, rights in party walls in most of the country were regulated by the common law. In some places, notably London, they were regulated by local Acts of Parliament: the immediate predecessor statute to PWA 1996 was the London Building Acts (Amendment) Act 1939 (LBA(A)A 1939). For the surveyors in *Shah v Power*, much was made of the fact that the dispute resolution procedure in s 55, LBA(A)A 1939 applied to 'any matter to which *a notice* under this part of this Act relates… [and which] may be in dispute between the building owner and the adjoining owner'. On the other hand, s 10, PWA 1996 does not refer to the need for a notice, but applies to a dispute or deemed dispute which is 'connected with any work to which this Act relates'. Although a 'deemed dispute' could only arise following service of a notice, it was argued that a 'dispute' could arise without service of a notice.

The Court of Appeal rejected these arguments. Lewison LJ considered that the change in wording between LBA(A)A 1939 and PWA 1996 did not justify the radically expanded scope of the dispute resolution procedure that was being argued for: according to its promoter in Parliament, the Earl of Lytton, the intention of PWA 1996 had been to extend the 'tried and tested' procedures under LBA(A)A 1939 to the rest of the country, not to introduce a new scheme. Coulson LJ considered that the link between ss 3 and 10, PWA 1996 was clear: although s 10 applied generally to 'work to which this Act relates', such work could only be authorised under PWA 1996 following service of notice by the building owner.

Building on the case law

While focusing on the scheme and wording of the legislation itself, the Court of Appeal also considered previous authorities. Although none were directly on point, they were consistent with the court's interpretation of PWA 1996:

- In *Woodhouse v Consolidated Property Corpn Ltd* (1992) 66 P & CR 234, after notices had been served regarding the construction of a wall, surveyors acting under LBA(A)A 1939 made a purported award determining the building owner to be liable for damage caused when the wall collapsed. The Court of Appeal held the surveyors had no jurisdiction to determine such disputes, but only those to which the notices, and any earlier consent or award under LBA(A)A 1939, related: service of the notices was therefore considered paramount in defining the ambit of a dispute.
- In *Louis v Sadiq* (1996) 74 P & CR 325, a building owner carried out works to a party wall without serving notice, only following LBA(A)A 1939 procedure later after the adjoining owner obtained an injunction. The adjoining owner subsequently brought a damages claim in nuisance: while the Court of Appeal observed that there would have been no nuisance if the statutory procedure had been properly followed and the works carried out in accordance with it, the court rejected the building owner's argument that LBA(A)A 1939's provisions ousted the application of the common law, in circumstances where a prior notice had not been served.
- Both these authorities under LBA(A)A 1939 were endorsed by the Court of Appeal in a PWA 1996 case, *Reeves v Blake* [2009] EWCA Civ 611, [2009] All ER (D) 253 (Jun). There, it was held that surveyors acting under PWA 1996, after notices had been served, did not have jurisdiction to award costs to an adjoining owner incurred in respect of contemplated court proceedings after the building owner had mistakenly carried out unauthorised works: s 10 only applied to disputes arising under PWA 1996.

Home improvement tips

This case has provided helpful confirmation from the Court of Appeal that PWA 1996's dispute resolution procedure only applies when a building owner has served proper notice of his works in accordance with PWA 1996: the statutory scheme cannot be relied on by an adjoining owner where a building owner disputes the application of PWA 1996 and has not served notice.

However, the underlying dispute in *Shah v Power* has not been resolved by these proceedings, despite the case having gone up to the Court of Appeal. This litigation was between Mr Shah and the surveyors as to the validity of the surveyors' award, and not between Mr Shah and his neighbours: there has been no determination by the court as to whether Mr Shah should actually have served a s 3 notice, or whether he is liable for the damage allegedly caused by his works.

The case is a salutary warning to property owners and their professional advisers to ensure that party wall matters are dealt with properly. Building owners should serve notice when PWA 1996 applies, to give themselves and their neighbours the benefit of the statutory scheme, and the time and costs savings that can be gained from the statutory dispute resolution procedure if it proves necessary. Equally, both parties (and their surveyors and solicitors) should ensure that time and costs are not wasted on the statutory dispute resolution procedure where it does not apply, or its application is disputed. NLJ

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