VOLUME 2

PARTY WALLS

BENJAMIN MACKIE

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

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Party Walls Volume 2: Articles concerning the law and practice of the Party Wall etc. Act 1996
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"This book is dedicated to the memory of Stuart Frame, party wall barrister, who generously gave of his time and expertise to so many in the party wall community, and who will be widely and sorely missed."

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INTRODUCTION

Benjamin Mackie

Following the success of the first party wall book of articles, I decided there was more than enough interest to do a second book. I am once again grateful to all who have contributed, whether by submitting an article, or supplying me with beautiful artwork. This book depends on goodwill, and I am pleased to see we have this in abundance.

I cannot go any further without mentioning the sad passing of Stuart Frame, the son of Alex Frame, the President of the Faculty of Party Wall Surveyors. I pass my heartfelt condolences to his family and friends. He was someone that I knew personally, and he contributed a great article to the first party wall book of articles. During my many emails and conversations with him, I found him to be intelligent, thoughtful, candid, and humble. I know he is a great loss, and I cannot imagine the pain that those close to him must bear. As a community, I know we will support each other where we can, and I leave my thoughts and prayers with his family and friends.

The purpose of this 'project' of which this book is one part, is to encourage debate and the exchanging of ideas. I would like people to understand the differing opinions on offer, and to respect those opinions. An example of this project working well is where we have Edward Bailey's article titled 'No myth: the party wall surveyor must

act impartially'. It is an excellent article, which directly addresses my own article in the first book titled 'The impartiality myth'. My aim has always been to encourage healthy debate, and we saw that in the first book again, with two articles on 'limitation' which drew different conclusions from *K Group Holdings Inc v Saidco International SA* (19 July 2021, CLCC). It is vital that we question things, and indeed one of my favourite philosophers said *'Judge a man by his questions rather than his answers'* (Voltaire). Asking questions shows a willingness to learn, and that you are open to new ideas.

I hope that this book provides the reader with new ideas, and a better understanding of the party wall act. I hope that it encourages debate. It isn't easy to submit an article, putting yourself in the firing line, so I appreciate every one of you who contributed. Every author deserves respect, having taken the time out of their busy lives to contribute to this amazing book. The book is free, and the articles ensure there is a wealth of thought-provoking literature available for those with an interest in party wall matters and construction dispute resolution.

Enjoy.

Benjamin Mackie
(Editor)

1. PARTY WALLS AT COMMON LAW

IS THE 1996 ACT OPTIONAL?

Matthew Hearsum

The decision of the Court of Appeal in *Power & Kyson v Shah [2023] EWCA Civ 239* ("***Power***") confirmed that the Party Wall etc Act 1996 ("***1996 Act***"), and in particular the right to appoint a tribunal of surveyors to determine a dispute, only applies if and when the building owner has served a notice under the 1996 Act. This principle is summarised in the now popular exclamation *"No Notice, No Act*".

But the decision in *Power* is not limited to the rights of adjoining owners. Whilst attention was quite rightly focussed on the impact of the decision on whether adjoining owners could appoint surveyors without a notice, the Court of Appeal also decided an arguably more interesting, and certainly more far-reaching, point that so far appears to have escaped unremarked upon by legal and surveying commentators.

NO NOTICE, NO ACT

The legal principle established in *Power* (what lawyers called the "*ratio decidendi*" as opposed to other things the Court drops in causally whilst chatting, called "*obiter dicta*") is that the 1996 Act only applies when the building owner has served a notice. This means that, unless and until a notice is served, an adjoining owner may not appoint a tribunal of surveyors under the 1996 Act, but still enjoys their rights at common law to, for example, bring claims in trespass or private nuisance should their property right be infringed.

However, it also means that, unless and until they serve a notice, the building owner also continues to enjoy all their rights at common law. The common law rights that the building owner enjoys are only replaced by their statutory rights if and when the building owner chooses to serve a notice. The building owner therefore may, if they chose, undertake works solely using their common law rights, and not exercise their statutory rights. The common law rights that the building owner enjoys are addressed later in this article.

"But the rights in the 1996 Act replace the common law!" I hear many voices cry. In the words of Lord Justice Lewison, (with whom Lady Justice Elizabeth Laing agreed): *"So they do, but only once the [1996] Act has been brought into operation"*. Until then the building owner remains free to exercise their common law rights. As put by Lewison LJ *"…it is the service of the party structure notice that causes the substitution of rights under the Act for common law rights…"*.

the substitution of rights under the Act for common law rights…".

In his judgment Lewison LJ explained that this point was not novel, but was in fact consistent with the previous authorities on this point:

- In *Standard Bank of British South America v Stokes*[1] the Court of Appeal did conclude that the Metropolitan Building Act 1855 "superseded" the rights of the building owner at common law.

- In *Selby v Whitbread & Co*[2] the High Court concluded that the London Building Act 1894 *"…is not an addition to but in substitution for the common law with respect to matters which fall within the Act. It is a governing and exhaustive code, and the common law is by implication repealed"*.

Lewison LJ observed that in both those cases the Court was dealing with a building owner who had served a notice and engaged provisions of the relevant Act. By serving the notice, the building owner's common law rights had been replaced by statutory rights.

Turning to previous decisions where a notice was not served, Lewison LJ observed:

- In *Louis v Sadiq*[3] the Court of Appeal explained that *"…the adjoining owner's common law rights are supplanted* ***when the statute is invoked****, which can have the effect of safeguarding the building owner from common law liabilities when he complies with the statutory procedures…"* [emphasis supplied].

- In *Rodrigues v Sokal*[4] the High Court said *"… **until such time as the Party Wall etc Act 1996 is invoked** … the building owner cannot rely upon a statutory defence… If the building owner subsequently obtains authority … that authority abates the common law rights from the time of the subsequent consent or when the Party Wall etc*

1 *(1878) 9 Ch D 68*

2 *(1917) 1 KB 736*

3 *(1997) 74 P & CR 75*

4 *(2008) EWHC 2005 (TCC)*

Act procedure was successfully invoked. If the works were never or would never subsequently have been authorised, ***the common law rights continue****."*

- In *Kaye v Lawrence*[5] the High Court said *"These authorities [Selby and Louis] show that,* ***when the provisions of the relevant Act are operated****, the common law rights are "supplanted" or "substituted" by the rights under the Act in relation to matters dealt with under the Act"* [emphasis supplied].

- In *Group One Investments Ltd v Keane*[6] the Court of Appeal said *"If for any reason* ***the statutory procedure is not followed****, then* ***the parties' respective common law rights and obligations continue to apply****."* [emphasis supplied]. Lewison LJ explained that in this decision the Court of Appeal *"…contemplated that both parties' common law rights remained in being, not simply those of the adjoining owner."*

Lewison LJ observed that each of these decisions confirms that the 1996 Act only replaces common law rights for both the adjoining owner and the building owner if the 1996 Act is invoked, i.e., when a notice is served. Until such time as the building owner serves a notice under the 1996 Act, they may choose to exercise their common law rights.

So, what are the rights in party walls at common law?

5 *(2010) EWHC 2678 (TCC)*

6 *(2018) EWCA Civ 3139*

WORKS TO AN EXISTING PARTY WALL

What rights the building owner has at common law to undertake works to an existing party wall will depend on what type of party wall it is. Surveyors will be aware that there are two types of party wall in the 1996 Act, commonly referred to as "type (a)" and "type (b)" for their numbering in the definition of "party wall" in section 20 of the 1996 Act.

At common law there are four types of party wall. Each of these types is described in the leading authority on the classification of party walls at common law, *Watson v Gray (1880) 14 Ch. D. 192:*

(1) *"A wall of which the two adjoining owners are tenants in common, as in Wiltshire v Sidford and Cubitt v Porter ."*

Prior to 1926 it was possible for two adjoining owners to hold a party wall in common ownership as tenants in common. However, the Law of Property Act 1925 abolished the ability to hold a legal estate as tenants in common, and section 38 provided that for party walls *"…shall be and remain severed vertically as between the respective owners, and the owner of each part shall have such rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created"*. In other words, after 1926 type (1) party walls became type (4) party walls as described below.

(2) *"A wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in Matts v. Hawkins"*

This type of party wall is similar to a type (a) party wall under the 1996 Act except that there are no reciprocal rights over the other half of the wall. This means that one owner may do what they like with their half of the wall and, provided they act with reasonable care, there is no liability

for damage to the other half[7]. This includes demolishing their half of the wall, even if this leaves a structure which is incapable of standing on its' own[8].

This type of party wall is rare in practice because the effect of section 62 of the Law of Property Act 1925 (and section 6 of the Conveyancing and Law of Property Act 1881 before it) is that, when two properties are built with a party wall and sold off separately, the law will usually imply into the conveyances that separate them easements of user and support over the other half of the wall. This implication is only disturbed when there is clear evidence of a contrary intention in the conveyance itself.

Even if a type (2) wall was successfully created, it would not exist for very long. After 20 years each owner would likely acquire easements of user and support by prescription under the doctrine of lost modern grant, in which case they would become type (4) party wall as described below.

(3) *"A wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the Building Acts."*

This is similar to the type (b) party wall in the 1996 Act.

The owner of the wall may do as they please with it, provided they take reasonable care and do not infringe the other owner's right to use the wall as a dividing wall.

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7 *Bradbee v Governors of Christ's Hospital (1842) 4 Man. & G. 714* at 760

8 *Wigford v Gill 78 E.R. 524; Cubitt v Porter 108* E.R. 1039 at 264

The owner of the wall is under no positive obligation to repair the wall and may allow it to fall into disrepair, even if that disrepair interferes with the other owner's right to use the wall[9].

The owner whose building is enclosed against the wall does have a right to undertake repairs to the wall so far as reasonably necessary to use the wall as a dividing wall, and may enter onto the other owner's land in order to affect those repairs[10].

(4) "...a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety."

This is similar to the type (a) wall in the 1996 Act, where the boundary line sits somewhere inside the wall — usually, but not always, in the middle — with each portion subject to easements of user and support over the other.

Each owner may do what they like with their half of the wall provided that (a) they take reasonable care and (b) do not interfere with the easements of user and support in favour of the other owner. This would include, for example, cutting to into to the wall up to, but not across, the boundary line.

Neither owner is under a positive obligation to repair their half of the wall and has no is under no liability if their half is allowed to fall into disrepair by inaction, but as with type (3) party walls the other owner may repair their neighbour's

9 *Jones v Pritchard [1908] 1 Ch. 630 at 637*

10 *Jones v Pritchard ibid* at 368

half and may enter their neighbour's property for the purpose of those repairs[11].

Unlike type (2) party walls, the presence of easements of user and support prevents the parties permanently pulling down their half of the wall[12], but either owner may demolish and rebuild the whole wall, provided it is done with reasonable care and speed[13].

At common law there is no concept similar to the horizontal divisions referred to in the definition of "party structure" in the 1996 Act. There is also no distinction drawn between party walls and "party fence walls" as in the 1996 Act.

ADJACENT EXCAVATION

At common law, the starting point is that an owner of land may do as they wish with their land, provided they cause no damage or unlawful interference with adjoining land. This includes excavations within three of six metres of the boundary line, irrespective of the depth of those excavations.

Whether the proposed excavations are likely or unlikely to cause subsidence of the land or settlement of buildings on the land, and therefore comprise either a nuisance and/or an interference with a right of support, is a question for expert evidence. I commend Mike Clark's excellent article in the first book of this series[14], "The

11 Jones v Pritchard ibid at 637; Sack v Jones [1925] Ch. 235.

12 *Upjohn v Seymour Estates Ltd [1938] 1 All E.R. 614; Brace v SE Regional Housing Association Ltd [1984] 1 E.G.L.R. 144*

13 *Cubitt v Porter ibid* at 264

14 Party Walls; articles concerning the law and practice of the Party Wall etc Act 1996.

Technical Implications of Section 6" for a wonderfully simple explanation that even a lawyer could understand.

CONSTRUCTION AT OR NEAR THE BOUNDARY

As with adjacent excavations, at common law an owner of land may (almost) do as they wish with their land. This includes the construction of a wall at or near the boundary with adjoining land.

However, unlike the statutory right in section 1 of the 1996 Act, the common law does not allow an owner to project foundations beneath adjoining land. Nor are there rights of access to adjoining land similar to section 8 of the 1996 Act, or indeed at all, and so the building owner would face significant difficulties in pointing or rendering the new wall.

CONCLUSION

The complex interrelation of rights and responsibilities that building and adjoining owners enjoy at common law explains the need for the 1996 Act and its predecessors, which provide a speedy and (mostly) cost-effective means of resolving disputes compared to legal proceedings.

The 1996 Act also includes rights that do not exist at common law — for example, the right to underpin a party wall in section 2(2)(a) of the 1996 Act — or rights that are more expansive than those at common law, such as the right to demolish and rebuild a party wall to a greater height under section 2(2)(e).

Surveyors should familiarise themselves with these common law rights, particularly where they are a viable alternative to proceeding under the 1996 Act. That said, building owners should, in my view,

always be encouraged to seek independent legal advice before proceeding with works under their common law rights.

Surveyors may also wish to include a clause in their terms and conditions — particularly when acting for building owners — explaining that their appointing owner might enjoy common law rights as an alternative to the statutory rights for which you are being appointed, but that the appointing owner should seek independent legal advice on those rights. This clause would remove any later complaints that surveyors had not advised their appointing owners as to the existence (or otherwise) of their rights at common law.


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2. WHAT CAN AN ADJOINING OWNER DO AFTER POWER V SHAH

IS IT REALLY A CASE OF "I CAN'T GET NO SATISFACTION"?

Nicholas Isaac KC

INTRODUCTION

In *Power v Shah* [2023] EWCA 239 the Court of Appeal concluded clearly that the Act cannot apply unless a notice under the Act has been served on the adjoining owner. This article seeks to explore where this decision leaves an adjoining owner faced with a building owner who has failed or refused to comply with his obligation to serve notice under the Act, but is either undertaking or has undertaken notifiable works.

Common law claims

In the absence of the Act, the adjoining owner has to rely on the common law to bring the building owner back onto the straight and narrow. Although the common law covers a wide range of different types of claims — also known as "causes of action" — in party wall matters the two usual types of claim are nuisance and/or trespass.

Nuisance

Nuisance is a type of claim based on unreasonable use of land. Since undertaking building work is a perfectly reasonable use of land in itself, the test for whether a building owner has committed a nuisance in respect of such work is whether the building owner has taken all reasonable steps to avoid causing unnecessary inconvenience to the adjoining owner — see *Andreae v Selfridges Co Ltd* [1938] Ch. 1

Many party wall surveyors will immediately recognise that this common law test precisely reflects the wording of section 7(1) of the Act, and this is no accident. Where the Act has been invoked by service of a notice, and notifiable building works are then undertaken pursuant to the Act, the building owner is under a duty, precisely as they are at common law, not to cause unnecessary inconvenience to the adjoining owner whilst undertaking such works. The unnecessary inconvenience in such circumstances is usually vibration, noise and/or dust.

In addition, a claim in nuisance arises where the building owner does something on their own land which causes *physical* damage to the adjoining owner's land. An obvious example in the party wall arena is where excavation on the building owner's land causes ground movement beneath and in the vicinity of the party wall, which in turn causes movement or cracks in the adjoining owner's building.

It is worth noting that a claim in nuisance arises whether or not the works causing the unnecessary inconvenience or physical damage are notifiable party wall works.

Trespass

In the party wall context trespass involves a building owner entering an adjoining owner's land without permission. This is not limited to a person physically entering an adjoining owner's land themselves or by their workmen, but also refers to building materials. Three examples serve to illustrate this point:

(1) Where a party wall is increased in height by a building owner, the bricks laid beyond the mid-point of the party wall — where the boundary line runs — will be trespassing;

(2) Erecting scaffolding on the adjoining owner's land, or which overhangs the adjoining owner's land, will constitute trespass, as will using that scaffolding;

(3) Underpinning the party wall will constitute trespass, both as to the excavations prior to casting the underpin, but also by the underpins in their permanent form, at least in so far as either of these go beyond the mid-point of the party wall and onto the adjoining owner's land.

So, it is fair to say that practically all notifiable party wall work, if undertaken without a party wall notice having been served, will give rise to a claim in nuisance and/or trespass. But to what remedies do such claims entitle you? The answer depends on whether such works are still underway, or whether they have been completed.

NOTIFIABLE WORKS BEING UNDERTAKEN

Where notifiable works are being undertaken by a building owner who has not served notice under the Act, the primary remedy available is an injunction, that is to say an order from the Court which requires the building owner to stop those works under the threat of an unlimited fine or imprisonment if they fail to comply with the court order.

As with most things, there are pros and cons to obtaining an injunction.

On the positive side of the equation, an injunction is the ultimate attention-grabbing stick with which to beat a building owner back to the lawful path they should have taken in the first place. In most cases, if an adjoining owner obtains an interim injunction at a without notice hearing, the building owner — usually as soon as they obtain competent advice — will concede they were in the wrong, accept liability for costs, and will serve whatever party wall notice they need to serve in order to regulate matters. The two main reasons for this are (1) the building owner is at risk of very substantial costs orders against them if the injunction action continues, and (2) their works can be delayed for a significant period unless they reach accommodation with the adjoining owner fairly swiftly.

Further, courts are generally extremely willing to grant interim injunctions where it is even reasonably clear that a building owner is carrying out notifiable works without the benefit of written consent or an award authorising such works.

Finally, although the rule of thumb in relation to legal costs is that a successful claimant can expect to recover about two-thirds of the money they have actually had to spend on legal costs, my experience is that courts are relatively generous when assessing costs in respect of injunction applications, so it might be reasonable to assume that costs recovery will be in the region of 75% or even

better. Indeed, recovery can sometimes be 100% if agreement can be reached with the building owner prior to what is called the "return date" of the injunction — i.e. a hearing usually 7-14 days after the initial injunction application, when the Defendant has the time and opportunity to put in evidence in response to the Claimant's evidence, and to argue, if they can, that the injunction should not continue.

On the negative side of the equation, and certainly in comparison to the default position which applies in a dispute which has proceeded under the Act, an adjoining owner is at a much greater personal risk in respect of costs should they issue a party wall injunction. First, they will generally have to pay their own lawyers to apply for the injunction. Secondly, if their application is for some reason unsuccessful, they might potentially be liable for the Defendant's costs of the application.

Further, when one applies for an injunction, the Court will generally require what is called a "cross-undertaking" to be given by the Claimant to the Court. This is a binding promise to pay damages to anyone who may have suffered loss as a result of the injunction order in the event it later becomes clear that the Claimant should not have obtained the injunction in the first place.

The requirement to provide a cross-undertaking is often the biggest single disincentive to applying for an interim injunction in relation to building work, since the potential losses to a building owner caused by a delay in the works can often be very substantial.

The saving grace in party wall cases, and the way to avoid or minimise the risk of either a negative costs order or a requirement to pay damages under the cross-undertaking, is to be careful, when applying for an interim injunction, to limit the injunction solely to what the adjoining owner is undoubtedly entitled to. Thus, you apply for an injunction which stops the adjoining owner from "undertaking any work notifiable under the Party Wall etc. Act

1996 unless and until they obtain either (a) an award under the Act authorising such work, or (b) the adjoining owner's written consent to such work."

This can be contrasted with an injunction which stops *any* building works on site. The problem with a wider injunction phrased in such a way is that it is quite likely that the building owner will be able to successfully argue that the adjoining owner was not entitled to an injunction stopping all work, merely notifiable work. If that turns out to be the case, the adjoining owner is suddenly at risk both as to cost, and on the cross-undertaking.

Another negative aspect of seeking an injunction is the need, or at least the perceived need, to employ the services of solicitors and/or barristers to obtain such an injunction. I have seen a wide range of estimates as to the legal costs of obtaining an injunction, but even at the lower end, these can seem like a very big financial pill for the adjoining owner to swallow.

It is certainly the case that the assistance of legal professionals, whilst expensive, can make the whole process of obtaining an injunction a smoother and generally less stressful experience. However, the Court and judges are quite used to self-represented litigants applying for injunctions without the assistance of solicitors or barristers, and it is quite feasible for such litigants, perhaps with the assistance of suitably experienced surveyors, to apply for and obtain injunctions at a very much more reasonable cost. Indeed, if an adjoining owner does the paperwork themselves, the only costs they are likely to have to pay in the first instance are the Court costs of issuing the application notice — on the basis of the fees current at March 2023, this would amount to £108 for a without notice application or £275 for an application on notice (i.e., where you are unable to say that the injunction application is truly urgent). In addition, after the initial hearing, you will normally need to issue the substantive proceedings seeking the injunction, and these would cost an additional £332 in

the County Court and £569 in the High Court. Court costs increase significantly if an adjoining owner is also seeking damages, as is discussed further below.

In addition to an injunction, it is quite possible that an adjoining owner might also want to seek damages from the building owner in respect of losses which they have already suffered. Generally, however, I would suggest that damages are not sought in the first instance. The reason for this is two-fold. First, if you seek damages in a court claim, then the court fees are significantly higher — around 5% of the total value of the claim depending on the precise amount claimed. Secondly, once the adjoining owner has obtained their interim injunction preventing notifiable works from continuing and effectively forcing the building owner to serve appropriate notices, it can then be agreed between the owners that party wall surveyors will have jurisdiction to determine compensation for losses suffered by the adjoining owner both before and after the notices have been served — thereby avoiding further legal costs being incurred by either party, and leaving mattes instead for the hopefully much more reasonably-priced party wall surveyors to sort out.

I deal with damages in more detail in the next section.

NOTIFIABLE WORKS COMPLETE

Where notifiable works have been completed, the adjoining owner's primary remedy will be for damages rather than an injunction.

Before dealing with damages, I should note that even where notifiable works have been completed there are circumstances where an injunction will still be an appropriate remedy available to the adjoining owner. To be clear, the Court will not grant the adjoining owner an injunction to remove notifiable works, even though these may strictly constitute a trespass, where the building

owner would have been entitled to undertake those works if they had served an appropriate notice. In such circumstances, the adjoining owner is only likely to be able to recover damages.

The position is different when (1) the works which have been carried out would never have been authorised under the Act, (2) the quality of the works is below an acceptable or appropriate standard, or (3) the unlawful works have had or will have a negative impact on the adjoining owner's property. In such cases, the Court will be prepared to grant a mandatory injunction, i.e., an injunction requiring the building owner to take appropriate positive action to remedy the position, but is unlikely to be willing to do so on an interim basis unless there is an immediate risk of damage to the adjoining owner's property, or injury to a person.

It is always worth remembering that the purpose of an injunction in such circumstances is to put the adjoining owner in the position that they would have been in were it not for the building owner's unlawful actions. Thus, in addition to, for example, requiring a poorly pointed new parapet wall to be repointed, the Court might also require the building owner to instruct an independent structural engineer to review the design and construction of the loft extension which included the same, to ensure that it is structurally sound/adequate.

Nonetheless, the normal position when notifiable works have been completed is that the adjoining owner requires damages to compensate them for the losses which they have suffered as a consequence of the building owner's unlawful works. Most commonly such losses will be the cost of repairing minor physical damage — often cracks — which have been caused to the adjoining owner's property. Other losses might include loss of amenity, the costs of alternative accommodation during remedial works, loss of earnings or profits, or indeed any head of loss known to the law and which might result from building works.

Although these heads of loss will all be familiar to party wall surveyors, it is worth remembering that the Court has a rather more formal approach to evidence. Consequently, careful thought should be given as to how each loss can best be evidenced.

To take some common examples:

Costs of repair

These need to be evidenced in two regards.

First, the evidence needs to show that the damage was caused by the building owner's works. This might be done by before and after photographs, by a witness statement from the adjoining owner, perhaps explaining that certain new cracks have developed and did so whilst or immediately after a Kango hammer was heard operating next door and the party wall was seen to be vibrating, or by an expert surveyor's report setting out the damage and explaining why, in the surveyor's opinion the unlawful works are likely to have caused that damage. The key points in all cases are that the damage was not there before the unlawful works, appeared while those works were underway or shortly after them, and therefore appear to have been caused by the works. The Court is likely to be highly sympathetic to an adjoining owner in these circumstances, since, if the building owner had complied with their obligations under the Act, there would inevitably have been a schedule of condition to accurately record any pre-existing damage to the adjoining owner's property. For this reason, the Court will very often presume that damage to the adjoining owner's property was caused by the unlawful works unless the building owner is able to provide persuasive evidence that this was not the case.

Secondly, the adjoining owner will need to prove the reasonable cost of repair. The easiest way of doing this is for the adjoining

owner to pay for repairs to be carried out, and then produce receipted invoices for the completed remedial work. However, if the repairs have not been carried out, evidence can be in the form of a report from a Quantity Surveyor, or quotes from contractors for the works.

Loss of amenity

Loss of amenity refers to the reduced enjoyment which an adjoining owner experiences as a consequence of either the unreasonable way a building owner's works are undertaken, or as a consequence of having to live in a property damaged by the building owner's works (and/or having to put up with the inconvenience of remedial works being undertaken whilst still occupying that property.

If the loss of amenity is substantial, whether as to impact or the length of time over which it is suffered, it is common to obtain expert evidence from a valuer as to the appropriate reduction in the nominal letting value of the adjoining owner's property. For example, the valuer might say that one bedroom of a two-bedroom flat has been rendered uninhabitable by the damage. They would then value the flat as both a one-bedroom and two-bedroom flat, the difference between those two valuations constituting the loss suffered by the adjoining owner. Alternatively they might simply provide valuations based on the property in its damaged state and its undamaged state, again the difference between those two valuations constituting the loss suffered.

Where the damage is less severe — perhaps some minor cracking rendering the adjoining owner's property just a little less attractive than it should be — it is possible to leave the assessment of loss of amenity to the judge without specific evidence as to the quantum of that damage. In such circumstances, the Court will generally award modest general damages, ranging from a few hundred pounds to the low thousands, in respect of such damage.

Loss of earnings

In a world where more and more people work from home on a regular basis, claims for loss of earnings by adjoining owners are increasingly common. Where an adjoining owner wishes to make such a claim, it is not enough to file a witness statement saying "I work as an IT consultant from home, and my earnings halved during the course of the building owner's works because the noise they generated made it impossible to concentrate".

Not only must the adjoining owner address their mind to how the unlawful aspects of the building owner's works caused their loss — i.e., rather than the mere fact of building works going on next door — but the adjoining owner must also produce either direct evidence as to those losses (in the form of, say, invoices rendered in the three months prior to and after the unlawful works, as well as those rendered during the works), or indirect evidence of the same (in the form of an expert accountant's report comparing the period during which works were being undertaken, with periods when they were not).

Appropriate procedure

Many claims for damages arising from party wall works are modest in amount.

Before *any* court proceedings are commenced, it will always be prudent for an adjoining owner to write to the building owner, setting out details of the sums they say the building owner is liable for, and inviting the building owner to pay the same.

Only if and when such a letter has been written without resulting in appropriate agreement and payment should the adjoining owner take the step of issuing proceedings in the County Court.

If the amount to be claimed is below the small claims limit of £10,000, the costs which can be recovered from the building owner are generally limited to what are called "fixed costs". As the name suggest, these are very limited. You can only recover higher costs if you can show that the Defendant's conduct has been unreasonable. Whilst there is an interesting argument to be had that a building owner who has failed to comply with their obligations under the Act must by definition have acted unreasonably, it is relatively rare for the Court to make such costs orders in small claims matters.

Where the damages claimed are higher than £10,000, it will often be worth instructing solicitors to assist, as their reasonable costs will be recoverable from the building owner in the event the adjoining owner succeeds in their claim.

Whilst much of this article might be thought to highlight the challenges of bringing proceedings for injunctions and/or damages, I would generally encourage adjoining owners to bring such proceedings against building owners who have failed to comply with their obligations under the Act. Many such building owners will concede liability reasonably quickly, and will generally be sensible of the likelihood of having to pay an adjoining owner's legal costs, as well as the fact that those costs will increase if the claim is not settled quickly.

As a final thought I would suggest that adjoining owners and their surveyors should also consider the benefits of alternative dispute resolution, whether mediation or arbitration, in order to resolve disputes where a building owner has undertaken notifiable works without serving notice and/or obtaining an award. The Pyramus & Thisbe society and the Faculty of Party Wall Surveyors can both assist in finding you a suitably qualified and experienced mediator or arbitrator in such circumstances, which can often prove to be a quicker and cheaper method of resolving such disputes.

3. AN ANALAYSIS OF POWER & KYSON V SHAH

Katie Gray

INTRODUCTION

It is fair to say that reactions in the party wall community to the decision of the Court of Appeal in *Power & Kyson v Shah* of March 2023 have been mixed. Plenty of surveyors have told me that the Court of Appeal merely confirmed what they knew to be true all along. Some, however, believe that the 1996 Act has been rendered entirely ineffective and take the view that building owners have been given licence to carry out whatever work they like to the party wall without any risk of reprisal.

With such a divergence of opinion about the decision, this article is a timely opportunity to engage in some analysis of the reasoning of the Court of Appeal.

FACTS

The facts of the case were straightforward, if unusual. The adjoining owner appointed the second appellant party wall surveyor to deal with damage allegedly caused to her property by her neighbour's work to the party wall. The second appellant in turn appointed the first appellant surveyor under the default procedure set down by the 1996 Act. The two surveyors then made an award requiring the respondent to compensate the adjoining owner for the damage, and to pay the fees of both surveyors. It was in enforcing those fees in the Magistrates Court that matters unravelled for the appellants, as the respondent alleged that they had no jurisdiction under the 1996 Act to make the award at all, and issued proceedings for a declaration to that effect.

ANALYSIS

First, it is notable that the decision came about in circumstances where an award had been made by an adjoining owner's surveyor acting jointly with a surveyor appointed for the building owner under the default procedure under section 10(4) of the 1996 Act (because the building owner maintained that the 1996 Act did not apply). The litigation did not directly relate to damage to the adjoining owner's property, but to the recovery of surveying fees. That must be a relatively rare situation in practice — most building owners acting in good faith will be advised of the need to comply with the 1996 Act and will serve the requisite notices before beginning works. Building owners acting in bad faith will be vulnerable to short notice applications for an injunction (as to which, see further below).

Secondly, any suggestion that the 1996 Act represented a radical departure from its predecessor, the London Building (Amendment) Act 1939, must now be rejected. The 1996 Act was intended to extend the "tried and tested" procedures of the 1939 Act to the whole of the country and cases decided under the previous legislation are of

continuing relevance when interpreting the 1996 Act. Matters have not changed since the decision in *Woodhouse v Consolidated Property Corp. Limited* (1992) 66 P.&C.R.234 — it remains the case that the notice is of paramount importance in determining the ambit of any dispute to be resolved under the statutory dispute resolution mechanism. Only the courts can resolve wider disputes. That is the case even though the wording in the 1939 Act, which referred expressly to surveyors resolving matters to which a **notice** may relate, was not replicated in the 1996 Act (which is drafted in the wider language of the **work** to which the 1996 Act relates).

Thirdly, it is wrong to state (as I have heard in some circles) that merely because a building owner does not want to engage with provisions of the 1996 Act, he does not have to. Rights that are in play under the 1996 Act may only be exercised once a proper notice has been served. The service of a notice is **mandatory** before any such rights are exercised (see paragraph 25 of the decision of the Court of Appeal). Again, notifiable works that have commenced without notice having first been served may be restrained by an injunction.

Indeed, it is for this reason that the Court of Appeal held that an award could not validly have been made under section 10 of the 1996 Act on the facts of the case. Section 10 applies only "in respect of any matter connected with any work to which this Act relates". That reference must, the Court of Appeal held, relate to section 2 works **after** a notice has been served, because service of such a notice is mandatory.

The notice performs an important function, which is not limited to kick-starting the dispute resolution procedure under the 1996 Act. An important purpose of the notice is to allow the adjoining owner to understand exactly what work the building owner wishes to carry out. This may prevent disputes arising altogether, as a great many neighbours will simply agree the works, sometimes without the need for any surveyor involvement at all. This is why there is a requirement to serve the notice two months in advance — this gives

time for the adjoining owner to consider the works, take advice and, hopefully agree the scope of the works.

Fourthly, though it is a handy shortcut to describe the decision reached by the Court of Appeal, the phrase "No Notice, No Act" does not mean that the 1996 Act is a lame duck. I have heard it suggested that injunctive relief cannot now attach to a building owner who simply does not wish to abide by the 1996 Act. That cannot be correct. If a building owner is carrying out works that are in fact notifiable under the 1996 Act, and no such notice has been served, the works (if still in progress and quick action is taken) can be restrained by injunction just as they always were. The service of the notice is mandatory.

CONCLUSION

Though it may be right to say that the decision of the Court of Appeal could cause less conscientious building owners to be more confident that they will get away with carrying out works that ought to have been the subject of notice, it is important not to overstate the impact of the decision on the party wall community. In the vast majority of cases, proper notices will be served, a dispute will be deemed to have arisen, and party wall awards will be required. The Court of Appeal has now provided useful guidance on the interpretation and the extent of the surveyor's powers under the 1996 Act. There is little high authority in this area because of the strict test that applies to second appeals and this decision should accordingly be welcomed.

4. SERVICE OF DOCUMENTS UNDER THE ACT

Tom Weekes KC

It is hard to imagine *any* statute in which the service of documents is more important that under the **Party Wall etc. Act 1996**. Issues are identified and resolved by the service in rapid succession of notices, counter-notices, awards, accounts, plans, sections etc. You would therefore hope that the *rules* about the service of documents would be clear and coherent.

Unfortunately, the rules about service contained in s.15 (at least as interpreted by the Court of Appeal) are a dog's dinner.

S.15 provides:

> "(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."

S.15 has twice been interpreted by the Court of Appeal: first in **Freetown Ltd v Assethold Ltd** [2013] 1 WLR 701 (in which I appeared successfully for the appellant), and then in **Goulandris v Knight** [2018] 1 WLR 3345 (in which I appeared unsuccessfully for the respondent).

The issue in **Goulandris** was whether a third surveyor had validly served an award by *emailing* it to a party. That happened before s.15 was amended to introduce subsections (1A)-(1C) (permitting electronic service if the recipient consents). The Court of Appeal held that the third surveyor *had* validly served his award by email because s.15 is a *permissive* service provision. In other words, rather than exhaustively prescribing permitted methods of service, s.15 *supplements* what otherwise constitutes good service. Therefore, email service was valid despite not being a specified method of service at the time.

At least as interpreted by the Court of Appeal, the drafting of s.15 is, in at least the following three respects, unsatisfactory.

First, some of the drafting is pointless. Given that s.15 is a *permissive* provision, no purpose is served by permitting service "by delivering [the document] to [the recipient] personally" (s.15(1)(a)) or "delivering [the document] to the secretary of clerk of [a] body corporate at its registered or principal office" (s.15(1)(c)). Personal

service is a narrow sub-set of what the common law, in any event, regards as constituting valid service.

Secondly, much of the remainder of the drafting has backfired so badly that it might even be legally ineffective. The amendment introducing subsections (1A) to (1C) was made by a statutory instrument promulgated under s.8 of the *Electronic Communications Act 2000*. That allows a minister by order to modify the provisions of any legislation "for the purpose of authorising or facilitating the use of electronic communications". Yet, if s.15 is a permissive service provision, the amendment made it *harder* to serve documents by electronic communications. Whilst documents could previously *always* be served by electronic communications, the amendment permits service by electronic communications only with the recipient's consent. In **Goulandris**, Patten LJ acknowledged [13] that the Court of Appeal's interpretation of s.15:

> *"…may give rise to arguments to the effect that the [statutory instrument amending s.15] was not only unnecessary but was also ultra vires in so far as it limited the circumstances in which service by electronic means is now permissible".*

Finally, whilst many statutes permit service by delivery to "a person on the premises" (subsection (2)), generally that is only "if it is not practicable after reasonable inquiry to ascertain the… address of the person… on whom it should be given" (or such like) (see, for example, s.94 of the **Building Act 1984**). An unqualified entitlement to serve on *anyone* at the premises is open to abuse.

5. GETTING TO GRIPS WITH THE DIFFICULT ASPECTS OF ADJOINING OWNER'S CONSENT TO WORKS

Mike Harry

INTRODUCTION

This article addresses one of the hardy perennial topics that is often referred to the author in his role as third surveyor. That subject, as the heading suggests, is that of the adjoining owner's consent to the building owner's works upon service of notice and to what extent the adjoining owner retains or loses his rights under the Act as a result of consenting to the works.

One might at first glance suggest that the matter appears relatively straightforward, *to wit*; the building owner serves notice, the adjoining owner confirms his consent to the works and the building owner happily progresses his works to conclusion without having borne the additional cost of surveyors' fees.

The above scenario is indeed a common and familiar pattern which appears to account for the majority of consented projects carried out under the Act. However, as straightforward an arrangement as this may at first seem, there are occasions on which some complexity and indeed consternation is infused into the arrangement where the well-meaning consenting adjoining owner is suddenly faced with a little more than he had at first bargained for.

With works afoot at the building owner's property, the adjoining owner may all of a sudden find his regular relaxing Sunday morning abruptly interrupted by a chorus of heavy breakers pounding away on the party wall; this in combination with the roar of mechanical excavators operating only feet away from his garden window. The following morning, in addition to the continued and persistent assault of high decibel tools and equipment, he may find himself rushing to draw his bedroom window blind having discovered a team of high-viz, dusty boot workers ensconced upon an un-covered scaffold with clear views into his bedroom window. Further, as if this was not enough, he may then find he is having to turn his central heating thermostat higher and higher still in order to combat the sharp drop in internal temperature that has resulted from the party wall having been unceremoniously converted to a temporary external wall having been recently exposed by the demolition of the building owner's previously enclosing structure.

The above scenario and many like it offer little thanks to an adjoining owner who sought to take the neighbourly approach of consenting to the works so that his neighbour would not have to bear the additional costs and delay of following a full party wall process. In addition such consent is often given on the back of a series of assurances from the building owner to the extent that his contractors would execute the works with such care and efficiency that the adjoining owner would barely know that the works were even happening!

It would of course be a reasonable expectation on the part of the put-upon adjoining owner that given his earlier benevolent approach in consenting to the works the building owner would rush to return the favour by doing all that he could to assuage the adverse impacts that the adjoining owner is now forced to complain about.

However, all too often adjoining owners' expectations in this regard are dashed. Having commenced the works, applying the measures necessary to properly address the adjoining owner's complaints could prove a costly exercise and could also lead to unscheduled delay to a building owner's project. Building owners often succumb to the temptation therefore of taking up the position that the adjoining owner has consented to the works and therefore has no say in how they are carried out. In effect, the adjoining owner is told; you have no rights under the Act; you gave up those rights when you consented to the works.

It tends to be at that point that an aggrieved adjoining owner knocks on the door of a party wall surveyor appealing for help to deal with the situation. Often having canvassed various surveyors for their view on the matter the adjoining owner will tend to appoint the surveyor who finally advises that they can indeed assist with the matter. The building owner will then in turn appoint a surveyor who agrees that the adjoining owner gave up his rights under the Act upon the provision of his consent to the works. The ground is accordingly set for dispute, followed by a referral of the matter to the third surveyor for a decision on the matter. The parties and their appointed surveyors then sit expectantly on the edge of their seats awaiting the outcome of the referral.

THE QUESTION FOR THE THIRD SURVEYOR

The central question that the third surveyor must address in such matters is; when a notice under the Act is served and the adjoining owner provides his written consent to the notice works, does the adjoining owner give up his rights under the Act; and if he does, then to what extent; does he lose all of the rights conferred by the Act or only some of those rights?

THE COMPETING VIEWS EXPRESSED BY SURVEYORS

In addressing such referrals the author has been presented with a number of differing views by way of surveyor submissions. Some of the more commonly expressed views are; that the adjoining owner has indeed given up all of his rights under the Act by consenting to the works; others suggest that the adjoining owner has given up all rights under the Act save only for where damage is caused by the works, whereupon the adjoining owner can then and only then access the section 10 dispute resolution procedures of the Act; Others suggest that no rights whatsoever are given up by the adjoining owner who consents to the works and in the instance of any dispute the consenting adjoining owner retains full access to the provisions of the Act. Finally, the view has also been expressed that having consented to the works, the adjoining owner no longer has recourse to the Act but does therefore have recourse to common law remedies.

In considering which if any of the views expressed above is the correct view it is perhaps helpful to first consider some industry body commentary on the matter.

INDUSTRY BODY COMMENTARY

Industry body commentary and advice remains a useful and important source of guidance in such matters. It should however always be noted that save for in the instance that the matters discussed comprise settled law, industry guidance should be considered as guidance only.

The RICS sets out that where an adjoining owner consents to the notice works this should not be seen as a waiver of the adjoining owner's rights under the Act, but should simply be seen as a statement that at present there is nothing in dispute.

However, the RICS guidance goes on in any case to suggest a cautious approach to the giving of consent and suggests that where consent is given, the adjoining owner should in giving such consent reserve his rights under the Act and confirm that disputes which subsequently arise in connection with the works are to be resolved in accordance with the section 10 procedures.

The Pyramus and Thisbe Society (P&T) places focus on the instance in which damage is caused to a consenting adjoining owner's property. The P&T sets out that where consent is given by the adjoining owner the building owner remains liable if any damage results from his activities.

However, in apparent agreement with the stance taken by the RICS, the P&T sets out that written consent given by an adjoining owner does not obviate the possibility that a dispute might arise out of the work during its progress or after it has been undertaken. The P&T states that in such circumstances if the owners cannot resolve the dispute between themselves surveyors can be appointed at that time to resolve the dispute.

The Faculty of Party Wall Surveyors does not depart from the views expressed by the RICS and the P&T. The Faculty sets out

that an adjoining owner may consent in writing to a notice and allow the works to continue without the need for surveyors to be appointed. However, the Faculty goes on to advise that consenting to a notice does not affect an adjoining owner's rights under the Act where a dispute relating to the works subsequently arises, at which time if necessary, a surveyor of the adjoining owner's choosing can be appointed.

There accordingly appears to be general consensus between the main industry bodies as to the implications of consent under the Act and the nature of the industry body agreement appears to be that when consenting to notice works the adjoining owner neither waives nor loses his rights under the Act and therefore retains access to the dispute resolution procedures of the Act in the instance that a dispute arises at any time in connection with the works.

It should be noted that the author is also in agreement with the above industry bodies. It is the author's view that in consenting to notice works the adjoining owner provides a neighbourly accommodation to the building owner. However, consent to notice works does not indicate any waiver of the adjoining owner's rights under the Act and indeed all such rights are retained by the adjoining owner for accessing in the instance of dispute.

However, this article would fail to do justice to its readers if it did not go on to set out the rationale behind the position taken. It is suggested that readers would not only benefit from knowing the position taken by the author and by those bodies mentioned above, but would perhaps benefit more from developing an understanding of how one arrives at that position.

THE RATIONALE

The author suggests that the appropriate starting point is that of section 7 of the Act. Section 7 confers a veritable raft of protection upon adjoining owners. Section 7(1) protects the adjoining owner against unnecessary inconvenience; section 7(2) compensates the adjoining owner for any loss or damage; section 7(3) provides protections to the adjoining owner's property where the building owner lays open the adjoining owner's property; section 7(4) protects the adjoining owner against the placing of special foundations on their land without prior consent; and section 7(5) protects the adjoining owner by requiring any works that may affect the adjoining owner to be carried out in accordance with relevant statutory regulations, which does not only include building regulations but also includes statutory regulations such as the 'Control of Pollution Act 1974' which deals with matters such as the control of noise on construction sites.

However, a careful consideration of section 7 of the Act reveals that there is a prerequisite to its operation. The adjoining owner will only benefit from the protections provided by section 7 under a particular circumstance. Each of the subclauses under section 7; (save for s.7(4) which requires the adjoining owner's consent) requires that in order for the protection provided by that subclause to apply, it is required that the building owner must execute work 'in pursuance of the Act'. There are no other prerequisites for the adjoining owner to benefit from the protections provided by section 7 and it should be noted that the section does not distinguish between adjoining owners who have consented to or dissented from the notice works, the protections provided by section 7 are afforded to all adjoining owners, and those who have consented to the works are accordingly not deprived as a result of that consent.

It has not escaped the author that the more eagle-eyed of readers may point out that not all of the subsections under section 7 state that the works must be 'in pursuance of the Act'. Indeed subsections

(1) & (3) refer instead to the exercise of "rights conferred upon [the building owner] by this Act". However, readers should not be swayed by this seemingly apparent but in fact non-existent disparity. At paragraphs 52 — 53 of his judgment in the High Court case of '*Kaye v Lawrence [2010] 2678 (TCC)*', Ramsey J set out the following;

> ***"There is no doubt that … the provisions of the 1996 Act use different phrases to describe the subject matter of the Act. Thus, in particular, section 7(1) … talks about "any right conferred on him by this Act" and section 7(2) talks about "any work executed in pursuance of this Act". The question, though, is whether they give rise to an intended distinction."***
>
> ***"I do not consider that the use of different phrases within the Act leads to the conclusion that they were applying to different subject matter. …"***

The author therefore suggests that it is now settled law that there is no distinction between the prerequisite phrases sewn into section 7 of the Act and that in every instance in which a building owner executes works in pursuance of the Act the adjoining owner is provided all of the protections conferred by section 7 of the Act by operation of law; this being inclusive of instances in which the adjoining owner has consented to the works.

WORKS IN PURSUANCE OF THE ACT

Given that the prerequisite for the consenting adjoining owner to derive the protection of the Act is that the building owner must execute works in pursuance of the Act, it is perhaps worthwhile considering exactly what falls under the description of 'works in pursuance of the Act'.

The legal definition of the words 'in pursuance of' was considered by the court of appeal in the (non-party wall) case of '*Saul c Norfolk CC [1984] Q.B. 559*' where it was held that the words had to be given their ordinary and natural meaning, namely, "*in exercise of the authority conferred by…*"

The matter was also considered in the County Court in the case of *'Shah v Power & Kyson'* (the decision of which was later upheld in the High court and then subsequently in the court of appeal). At paragraph 18 of the County Court judgment it is made clear that in order to execute work in pursuance of the Act notice must be served and an award made or the notice consented to. It is also made clear within the same paragraph that the protection provided by section 7 of the Act is only afforded to the adjoining owner where such notice is served and either an award is made or the notice is consented to. Only under those circumstances can works be carried out in pursuance of the Act. If works are carried out in the absence of service of notice then the works will not be in pursuance of the Act and section 7 protection would not apply.

The sentiments of the above judgment are further summed up by Nick Isaac KC who in discussing works that are executed in pursuance of the Act sets out as follows;

> ***"Works in pursuance of the Act are those described in sections 1, 2 and 6. However, such works are only exercisable upon service of a relevant and valid notice, and upon the building owner then obtaining a counter-notice giving consent or an appropriate award. Consequently, section 7(2) will not apply where a building owner has carried out notifiable work without service of a notice, and/or without obtaining a counter-notice giving consent…"***

The author suggests that the information set out above clearly provides that where the building owner serves notice on the

adjoining owner and the adjoining owner consents to the works the Act is properly engaged and the building owner's works will then be executed in pursuance of the Act. Where works are executed in pursuance of the Act the adjoining owner will benefit from the protections provided by section 7 of the Act and all other protections the Act has to offer.

CONCLUSION

One of the fundamental purposes of the Party Wall etc. Act 1996 is that of providing protection and recourse for the adjoining owner. Among its various provisions the Act contains express provision for the adjoining owner to consent to the building owner's works thereby allowing the building owner to forgo some of the more time-consuming and costly procedures of the Act. However, it would be strange indeed if given the above-mentioned fundamental purpose of the Act, there was incorporated within the Act an express provision which would have the effect of extinguishing that purpose. Accordingly, it is the author's view that if by availing himself of the provision within the Act that allows him to consent to the building owner's works, the adjoining owner did by that action lose the protection of the Act, this would be considered an absurdity.

From the author's experience in addressing matters as third surveyor it is apparent that there is a reasonably common misconception among some surveyors that by consenting to the building owner's works the adjoining owner divests himself of any recourse to the Act and that the provisions of the Act therefore no longer apply to the consenting party. The author suggests this is quite wrong.

In addition to the authorities cited above, the question of whether an adjoining owner loses the protection of the Act where that adjoining owner has consented to the works was also before the County Court in the case of *'Onigbanjo v Pearson [2008] BLR 507'*;

The court was emphatic in confirming that the adjoining owner will not lose his rights under the Act where he had consented to the building owner's works; and that surveyors will retain the required jurisdiction to address any matter in dispute between the parties under the dispute resolution mechanisms provided for under section 10 of the Act.

Given all of the above the author is minded that surveyors should now feel confident in advising their appointing owners accordingly.


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6. NO MYTH – THE PARTY WALL SURVEYOR MUST ACT IMPARTIALLY

Edward Bailey

(1) In his article "The Impartiality Myth" the Editor states that "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" (!). One can, incidentally, search in vain in the Article for the "damage" to confidence in the 1996 Act caused by this misguided belief, but the final paragraph suggests that the impartiality myth "hinders the finer workings of the Act". What these "finer workings" are we are not told. Another article will be required to explain both what these finer workings are and how they, or confidence in the Act generally, are damaged.

(2) The real problem with the Article is that the Editor has not sorted out the difference between the party wall surveyor acting in his dispute resolution role, (his only statutory role), and the same surveyor acting outside this role on behalf

of his appointing owner. Thus, the Article opens with the "[...] general misconception that party wall surveyors are required to act impartially, *at all times,*" (my emphasis, but not my comma!). And the article ends with "[...] 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 inclusion in these sentences of the words in italics leaves open the possibility that the Editor accepts that there will be times that the party wall surveyor should act impartially, and other times when he need not do so. But as the article does not explore this possible dichotomy the reader is left unaware whether the Editor does accept that there will be times that the party wall surveyor must act impartially.

(3) That the Editor, as author of the Article, might accept that there may be a dichotomy between times when impartiality is required and when it is not is certainly not apparent for most of the Article. In the fourth paragraph of the Article the Editor states that the "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". [Reader please note that s 10(10) does additionally provide that all three surveyors may settle any dispute by award.] The Article then continues:

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

This is a general assertion which this writer finds quite unacceptable. Interestingly, the Editor, in his article under review, continues after the text quoted above by pointing out (correctly) that the 1996 Act places no *express* obligation

on surveyors to act impartially but does not explain why, in these circumstances, both an agreed surveyor and a third surveyor must act impartially. Where does this come from? And why does it apply to agreed surveyors and third surveyors, but not to owner-appointed surveyors?

(4) This writer's answers are twofold: first that the impartiality requirement on the agreed surveyor or third surveyor comes from the fact that he is acting quasi-judicially (see Jackson LJ in *Gray v Elite Town Management Ltd* [2016] EWCA Civ 1318 at [38] approving the statement to this effect by Brightman J in *Gyle-Thompson v Wall Street Properties* [1974] 1 WLR 123, 130) and or quasi-arbitrally (see Lord Lytton introducing the Bill on its second reading which led to the 1996 Act in the House of Lords on 31 January 1996.) Secondly, that impartiality applies equally to owner-appointed surveyors as it does to agreed or third surveyors.

(5) How does the Court of Appeal arrive at the conclusion that the party wall surveyor is acting quasi-judicially? The answer is straightforward. It is a conclusion inevitably arrived at from a proper consideration of the provisions of s 10 of the Party Wall etc. Act 1996. While section 10 needs to be interpreted as a whole, its provisions may be considered in a step-by-step process:

> (1) The section's sub-heading is "Resolution of disputes" and s 10(1) provides that its provisions only arise where "a dispute arises or is deemed to have arisen". The parties then either appoint an agreed surveyor or appoint their own surveyor, and if the latter, the two party-appointed surveyors must select a third surveyor.
>
> (2) S 10(2) provides that appointments and selections must be in writing, *"and shall not be rescinded by either party"*. The irremovability of either a party-appointed

surveyor or a selected third surveyor by either party is important, quite inconsistent with a party wall surveyor acting as agent or advocate. A dispute resolver who, once appointed, cannot be removed by either party gains an independence from the parties which (hopefully) enables him to act without fear or favour.

(3) S 10(10) defines the overall scope of the surveyor's dispute resolution role ("any matter which is connected with any work to which the Act relates which is in dispute between the building owner and the adjoining owner"), and s 10(11) covers the situation where the two party-appointed surveyors cannot agree. S 10(12) specifies those matters which may be determined within the overall scope.

(4) S 10(16) provides that the award "shall be conclusive and shall not except as provided by this section be questioned in any court", and s 10(17) provides the exception, an appeal (within a very short time frame) to the county court.

It is difficult if not impossible to consider these provisions of s 10 and reach a conclusion other than that the party wall surveyor is undertaking a role equivalent to that of a judge or arbitrator. It is a dispute resolution role, a role which provides a decision (by way of award) which cannot be questioned in any court, other than by way of appeal under s 10(17), and a decision made by appointees who, once appointed, cannot be removed by either of the parties who will be bound by the decision once it has been determined. As the party wall surveyor is not actually a judge, nor is he appointed as an arbitrator within the provisions of the Arbitration Act 1996, his role is aptly described as "quasi-judicial" or "quasi-arbitral".

(6) A further point to support the argument that the party wall surveyor is acting quasi-judicially comes from the judgment of the Court of Appeal in *Gray v Elite Town Management Ltd* [2016] EWCA Civ 1318, where the Court determined that an appeal from the county court was a second appeal for the purposes of the Civil Procedure Rules and not a first appeal. This decision puts the dispute resolution process leading to an Award on the same footing as the dispute resolution carried out by a District Judge leading to a judgment.

(7) How does the fact that in making an award the party wall surveyor is acting either quasi-judicially or quasi-arbitrally lead to a requirement that he should act impartially? 'Quasi" comes from the Latin and means "as if". The Court of Appeal describes the party wall surveyor as acting judicially, as if a judge. A judge must act impartially. This arises as a matter of law but follows from the judicial oath all judges must take on appointment, the operative words being "…I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will". Lord Lytton in the House of Lords described the role as "quasi-arbitral", as if an arbitrator. If this description of the role is to be preferred, the requirement to act impartially arises from the provisions of s.33 of the Arbitration Act 1996 which require that an arbitrator "[…]shall act fairly and impartially as between the parties[…]" An argument that a *quasi*-judge or *quasi*-arbitrator need not act impartially makes a mockery both of s 10 and of language. And making a distinction between an agreed surveyor or a third surveyor who must act impartially and a party-appointed surveyor who can act as partially or as unfairly as he has a fancy to has no warrant on the words of the Act.

(8) There is no provision in the 1996 Act which requires a party wall surveyor to act other than in the s 10 dispute resolution role or, indeed, even recognises that he may

do so. But neither is there any prohibition on the party wall surveyor acting in a different role. While, on a strict reliance on the Act, a party-appointed surveyor may refuse to deal with the appointing party either on any matter not immediately connected with the dispute being resolved or indeed at all, most surveyors will engage with their appointing owner to explain the application of the Act, the issues arising on the matters in dispute, or to ascertain facts and matters of background interest to the dispute resolution process. Whether this is done in a spirit of friendliness, or with an eye to the surveyor's own professional reputation, or both, the party wall surveyor will here be acting outside his dispute resolution role. Engaging with an appointing owner outside the dispute resolution role (which is essentially the formulation and publication of the award) may be undertaken in a variety of ways and cover many different facets of the many issues which arise on a party wall matter. How the party wall surveyor conducts such engagement is up to the individual concerned. It is not obvious to this writer that communications between a party-appointed surveyor and the appointing owner need be other than impartial, but whether or not any partiality creeps in is of no particular consequence provided the surveyor acts impartially in drawing up the award.

(9) There will doubtless be occasions when an appointing owner, more usually the adjoining owner, has particular concerns about the issues at stake in the dispute requiring resolution. For the owner-appointed surveyor to take up such concerns, if necessary investigating factual matters relating to them, and ensuring that the points of concern are carefully and fully considered by both party-appointed surveyors will not of itself be acting other than impartially. Rather the reverse, at least in the case of many concerns raised by an owner. As the award may determine not only

the right to execute any work but the time and manner of executing the work, it may be appropriate for the surveyors to consider a wide range of concerns. *Advancing the concerns, and any merits involved in those concerns, of the appointing owner is not in itself a partial or unfair act by the party-appointed surveyor.* A proper consideration of such matters is part and parcel of the dispute resolution role the surveyors must play.

(10) A judge or arbitrator will usually have the advantage of hearing advocates raising arguments, and countering the arguments of the opposition, which can be of enormous assistance in reaching what the decision-maker considers to be the correct decision. A party wall surveyor (except occasionally a third surveyor hearing or reading arguments raised by the party-appointed surveyors) does not have this assistance. It will be incumbent on the party wall surveyor to ensure that all proper arguments relevant to the issues in dispute are considered before the award is finalised. In small and simple domestic matters there may be little if anything by way of argument to be raised in this context. In the more difficult or contentious cases a whole raft of issues might be raised by one or both owners, with many issues requiring careful attention. Acting impartially involves resolving contentious issues fairly, that is without allowing any favouring of one side over the other or without regard to the objective merits of the material under consideration. It may well be that the party-appointed surveyor who does not advance the proper concerns of the appointing owner, so that these concerns are given due consideration by both party-appointed surveyors before the determination of the award, may not in fact be acting impartially. The impartial nature of the role requires a proper analysis of what is or is not a proper concern for consideration, and in arriving at a merits-based conclusion which favours neither one side or the other.

(11) It follows that in allowing each owner to appoint a party wall surveyor the Act is not inviting party-appointed surveyors to act partially without regard to the merits of the material before them, and simply pursue the interests of the appointing party. Rather, it is helping to ensure that the proper concerns and interests of both owners are raised for due and impartial consideration in the dispute resolution process. "Acting for the wall" is a neat way of getting this across to an owner not well versed in either the law or party wall matters. If appointing a surveyor makes an owner feel that there is someone 'on their side', all is well and good, provided that it is made clear to the appointing owner that 'on their side' does not mean advancing the owner's interests for good or ill, and that in making the award the surveyors will act impartially favouring neither one owner or the other. In this connection it should be pointed out that the decision in *Evans v Patterson* [2021] (referred to by the Editor in his myth-article) turned on there being no dispute, and therefore no basis on which the party wall surveyors could have made an award. It had nothing at all to do with the building owner being entitled to have someone 'on her side'.

(12) The writer is conscious that the authors of *Party Walls Law and Practice* 4th Edn, Stephen Bickford-Smith, David Nicholls and Andrew Smith, suggest, at para 8.6 that "the degree of impartiality required of an agreed surveyor is higher than that required of a surveyor appointed by a party". This comment raises the intriguing prospect of degrees of impartiality, an extraordinarily difficult concept, at least to this writer. The genesis of the comment appears to be threefold. First, the observation by HHJ Lloyd QC in *Chartered Society of Physiotherapy v Simmons Church Smiles* [1995] 1 EGLR 155,159 that party wall surveyors are "not obliged to act without regard to the interests of the party who appointed them". Secondly, HHJ Marshall QC's

observation in *Many v Euroview Estates Ltd* [2008] 1 EGLR 165, 166F that the "statutory procedure is then prescribed to ensure that … a scheme to define the actual works to be done, and the terms on which they should be carried out, can then be fixed expeditiously, with both parties' interest being properly represented and protected". Thirdly, the authors refer to a trilogy of cases involving architects and engineers making decisions as supervising officers which affect both the employer and contractor.

(13) There is nothing in the observations of either Judge Lloyd QC or Judge Marshall QC to support a suggestion that there are differing degrees of impartiality required of party-appointed or agreed surveyor. The two judges are each making the point that both building and adjoining owners' interests must be considered and taken into account when an award is being prepared, and this necessarily involves a party-appointed surveyor having regard to his appointing party's interest, as well as the interest of the other party. The position of the architect or engineer making a decision under one of the standard forms of construction contract does not advance the matter one jot. The cases in question (*Lubenham Fidelities v South Pembrokeshire DC* (1986) 33 BLR 39, *Sutcliffe v Thackrah* [1974] AC 727 HL, *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] 1 WLR 2339, CA) establish that the duty of architects or engineers is "to make decisions independently and honestly", but that neither architects or engineers have "additional duties deriving from the label quasi-arbitrator". Accordingly, whether the reader shares the writer's difficulty with the concept of degrees of impartiality or not, there is no support given by the authors of *Party Walls Law and Practice* for the suggestion that differing degrees of impartiality are involved where an agreed surveyor acts and where party-appointed surveyors act. It is to be hoped that para 8.6 is revisited when a further edition of *Party Walls* is prepared.

(14) *The Agreed Surveyor*: The need for all proper concerns and interests of both owners to be raised and considered by the surveyor or surveyors making the award can impose a considerable burden on an agreed surveyor in anything other than a simple case. As Nick Isaac KC points out in *The Law and Practice of Party Walls* 2nd Edn at 7-40 "...where significant works are to be carried out, it is generally not sensible to appoint an agreed surveyor". An able and diligent surveyor could perhaps approach the task of acting as Agreed Surveyor in three stages: first acting as if adjoining owner surveyor, then as if building owner surveyor, and then as an impartial award writing tribunal. Alternatively the agreed surveyor could identify and prepare a list of all the potential issues for agreement with both owners, and then seek their respective views on each of the issues which will properly fall for determination. However, in either case, the risks of error rise with the complexity of the issues at stake. Better for two owner-appointed surveyors to come together with their owners' issues and then resolve those that require resolution in a joint impartial manner, than leave a single surveyor to ascertain and then grapple with all the issues by himself.

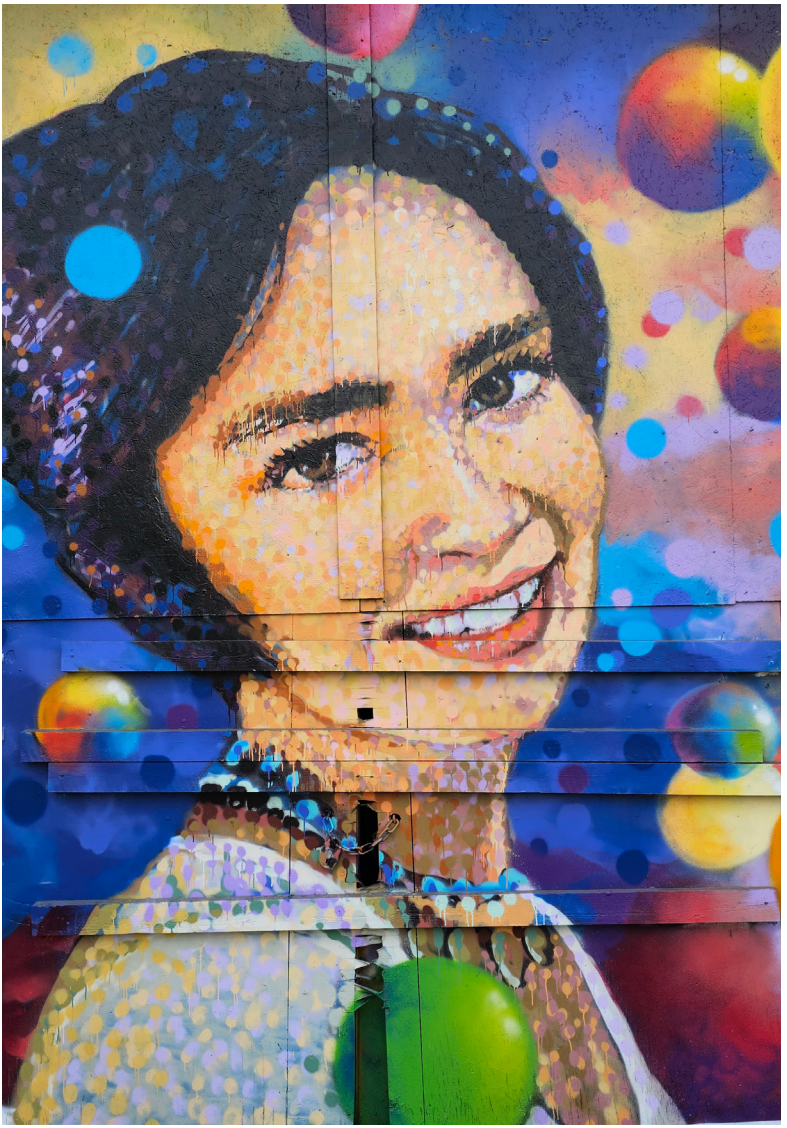
(15) Accordingly, the appointment of an agreed surveyor is best left to small and straightforward party wall cases, where there is unlikely to be significant interference with the party wall; where, in effect, the award writes itself. In such a case an agreed surveyor is usually a sensible and cost-effective approach to the need for an award. The cost of party wall surveyors is a perfectly legitimate concern, particularly for the building owner who will usually have to meet all the surveyors' costs. S 10(13) expressly provides for the award to cover the *reasonable* costs incurred in making or obtaining an award. In *Amir-Siddique v Kowaliw* (5 September 2018) the building owner, in an effort to keep down costs, offered to agree to the

adjoining owner's appointed surveyor acting as agreed surveyor. The surveyor concerned was prepared to act as agreed surveyor but only if the adjoining owner agreed to him so acting. The adjoining owner refused to agree, thus causing the building owner to incur the additional cost involved in appointing her own surveyor. The judge considered that this conduct amounted to unreasonable behaviour on the part of the adjoining owner and the court ordered an appropriate amount to be deducted from the costs awarded to the adjoining owner on the making of the award.

(16) In conclusion, impartiality must remain the keystone for all surveyors making party wall awards. Indeed, party wall surveyors should take care to be impartial. Whether or not the party wall surveyor has immunity from suit (see "Care and immunity, or How liable may a party wall surveyor be" elsewhere in this book) his prospects of being immune from an action where he has acted partially or unfairly are vanishingly small. The party wall surveyor should bear in mind that although arbitrators do have immunity from suit, see s 29(1) of the Arbitration Act 1996, this immunity is restricted:

> "An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator **unless the act or omission is shown to have been in bad faith**".

The distinction between acting partially or unfairly and acting in bad faith is a small one at best. The surveyor facing a claim that he has acted in bad faith who has previously announced to the world that the need to act impartially when making awards is a mere myth has gone a long way to proving the other side's case for them!



7. THE IMPARTIALITY OF PARTY-APPOINTED SURVEYORS IS DEFINITELY A MYTH

Benjamin Mackie

It is both a pleasure and an honour to have had someone as respected as HH Edward Bailey provide an article for this book whereby he critiques, and no doubt disagrees with my own article titled 'The impartiality myth' which can be found in the book titled 'Party Walls — Articles concerning the law and practice of The Party Wall etc. Act 1996'. My article was written in 2022, and since then, HH Bailey and I have debated impartiality on a podcast, and we have continued to hold opposing views on the matter. A betting man would no doubt place their money on the retired Judge being correct, but I remain committed to my views, for reasons which I will outline in this article.

I will tackle HH Bailey's article head on, addressing his points and ensuring that the reasons for my opposition to the notion that

party-appointed surveyors are not required to act impartially are made clear.

HH Bailey's article is in 16 parts, and my own article aims to address all his points.

(1) HH Bailey fires his opening salvo by implying my article 'The impartiality myth' has failed in one of its aims, which was to look at the damage done to confidence in the Party Wall Act by the misguided belief that surveyors are impartial saints.

There are many reasons as to why confidence in the Act is damaged by misunderstandings regarding impartiality:

- **Unnecessary costs.**
  Misunderstanding impartiality decreases the uptake of agreed surveyors, costing building owners more money. Building owners are rightly bewildered when their costs are doubled, and their surveyor informs them that this is because their neighbour insists on having two 'impartial' surveyors settle the dispute instead of one. Quite rightly, a building owner will often wonder why, if both surveyors must act impartially, it is better to have two surveyors to do the one task.

- **Increased appeals.**
  Surveyors acting impartially are often letting their appointing owners down. Party-appointed surveyors have their awards appealed far more frequently than their agreed surveyor counterparts, and this may in part be because surveyors acting impartially are not properly representing their appointing owners. A surveyor's primary responsibility is to their appointing owner. Failing to recognise this responsibility ensures that awards made by party-appointed surveyors are disproportionately appealed.

- **Eroded public confidence.**
  By 'acting for the wall', party-appointed surveyors may be less likely to truly understand the needs of their appointing owner. Surveyors will step back from their appointing owners, lack engagement, and cite 'impartiality' as the reason for their distance from their appointing owner. To effectively settle a dispute, a surveyor should work closely with their appointing owner to understand their concerns, and to provide support, ensuring that where possible the needs of their appointing owner are met. The public will have greater confidence in the Party Wall Act if they believe it can work for them.

(2) HH Bailey states that *'the real problem with the Article is that the Editor has not sorted out the difference between the party wall surveyor acting in his dispute resolution role, (his only statutory role), and the same surveyor acting outside this role on behalf of his appointing owner.'*

HH Bailey's point here is simply addressed. A 'surveyor' under section 20 of the Act is only a surveyor insomuch that they are fulfilling their role under section 10 of the Act. There is no need to differentiate between a surveyor acting under the Act, and a surveyor acting as an agent, because the Act does not permit surveyors to act outside of their jurisdiction.

HH Bailey rightly points out I made the case that party wall surveyors were not required to act impartially 'at all times.'

The Act makes it clear under section 10(6) and (7) that where there is an *ex parte* action, then this is to be undertaken as if the surveyor had been an agreed surveyor. This is a safety net as the Act can foresee the adversarial nature of party-appointed surveyors. To prevent abuse of process, the surveyor taking the *ex parte* action is ordered to act impartially, whether it be under section 10(6) whereby the

surveyor may serve an *ex parte* award, or under section 10(7) whereby the surveyor may act *ex parte* in respect of the subject matter of the request. This makes perfect sense, because the *ex parte* route is moving from two surveyors back to one, and a surveyor must be able to be understand the responsibility involved in acting on behalf of both parties. An agreed surveyor and a third Surveyor have a duty of care to both parties and must act impartially, and so too must a party-appointed surveyor who is choosing to act *ex parte*.

I reiterate sections 10(6) and 10(7) demand that a surveyor act as if they are an agreed surveyor. Why demand this if impartiality is a requirement of party-appointed surveyors? Why not remain silent? How does HH Bailey explain this demand? Is it simply a reminder to a forgetful surveyor?

I contend that the very reason that this demand is placed on a surveyor undertaking an *ex parte* action is because they do not need to act impartially, and the Act foresees this, and specifically orders that the surveyor change their conduct by ensuring that their actions when acting *ex parte* are indeed impartial. This must be strong evidence that impartiality is not a requirement of a surveyor, when party-appointed, and so long as their counterpart remains involved. Merely saying this demand is a 'reminder' would be a lazy argument suggesting a poorly worded and repetitive Act. Instead, the wording of the Act is deliberate, and the expectations are clear, so much so, that 10(6) and 10(7) are worded in a way in which a surveyor's approach to a matter is expected to *change*.

A party wall surveyor should be comfortable to act as the building owner's surveyor, the adjoining owner's surveyor, and the agreed surveyor. A surveyor should know how to switch between the roles and understand the differences

between each role. The three roles are unique, with their own pressures, and it is not a case of 'one size fits all'. A good surveyor will thrive in each role, which requires different skillsets.

(3) It is unacceptable to HH Bailey that party-appointed surveyors need not act impartially. HH Bailey rightly asks 'where does this come from? And why does impartiality apply to agreed surveyors but not to owner-appointed surveyors?'

These are fair questions, though the Act itself does not mention impartiality once. It is reasonable to expect that an agreed surveyor must treat both parties equally, in that they are appointed to resolve a dispute on behalf of both parties. This must be common sense, and common sense is one of the tests used by Courts when interpreting a contract (i.e. a letter of appointment). Is the contract consistent with the purposes and intentions of both contracting parties? Is it likely that when appointing an agreed surveyor, both parties can expect to be treated fairly? If this were not the case, the incentive to have an agreed surveyor would evaporate.

If a building owner appoints a surveyor, and the adjoining owner appoints their own surveyor, we have two surveyors (great maths by the author!), each acting on behalf of their own appointing owner. The building owner's surveyor is appointed to act for the building owner, not the adjoining owner. If impartiality were required, and the building owner was required legally to treat both parties equally, why then, would the building owner surveyor not be legally allowed to obtain a letter of appointment from the adjoining owner? There can be no doubt that this is because they do not have the same duty of care to the party which chose not to appoint them. Uniquely, it is the impartial agreed surveyor who will obtain a letter of appointment from both parties.

(4) HH Bailey argues that surveyors are quasi-judicial. This is incorrect. In disciplinary proceedings brought by RICS against Philip Antino, Sir Michael Burton noted that arbitrators have the duty under s 33(1)(a) Arbitration Act 1996 to *"act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".* He observed that no similar duty is applicable to Party Wall Surveyors.

Going further, Sir Michael Burton stated:

"We considered the differences and similarities between the procedure under the Party Wall Act and judicial proceedings, assisted by schedules prepared by the parties at our request. ... the list of differences identified by the [RICS] far exceeded the number of similarities. The differences included:

- No procedure in the Party Wall Act for hearing evidence or submissions.
- No procedure in the Act for disclosure.
- Not clear what evidence the PWS will rely on, the PWS is not limited to the information the parties put before him.
- There is no requirement for a hearing in public or otherwise.
- No witness called on oath or otherwise.
- No ability to compel evidence.
- No judicial training or assistance.
- No formal qualifications needed at all.

- *The PWS investigates rather than just adjudicates, which is a non-judicial function.*

- *Unlike a judge or arbitrator, he can rely on an opinion which has not been ventilated before the parties to reach his decision."*

Surveyors are not quasi-judicial.

(5) Appointments and selections must be in writing and 'shall not be rescinded by either party' and HH Bailey states 'It is difficult if not impossible to consider these provisions of s10 and reach a conclusion other than that the party wall surveyor is undertaking a role equivalent to that of a judge or arbitrator.'

Ignoring the findings of Sir Michael Burton on behalf of RICS, HH Bailey doubles down on what he terms as the 'apt' description of the role of a surveyor being 'quasi-judicial.' Also ignored are sections 10(6) and 10(7) whereby one of these so-called quasi-judicial surveyors can be removed from the process by way of an *ex parte* action. The removal of a surveyor in these circumstances is hardly befitting of a 'quasi-judicial' surveyor.

(6) HH Bailey makes a point that the dispute resolution process leading to an award is on the same footing as the dispute resolution carried out by a District Judge leading to a judgment.

I counter that the differences are enormous.

Section 10 of the Act is the dispute resolution process, and it is clear that unlike a Judge, a party-appointed surveyor can be removed via an *ex parte* action and can be on the receiving end of a third surveyor referral that goes against

them, forcing them to accept something with which they may not agree, which would form part of an award served by them and subject to an appeal.

Additionally, parties to the dispute pick surveyors, but in litigation, where a matter goes to Court, the parties follow the rigid legal system, and they cannot appoint a Judge to act on their behalf. The reason why people cannot pick their own Judges and pay them are hopefully clear and obvious: any findings may not look very impartial!

(7) HH Bailey stays with his 'quasi-judicial' argument by saying that it makes a mockery of the Act if a party-appointed surveyor can act as partially or unfairly as they choose. Again, this ignores sections 10(6) and 10(7) which make surveyors act in a way which is accountable. Indeed, if surveyors were quasi-judicial and immune from suit, I suggest that this would make a mockery of the Act as we would lack accountability. Instead, I argue that surveyors must act 'effectively' as per the specific and deliberate wording of the Act, and I believe surveyors must account for their actions. A surveyor does not have a licence to act improperly, and where there are party-appointed surveyors, there is the vital safety net of the impartial third surveyor, who must settle any referral fairly.

The Act provides mechanisms where the behaviour of the surveyor can be kept in check. Aside from the requirement to act effectively under 10(6) and 10(7), and the fact that a third surveyor referral can be made under section 10(11), the Act also places the obligation on the surveyor to have 'reasonable costs' and to undertake 'reasonable inspections,' i.e. there is the duty to act *reasonably*.

The Act could have chosen to state that a surveyor must act 'impartially', but it doesn't.

The absence of this word does not give a surveyor the right to act as HH Bailey suggests ('as partially or as unfairly as he has a fancy to'). This line of argument is wishful thinking and would serve HH Bailey's argument well if it were true. Instead, I have consistently stated that the Act does enough to keep surveyors' behaviour in check, and that the party wall act can work perfectly well if party-appointed surveyors are primarily responsible to their own appointing owners.

(8) HH Bailey suggests that a surveyor may communicate with his appointing owner about party wall matters and that this action may be outside of the Act. He states that where communication is not impartial, it is of no consequence so long as the award is impartial. This argument is not understood by the author. An appointing owner is perfectly entitled to speak candidly with their surveyor, and as part of the process, the party-appointed surveyor should understand the needs of their appointing owner. Acting reasonably and effectively, the surveyor will talk about what they can achieve for their appointing owner, and this can include informing them of certain things that they may not wish to hear.

For example, an adjoining owner may instruct their surveyor not to award access onto their land, which would inhibit the building owner's ability to build. There is nothing wrong with the surveyor asking their counterpart if access can be avoided.

It is perfectly acceptable for the building owner's surveyor to reject this request on the basis that access is necessary. It is also acceptable for the building owner's surveyor to request favourable terms of access.

An award is served settling the dispute, with both surveyors using their knowledge of the Act, and conducting themselves

'reasonably' and 'effectively' (words which the Act uses to describe a party-appointed surveyor's behaviour). The award settles the dispute, and both parties can be satisfied that their surveyors put their needs first but were required to make compromises. Both parties can feel that their positions were mutually respected, and it is often said that 'an award where neither party is happy is a good award'.

(9) *'Advancing the concerns, and any merits involved in those concerns, of the appointing owner is not in itself a partial or unfair act by the party-appointed Surveyor,'* states HH Bailey.

I remind the reader that the very definition of impartiality is to treat both parties equally, and I maintain that a surveyor is primarily responsible to the party that has appointed them, thereby not treating both parties equally.

A letter of appointment signed by a building owner appoints the building owner's surveyor to act on their behalf, meanwhile the adjoining owner signs a letter of appointment appointing *their* surveyor on *their* behalf.

This is stating the obvious, however, it must be reiterated that the letter of appointment gives the surveyor the right to act solely on behalf of their appointing owner, and not the other party. This very simple point is often overlooked, and it cannot make sense that a surveyor who is appointed by the building owner has the same duty of care to the adjoining owner.

If impartiality were truly required, the surveyors may be expected, perhaps ridiculously, to obtain a letter of appointment from *both* parties.

In practice, surveyors will not treat both parties equally.

Example: A building owner's surveyor will ordinarily seek to have a request for security for expenses kept to a minimum, and the same applies with any payment due under section 11(11) where the building owner wishes to make use of the adjoining owner's wall.

The adjoining owner's surveyor never rejects a payment under 11(11) because they deem it too high!

Likewise, the building owner's surveyor is unlikely to challenge an adjoining owner's surveyor's request for a section 11(11) payment that they deem too low.

Instead, the party appointed surveyors are likely to consider the dispute settled if their own appointing owner is not disadvantaged, and it is the party-appointed surveyor's responsibility to ensure that they agree and award what they are happy with, with respect to their appointing owner's position.

There are no known cases of surveyors making third surveyor referrals *against* their respective owners. This statement will no doubt raise eyebrows, but impartial surveyors *acting for the wall* should theoretically be just as likely to support their appointing owner with a third surveyor referral, as they are to make a referral against them. The fact that surveyors do not turn against their appointing owners in this way just goes to show that impartiality is definitely a myth.

(10) HH Bailey outlines one of the many differences between a Judge and a party wall surveyor: a Judge has the advantage of having advocates raising arguments and countering the arguments of the opposition. He notes that party wall surveyors do not.

HH Bailey concludes that an award must not favour one side over another.

Unfortunately, it is often the case that an award feels unfair, particularly to the building owner who has to settle the fees of two surveyors purporting to act impartially.

It is common for surveyors to abuse the process by taking action which undermines the Act. Raising a request for security for expenses after an award has been served for a residential loft build is an example. The building owner, expecting to undertake the work, will likely need to consent to the request or face having the works further delayed by the settlement of a brand-new and unforeseen dispute.

Awards are full of compromises, and sometimes, one side dominates the other. A building owner requiring an award quickly is likely to be in a position of weakness, and knowing this, the adjoining owner's surveyor can press home the advantage by making the award favourable to their appointing owner.

Alternatively, a building owner, sensing their vulnerable neighbour cannot afford an injunction, can pile on the pressure by starting work, putting the surveyors in a difficult position. Do the surveyors serve a substandard award, lacking in information? Do they refuse to serve an award until this information is provided?

Awards are often unfair, and it is only for the very rich or misguided to challenge them by way of an appeal.

It is also important to note that appointing owners can agree to anything, and this can include making compromises that their surveyor feels are unfair. A good surveyor will pick their battles and ensure that any dispute

is not surveyor-driven, but rather supported by their appointing owner.

(11) HH Bailey states *'It follows that in allowing each owner to appoint a party wall surveyor the Act is not inviting party-appointed* surveyors *to act partially without regard to the merits of the material before them, and simply pursue the interests of the appointing party.'*

The Act states that a surveyor must act 'effectively' and 'reasonably' and to achieve this, both parties can expect the surveyors acting on their behalf to use their expertise to negotiate the content of an award. A surveyor should be guided by the Act itself, and an understanding of construction, the law and dispute resolution will help the surveyor to act reasonably and effectively.

A surveyor cannot make up the law as they go along. They cannot be too difficult or obstructive, because the Act has safety nets including 10(6) and 10(7), along with the third surveyor, and an award can be appealed. Surveyors can be sued, and they can be answerable to their professional bodies. A surveyor need not throw away their reputation because they choose to act effectively and reasonably, but not impartially — as their primary responsibility is to their appointing owner.

(12) Degrees of impartiality is something HH Bailey struggles with, and rightly so. To be impartial is to treat both parties equally — you either do it, or you don't. Sections 10(6) and 10(7) demand impartiality where a surveyor is acting *ex parte*. One surveyor acting on behalf of two parties is like an agreed surveyor, and the Act stipulates that this is how the party-appointed surveyor must behave when undertaking an *ex parte* action.

(13) There are not 'degrees of impartiality'. You either are, or you aren't.

(14) '*Better for two owner-appointed surveyors to come together with their owners' issues and then resolve those that require resolution in a joint impartial manner, than leave a single surveyor to ascertain and then grapple with all the issues by himself.*'

This very statement, made by HH Bailey, highlights a lot of what is wrong with the agreed surveyor role, and its low uptake. If a surveyor is unable to resolve a party wall dispute as an agreed surveyor, should they morally take on the role as a party-appointed surveyor?

Is it reasonable to expect the building owner to cover costs associated with the lack of confidence of a surveyor? Does this instil confidence in the party wall community, that it is better to have two surveyors than one, because it might be a bit too much for one (quasi-judicial!) surveyor to handle?

The uniqueness of the agreed surveyor role is downplayed, and so the uptake of agreed surveyors is lower than it should be. This can erode public confidence in the Act, with unnecessary fees being incurred, along with the perception that surveyors are not competent enough to undertake their role alone — instead they need their hand held by a friendly impartial counterpart.

Reassuring indeed, but only to the bank accounts of party wall surveyors.

(15) *Amir-Siddique v Kowaliw* is an example of the building owner wishing to keep costs proportionate. This was done by approaching the adjoining owner's surveyor and asking him if he would act as the agreed surveyor. The surveyor accepted the request to act as the agreed surveyor, but the

adjoining owner did not permit this, forcing the building owner to appoint their own surveyor.

The award was appealed on the basis that costs were unreasonable. Judge Bailey agreed and found that the building owner's surveyor's fee was unreasonably incurred and must be settled by the adjoining owner.

This case creates a problem, in that on the one hand HH Bailey makes a statement encouraging party-appointed surveyors because it's 'better to do this than leave one poor surveyor to grapple with the issue alone', whilst on the other, the rejection of the agreed surveyor route by an adjoining owner was found to be unreasonable.

In *Amir-Siddique v Kowaliw,* the adjoining owner's surveyor confirmed that he would be able to act as the agreed surveyor, and so was happy to grapple with matters alone. However there is still an issue here — is it for the surveyor to decide if they will take on the agreed surveyor role, and does their appointing owner carry liability for their decision? We may now see surveyors required to make excuses as to why they cannot take on the agreed surveyor role, so as not to undermine their appointing owner by putting them at risk of costs.

(16) HH Bailey writes two excellent articles for this book, one of which concerns 'immunity from suit'. I agree with HH Bailey that party wall surveyors are unlikely to be immune from suit. At the very least, a party-appointed Surveyor should conduct themselves as follows:

- Act as if they can be sued.
- Act as if every email can be read, no matter how private that email may feel.

- Every action undertaken must have four attributes: proportionate, legal, appropriate and necessary. It is not enough for an action to just have one or two of these attributes. Each action must have ALL four attributes.

- Be accountable.

- Act effectively and reasonably, as per the Party Wall etc. Act 1996.

- Do not compromise on integrity.

There is no requirement for party-appointed Surveyors to act impartially unless they undertake an *ex parte* action.

There should be no fear of a surveyor being primarily responsible to their own appointing owner, with no requirement to treat the other party equally because the Act provides many safety nets, and these include:

- The requirement under sections 10(6) and 10(7) to act as an agreed Surveyor i.e. impartially, when undertaking an *ex parte* action.

- The mandatory selection of an impartial third surveyor.

- The requirement to act 'effectively' as referred to in sections 10(6) and 10(7).

- The demand that a surveyor acts reasonably, as costs are to be reasonable as per section 10(13) and the justification for inspections of work are to be reasonable as per section 10(13)(b).

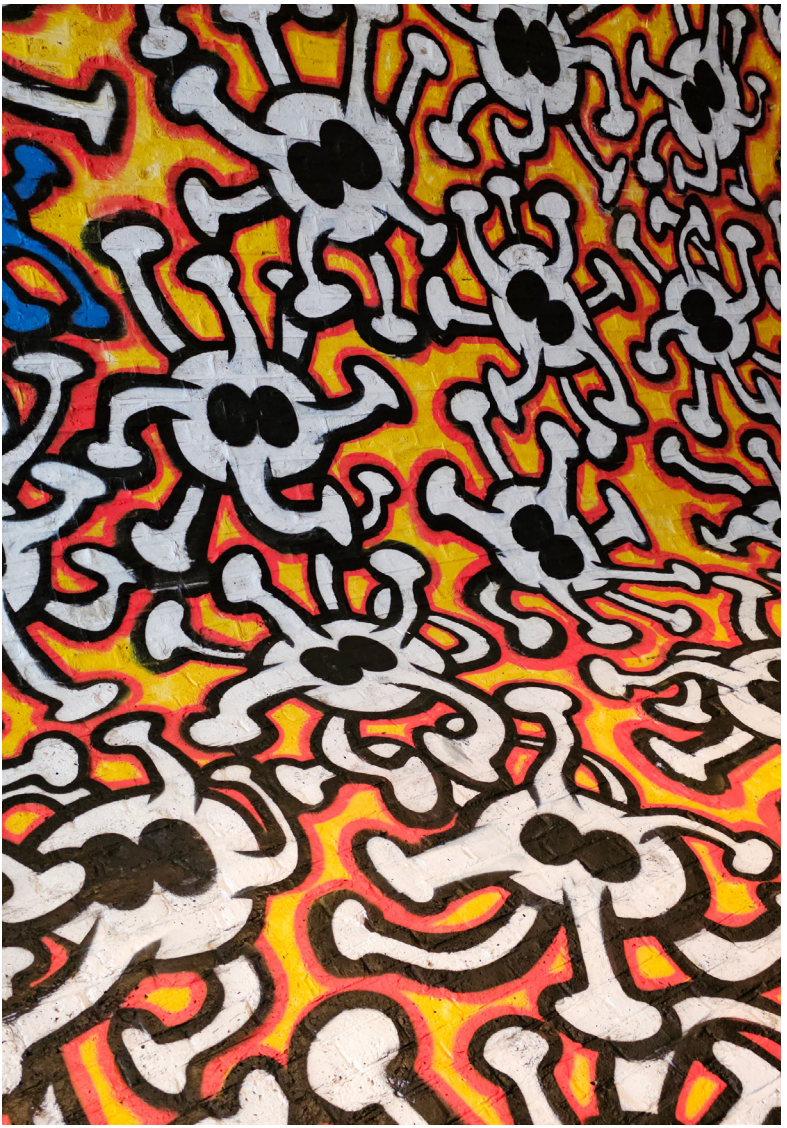
- Under section 10(8) an appointing officer or the Secretary of State may select a third surveyor if either party-appointed surveyor refuses or neglects to do so.

There may be concerns about the conduct of a surveyor who openly favours their appointing owner, but surveyors are accountable, with many belonging to professional bodies. They can receive reviews on the internet, and if a surveyor were to behave poorly, the party wall community is small, and can be a difficult place for a surveyor who is not respectful towards fellow peers and discharging their duties responsibly.

If we can embrace the notion that party-appointed surveyors are primarily concerned with their own appointing owners, we may see a greater uptake in impartial agreed surveyors, as the public would understand just how special and responsible this role is.

The uptake of agreed surveyors is to be encouraged, and to do this, the role must be highlighted, put on a pedestal, and admired. The public need to be given the correct information, so that they can take the correct steps to have their disputes resolved. Too often, the agreed surveyor route is ignored, increasing costs to the building owner.

It should be for the public to decide whether one impartial surveyor is suitable for the resolution of their dispute, or whether party-appointed surveyors are required who will act effectively and reasonably but being primarily responsible to their own appointing owner. The sense of duty that a party-appointed surveyor has to their appointing owner can go a long way to ensuring that the parties feel that they have had their positions properly and professionally represented.



8. PAYMENT IN LIEU OF MAKING GOOD

CASE STUDIES UNDER SECTION 11(8) OF THE ACT

Dr Stephen Cornish

INTRODUCTION

The origins of this paper derive from seminars and webinars I have presented to both the Faculty of Party Wall Surveyors and the P & T Society. I am grateful to Nicholas Isaac KC for the considerable help he has provided through our discussions and the information provided in his book *The Law and Practice*[15] and his joint publication with Matthew Hearsum in their *New Party Wall Casebook*[16]. This

15 Nicholas Isaac, The Law and Practice of Party Walls (second edition) p.196.

16 Published in 2019

paper is in four parts: the first part considers the limited provisions of section 11(8) of the Act. The relevant subsections in the Act are discussed in the second part, identifying rights and corresponding obligations under specific subsections. The central theme of this paper is payment in lieu and part 3 of this paper provides information on what can and cannot be included in such payments: a distinction is made between expenses and compensation and the conundrum of "betterment" is addressed. The final part of this paper provides three case studies, where the principles set out below are applied. Key words/phrases have been emphasised in this paper and they are: payment in lieu; make or making good; right(s); obligation(s) and corresponding obligation(s); expense(s) and betterment.

Building owner's work to a party wall may, and frequently does, cause damage to the adjoining owner's property. This paper will show that work carried out to party wall in pursuant of **rights** set out in specific subsections of the Party Wall etc. Act 1996 ('the Act') is subject to a **corresponding obligation** on the part of the building owner to **make good** all damage to adjoining owners' premises or to their internal furnishings and decorations occasioned by the work. In reality, this obligation to **make-good** would normally be met by the building owner's own builders (often the same individuals who have caused damage).

Where the damage has been caused to an adjoining owner's property by the building owner's builder, it is understandable that the former would have little confidence in that particular builder's ability to make-good. In such circumstances section 11(8) provides:

"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 the work to make the damage good.[17]

PART 1: THE LIMITED PROVISIONS OF SECTION 11(8) OF THE ACT.

Having set out the provision of Section 11(8) it is important to consider its limited application. Nicholas Isaac advises us that the reach of section 11(8) is more limited than is often assumed. It only applies when there is a primary **obligation** on the part of the building owner to **make good** damage, i.e., the **obligation** is contained in specific sub-sections, and these are identified in the second part of this paper. Where damage is caused to adjoining owner's property which does not fall within those sub-sections, the adjoining owner's remedy must in any event be either (1) compensation (i.e., financial compensation) equivalent to the cost of carrying out such works under section 7(2), or in (2) a similar sum in damages on the basis of the common rule cause of action in nuisance or trespass.[18] The limited application of section 11(8) was recognised in the case of *Lea Valley Developments Limited v Derbyshire [2017].* Here the defendant wished to carry out development on its property in Muswell Hill which involved notifiable excavation works and obtained an award authorising the same. Mr Derbyshire's adjoining property was a block of flats, converted from what had originally been a single large house. Lea Valley's excavation works caused substantial damage to the property, such that, by August 2016, the parties' surveyors agreed that it was damaged beyond repair. Judge O'Farrell noted that in clause 4(d) of the award, which reported to "**make good**" any damage it caused, or to make **payment in lieu** of **making good**, was

17 The emphasis has been added to the "key words/phrases" in this full quotation of section 11(8).

18 Nicholas Isaac, *The Law and Practice of Party Walls* (second edition) p.196.

ultra vires, because there was no obligation to **make good** to section 6 excavation work.

PART 2: THE RELEVANT SUBSECTIONS IN THE ACT

Having established the limited application of section 11(8) it is now necessary to consider the subsections in the Act where the exercising of **rights** may lead to damage and then move on to review the corresponding subsections containing **obligations** to **make good**; these relevant **rights** and **corresponding obligations** are summarised in table at the end of this part of my paper.

Section 2(2)(a) provides **rights** for a building owner "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". These **rights** have a **corresponding obligation** under Section 2(3) of the Act to make good but only where such works are not necessary on account of a defect or want of repair of the structure or wall concerned. Consequently, where the building owner is exercising section 2(2)(a) **rights** while undertaking an extension or upgrading his building generally, he will also be liable to **make good** all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations. As a footnote, it seems almost certain that "furnishing" used repeatedly in section 2 is a miscopying of the word "finishing" used in section 46 of the 1939 Act, and, if ever in issue, it is likely to be construed by the Court as such, or as the more modern "finishes". Section 7(2) would in any event provide for compensation to damaged furnishings.[19]

Section 2(2)(e) provides the Building Owner with **rights** "To demolish a party structure which is of insufficient strength or height for the purposes of any intended building of the building

19 See Isaac *The Law and Practice* p36, footnote 69.

owner and to rebuild it of sufficient strength or height for the said purposes (including rebuilding to a lesser height or thickness where the rebuild structure is on insufficient strength and height for the purposes of any adjoining owner)". The **corresponding obligation** is Section 2(4) provides that this **right** is exercisable subject to **making good** all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations. This **obligation** is therefore in substance identical to that which applies to the **rights** under section 2(2)(a).

Section 2(2)(f) provides the Building Owner with the **right** to "To cut into a party structure for any purpose "which may be or include the purpose of inserting a damp proof course)."

Section 2(5) makes this **right** subject to an **obligation** to **make good** all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations. Although the **right** only specifically mentions installation of a damp proof course as an example why the building owner might wish to cut into party structure, there are many legitimate reasons why a building owner might wish to do so. The most common include cutting into the wall in order to form a padstone, or to key in a wall perpendicular to the party wall and cutting chases into the wall to run pipes or cables. The mention of cutting chases into a party wall necessitates a temporary diversion in this discussion to establish what is notifiable under this subsection, particularly in the context of *de minimis*.

The cutting-in of chases is explicitly referred to in the Department for Communities and Local Government's Explanatory Booklet on the Act as an example of which "may be too minor to require a notice." Nicholas Isaac comments that this "it is almost certainly wrong in this regard, at least in most circumstances." [20] The unauthorised cutting of a chase into a party wall led to a hearing in the Court of

20 Nicholas Isaac *The Law and Practice* p40, footnote 75.

Appeal in Roadrunner Properties Ltd v Dean.[21] In this case the use of a Kango combination hammerdrill by the Defendant caused damage to the property owned by the Claimant. The point made by in the Department for Communities and Local Government's Explanatory Booklet engages the concept of *de minimis.* The question often asked is whether all works to a party wall must be dealt with under the Act.[22] If one wants to drill a hole to hang a picture, or remove and patch a section of unkeyed plaster, or repoint a plaster wall, do these bring the Act into play?

The answer is that if the work one is proposing to a party wall is so minor that it would not occur even to the most cautious/ nervous surveyor that damage might occur to a neighbouring property, then this will probably be considered *de minimis*, i.e., so negligible that the law does not consider it worthy of a notice. The first of the examples above would certainly fall into *de minimis* category. Plaster has certainly traditionally been viewed by party wall surveyors as also falling into this category. However, this is now doubtful following the case of *Grand v Gill [2011]* in which plaster was held to be structural in nature (in a case concerning the extent of the landlord's implied repairing obligation). Nicholas Isaac considers that re-pointing would, almost certainly, engage the Act.[23]

Section 2(2)(g) of the Act provides a building owner with the **right** "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". It is worth noting that this right, which applies to cutting away any "projection on or over the land of a building owner" and

21 Court of Appeal [2003] EWCA Civ 1816, [2004] 1 EGLR 73

22 For this and what follows see Nicholas Issac *The Law and Practice* p. 6 and 40.

23 Ibid, p.7.

"for any purpose" is, though very similar to the right at 2(2)(h) not limited by any reference to necessity, and is last potentially much wider in scope. Section 2(5) makes this **right** subject to an **obligation** on the part of the building owner to **make good** all damage occasioned by the works to the adjoining premises or to their internal furnishings and decorations.

The building owner has **rights** under Section 2(2)(h) "To cut away or demolish parts of any wall or building of the 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 party wall or building of the adjoining owner". There appears to be a contradiction between this **right** and section 9(a) of the Act which protects adjoining owner's "easements or relating to a party wall". However, the **right** or easement to maintain a projecting part of a building will often not be a **right** "in or relating to a party wall". Rather it will be a **right** which is exclusively referrable to the adjoining owner's wall (which is not a party wall). To illustrate this, some time ago Nicholas Isaac provided an expert legal opinion as part of a determination by me as a Third Surveyor. It related to a common situation to which the **right** of section 2(2)(f) applies, that is, projecting eaves and gutters at the top of a building, where the outside face of the flank wall of a building delineated the legal boundary between the properties. As the wall was a flank wall and not a party wall, it was determined that the **right** to cut away the projection would not be limited at all by section 9(a).

It is also common for foundations to be project beyond the boundary line separating properties. Generally, projecting foundations may be cut back under section 2(2)(h). If the foundations project from a building which is constructed (save for the foundations) entirely on the land of one owner, then section 9(a) is not engaged since the **right** to maintain them is not a **right** in "in or relating to a party

wall" even if they have been in situ long enough to acquire a **right** to remain by prescription.[24]

Section 2(5) makes this **right** under section 2(2)(h) subject to an **obligation** on the part of building owner to **make good** all damage occasioned by the works to the adjoining premises or to their internal furnishings and decorations.

The final subsection to consider in this discussion on **rights** is Section 2(2)(j) and this provides that the building owner may "[…] cut into the party wall of the adjoining owner's building in order to insert a flashing or other weather-proofing of a wall erected against that wall". This narrow but important **right** provides a practical solution to the difficulty which would otherwise be faced by a building owner who wants to ensure that the junction between the two buildings, built separately but immediately adjacent to one another, is not a source for problems. Often this sub-section is relied upon when a building owner is erecting an independent building which abuts directly onto an existing building of the adjoining owner. In these circumstances it is plainly in both parties' interests that the junction between the two buildings is suitably weatherproof. Section 2(6) makes this **right** exercisable subject to **making good** all damage occasioned by the works to the wall of the adjoining owner's building.

24 Ibid, p.42,

SUMMARY	
Building Owner's rights	**Building Owner's obligation**
2(2)(a)	2(3)(a)
2(2)(e)	2(4)(a)
2(2) (f)	2(5)
2(2) (g)	DITTO
2(2) (h)	DITTO
2(2) (j)	2(6)

PART 3: WHAT MAY BE INCLUDED IN PAYMENTS IN LIEU?

The provisions for the adjoining owner to ask for the damage to be made good or to receive **payment in lieu** has been identified and correlated. The latter option is the focus of this paper and consideration is now given to what may be included in **payment in lieu.** Section 11(8) defines **payment in lieu** as an **expense** and therefore it is not considered as compensation; comparing the two is of value.

Although "**expense**" and "**expenses** " are not expressly defined in the Act, it is clear from the context of their use[25] that they primarily refer to the actual costs of carrying out the work, including the usual costs incidental to such building work. Such incidental works include, for example, professional fees. The total costs of repairs by way of an **expense** under section 11(8) has certain parallels with compensation under section 7(2)[26] but the latter route may be more useful to the adjoining owner who has employed his own contractor

25 Sections 1(3) (b), 1(4)(a), 1(7), 6(3), 7(3), 11, 13, 14.

26 Section 7(2) provides: "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."

to repair the damage caused by the building owner's works. This is because the cost which has actually been incurred and paid by the adjoining owner is a loss which, unless it is unreasonable, is likely to be recovered under section 7(2). In contrast, if the party wall surveyors are asked to limit their determination to the reasonable costs of **making good**, they may well produce a lower figure. It is apparent that by definition, compensation for loss or damage recoverable under section 7(2) has a wider range than **expenses** recoverable under section 11(8). This is made clear if one considers the potential heads of damage under section 7(2) over and above the costs of repair: diminution in value, alternative accommodation, storage and/or moving costs, loss of earnings, loss of amenity, legal costs, professional costs.[27] Particular circumstances may therefore dictate an adjoining owner's decision and/ or ability to seek **payment in lieu** or compensation.

The problem faced by surveyors is determining the extent of the costs of the repairs when the adjoining requests **payment in lieu**. This problem typically arises when party wall surveyors put forward the argument that there should be a discount applied to the cost of repair claimed by an adjoining owner on the basis of **betterment,** that is, that the adjoining owner's property would be in a better state of repair and/or decoration after the remedial works than it was prior to the building owner causing damage and consequently the adjoining owner should not receive the full cost of these works.

The phrase **betterment** is not used in the Act but its potential application requires investigation. The Court of Appeal case of *Harbutt's Plasticine Limited v Wayne Tank and Pump Company Limited (1970)* provides authoritative guidance. Although this was not a party wall case, it is nevertheless considered applicable by

27 These losses must be related to matters in pursuance of the Act.

Nicholas Isaac, Matthew Hearsum[28] and the retired party wall judge, HH Edward Bailey.[29] The *Harbutt's* case makes it absolutely clear that there is no legal basis for discounting the costs of repairs in such cases. If, in carrying out repairs reasonably necessary to remedy the damage caused by the defendant's works, the claimant's property is in a better state of repair than it was prior to the defendant's works commencing, that is just good fortune on the part of the claimant. In *Bradley v Chorley Borough Council (1985)* the Court of Appeal referred to the principle regarding obligations to remedy damage as set out in the *Harbutt's* case and confirmed that decorations are to be considered in the same way as other property damage.

The starting position for party wall surveyors when considering the cost of repairs claimed by an adjoining owner is that the adjoining owner is entitled to be put in the position he/she would have been in but for the damage. Perhaps the key point, when it comes to decorations, is that the adjoining owner is entitled to a consistency of appearance after repair and redecoration. This is now considered in Case Study 1.

28 This case is included in their book *The New Party Wall Casebook*, p.86.

29 A personal communication.

PART 4: CASE STUDIES

Case Study 1:

In this case study, I was called upon as a Third Surveyor under section 10(11) of the Act to settle a dispute between the appointed surveyors over the extent of redecoration. The above photograph shows the isolated damage to the party wall in the living room to a house, following the insertion of a beam. The extent of the crack and plaster repairs were not in dispute. The Adjoining Owner's Surveyor considered, however, that the whole room should be redecorated because merely painting the relatively small area of repaired plaster would stand-out. The Building Owner's Surveyor disagreed, initially saying that he felt only the new patch of plaster required painting but later changing his stance saying that he would agree to one wall being redecorated. I was therefore asked

whether the redecoration of one wall was an adequate repair. I inspected the Adjoining Owner's property and noted that the existing emulsion paint applied to the walls was not new, and clearly faded.

I determined that all the walls in the room were to be redecorated. My reasoning was based on the principles of the above mentioned *Harbutt* and *Bradley* cases: in terms of decorations the adjoining owner was entitled to a consistency of appearance after repair and redecoration. I was of the opinion that after the party wall had been redecorated, an objective observer would be able to see a difference between the party wall and the other walls in the room; a consistency of appearance was not possible. The adjoining owner was entitled to be put in the position she would have been in but for the damage.

Case study 2

Case study 1 provides a relatively low cost example of **"betterment"** being "the claimant's good fortune." A much more costly example is provided by the previously mentioned *Lea Valley Developments Limited v Derbyshire.* In this case damage was caused by a building owner to an adjoining owner's property which was already in a poor state of repair but led to the building owner paying for an entirely new building for the adjoining owner. It must be stressed, however, that each case is fact dependent and this is best illustrated in the next case study.

Case Study 3

In this case I was the building owner's surveyor. This case involved the cutting away of a reinforced concrete balcony from a party wall. The Building Owner's builder did not follow the agreed method of cutting the balcony away from the party wall. The unauthorised use of a Kango in the removal of the balcony from the party wall, together with vibration caused cracks in the party wall in the Adjoining Owner's living room.

The Adjoining Owner's surveyor and I recorded in the schedule of condition prepared before the notified works commenced that the decorations within the Adjoining Owner's property were relatively new and clean.[30] As in Case Study 1, the extent of crack repairs to the party wall were agreed but the Adjoining Owner wanted the

30 The schedule of condition was appended to the Party Wall Award.

whole room redecorated; the Building Owner was only prepared to pay for the redecoration of the party wall. As the parties could not agree on the extent of redecoration, the Adjoining Owner's Surveyor and I were given authority by the Parties to make a further award. We determined that only the party wall required redecorating as it would not look noticeably different in terms of colour or cleanliness from the other walls in the room.

CONCLUSION

The aim of this paper has been to identify where and under what circumstances an adjoining owner may request **payment in lieu** for **making good** under section 11(8) of the Act. This investigation has shown that the reach of section 11(8) is limited. The **obligation** for a building owner to make **payment in lieu** of **making good** only derives from the **rights** set out in sub sections (2)(a), (e), (f), (g), (h), and (j) of the Act. The **corresponding obligations** to these specific **rights** have been identified in sub-sections 2(3)(a), 2(4)(a), 2(5) and 2(6) and tabulated for ease of reference. Two important factors have been discussed to guide party wall surveyors in determining **payment in lieu:** first, a distinction has been made between an **expense** under section 11(8) and compensation under section 7(2); an **expense** is limited to the full costs of the repairs, which may include those costs incidental to **making good**. Two legal cases emanating from the Court of Appeal provide guidance to party wall surveyors in addressing the conundrum of **betterment** when assessing the actual costs of repair under section 11(8). The three case studies illustrate how all the principles established in this paper are applied.

9. WHEN CONCRETE OVERSPILL SPILLS OVER INTO LITIGATION

Cecily Crampin and Edward Blakeney

The Party Wall etc Act 1996 ("**the Act**") provides a self-contained code for dealing with Party Wall disputes. Running to just some twenty-two sections, it has proved to be a succinct and effective piece of legislation at resolving disputes before they even reach the stage of litigation.

Inevitably, some cases do end up in Court and can be fought over a variety of matters. We were recently opposing counsel in one such case involving concrete overspill, and this required a closer look at the nature of concrete overspill, its legal status, parties' remedies where concrete overspill is encountered, and the practical considerations for those on either side of such a dispute. Once the case had concluded, we thought it was high time for an article on this deceptively beguiling topic.

WHAT IS CONCRETE OVERSPILL?

Concrete overspill is most frequently encountered in basement constructions. In short, it is where excess concrete has crossed over the boundary line from one property into another.

A typical scenario is thus: Cecily and Ed are neighbours that share a party wall, and neither of them have excavated their basements. When Cecily proceeds to excavate the area beneath her house, a retaining wall is constructed against or across the boundary line by pouring the concrete into place. However, for reasons that may or may not be within the control of Cecily (or her contractors), a certain amount of concrete does not stay in place and spills over the boundary line or the intended face of the new wall and therefore onto (or, rather, underneath) Ed's property.

The concrete overspill hardens and remains unnoticed until Ed goes to construct his basement in due course. Ed then realises the problem and has to remove the additional concrete so as to proceed with his works.

REMEDIES FOR CONCRETE OVERSPILL — THE COMMON LAW

There will be three primary common law claims that Ed could bring once concrete overspill is uncovered: trespass, nuisance and negligence. There seems to be no reason why these causes of action would not sit alongside and together with claims under the Act itself (discussed below), although of course it could be said that they are strengthened (for policy reasons if nothing else) if for whatever reason the Act is unable to provide effective relief.

When it comes to claims in negligence, the claim would likely have to be against Cecily's contractor, unless it could be said she had authorised or intended the overspill, which seems unlikely.

Ed would have to establish the builder owed him a duty of care (which seems likely) and that the works that were carried out fell below the standard expected of a reasonably competent builder. The mere fact that there is concrete overspill may not be sufficient to establish that. It could have occurred even if the contractor had exercised all due care and skill, for example where the soil is particularly difficult to work with. So, whilst it might be relatively easy to establish that a contractor owes a duty of care to a neighbour, there could be an evidential burden on the question of whether that duty has been breached.

Limitation points are likely to be relevant to a negligence claim. In cases of negligence, s.14A of the Limitation Act 1980 will permit the primary limitation period of six years to be extended to three years from the date on which the overspill was discovered, subject to a long-stop date of 15 years from the original underpinning.

More straight-forward as a claim against Cecily, perhaps, would be a claim in trespass or nuisance. Trespass involves an unjustifiable intrusion by one person on the land of another. Nuisance involves one person's use of his land which interferes with his neighbour's ability to enjoy his property. To be nuisance, the act has to be beyond an act necessary for the common and ordinary use and occupation of land (see the recent analysis of the law in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4). Nuisance and trespass are at their closest with encroachment by one person onto his neighbour's land. If Cecily builds on her own land but with a cornice projecting over Ed's so that rainwater is diverted into Ed's, that is a nuisance. If the cornice itself is in Ed's airspace however, i.e., over the boundary, then the building of the cornice was a trespass. Although there may be arguments to the contrary in certain cases, it seems to the authors that the creation of concrete overspill is most likely to be a trespass not a nuisance, because it involves putting Cecily's concrete onto Ed's land.

One might think that, if the result of Cecily's works is for concrete to spill from their property, across the boundary line, and onto/under Ed's property, it would be unlawful and Ed would have a clear claim in trespass which he could rely on years later when he came to construct his basement, that is, assuming, as seems likely, that the overspill was not permitted by a party wall award made and permitting Cecily's works.

That the overspill would be a trespass at the point overspill concrete went from Cecily's land to Ed's, during Cecily's basement works, is indeed not controversial. The issue, highly relevant to whether the limitation issues discussed below could be problematic, is whether the trespass is continuing.

The easiest way to illustrate this point is to step back from the concrete overspill case, and think about a party wall built across the boundary line by Cecily in accordance with the Act. When Cecily (or her contractors) puts the bricks for the wall on Ed's property, that would be a trespass save for the provisions of the Act. Under the procedure set out by the Act, Ed has either consented (so that there is no trespass), or there is an award permitting the works. That award prevents the acts permitted by it being a trespass.

What happens when the works have been completed? Who owns the bricks and the wall on Ed's side of the boundary? One answer is that the Act authorises what could otherwise be a continuing trespass. The other answer is that provided the wall built is sufficiently permanent, it is a fixture on the land, and the part on Ed's side of the boundary becomes part of Ed's land and within the ownership of Ed. Ed owns the bricks and wall on his side because they have become part and parcel of the land. Ed can do works to that wall without interfering with Cecily's goods, though he will likely have to comply with the Act in so doing.

If one thinks about trespass more generally, a similar analysis can apply. If Cecily builds a house across the boundary line onto Ed's

land, so that when built Cecily's kitchen sits across the boundary line, then the act of building was a trespass. In addition, Cecily's use of the kitchen is a trespass because in using it she is entering onto Ed's land.

What also seems likely, though this point does not seem to be discussed clearly in case law or commentary, is that because Cecily is using the kitchen, and the walls are a necessary part of it, the presence of the walls is a continuing trespass, even though on the fixture analysis the walls have ceased to be a collection of Cecily's chattels (the bricks when bought being Cecily's chattels) but have become part of Ed's land. That seems to accord with *Holmes v Wilson (1839) 113 ER 190,* where the defendant built buttresses on the claimant's land to support the defendant's road. Though the point is not discussed in detail, the basis on which the court found there was a continuing trespass by reason of the buttresses remaining in position after a request by the claimant for their removal, appears in part because the buttresses were continuing to be used to support the defendant's road.

Suppose instead that Cecily went into the middle of Ed's garden and built a house in it, with none of that house crossing the boundary line. Suppose Cecily never goes into that house again. The act of building the house was a trespass. The question is whether the continuing presence of the house without her use is a continuing trespass or whether the house has become part of Ed's land and without her use there is no further trespass.

In the only case the authors have found which suggests it would be, *Field Common Ltd v Elmbridge BC [2008] EWHC 2079 (Ch)*, the defendant had tarmacked a road over which they had a right of way, but had tarmacked beyond that way so as to trespass onto the claimant's land. The road was continuing to be used, by the Council's tenants, for some of whose such acts the defendant was liable in trespass. Warren J also considered whether the tarmac remaining, without the claimant asking for or wanting its removal, was a continuing trespass.

At [29] he said, setting out the argument that there was a single act of trespass relating to the laying of tarmac, *"… where the trespass takes the shape of fixing materials to the land (such as building a wall on it or constructing a road on it by the laying of tarmac), the materials become, on one view, part of the land and ownership passes to the landowner. On that basis, the continued presence of those materials is not a continuing trespass. That does not mean the landowner has no remedy. If he suffers loss as a result of the presence of the wall or the road in those examples, he can recover the loss even if there is only a single act of trespass. If the landowner wishes the wall or road to be removed, he can ask the trespasser to do so; if the trespasser fails to do so, the landowner can remove it himself, and, if it was reasonable for him to do so, he will be able to recover the expense. It might seem, therefore, that it makes little difference in practice whether there is a single act of trespass or a continuing trespass.*

That is not necessarily so in all circumstances. Suppose that the wall or the road remain in place for more than 6 years without objection. The limitation period for a claim in trespass in relation to the building of the wall or the construction of the road will have expired. And if there is a single act of trespass, the landowner will have no remedy for the continuing presence of the wall or road. This will be so even if the trespasser continues to enjoy what he has wrongfully placed on the landowner's land, for instance by driving over the road, although in that case, such actual use gives rise to separate acts of trespass for which the landowner may be able to recover damages …"

Warren J went on at [36] to conclude that the continued presence of the tarmac was a continuing trespass giving rise to a new cause of action from day to day. The positive basis on which it is said that was so, contrary to the summary of the alternative argument, is not clear in his decision, however. It may be understood as a consequence of the continued use of the road. Each use by or authorised by the Council was itself a trespass, but also a continuation of the trespass of surfacing the road because use of the surface was what allowed that trespass, just as the buttresses continued to be used to support

the road in *Holmes v Wilson*. Moreover, Warren J suggests some uncertainty about his decision, saying "*Even if that is wrong, the point is one which … I consider was for the [Defendant] to take at the trial of liability; the [Defendant] should not be allowed to raise it in this assessment of damages.*"

Thus, one possible analysis of the situation where Cecily built a house in the middle of Ed's land and never used it is that there was no trespass after the building works ended.

The overspill case is on the edge of the two examples. Assuming Cecily's new basement wall was permitted, under its award, to be built across the boundary line, the half of the wall across the boundary will, on the above fixture analysis, become Ed's. The overspill when created was a trespass. Once created it is attached to Ed's wall, and as a matter of physicality becomes part of his land. That suggests that its continued presence may not be a continuing trespass, if the fixtures argument is correct. One might say that Cecily (and anyone she sells to) is using the overspill part of the wall in using the basement and hence continuing the trespass, but that does not seem an obvious conclusion. The overspill is not a necessary part of enjoyment of the use of the basement as the wall is, and, if the permitted wall is a wall across the boundary, the wall to which it is attached is now Ed's and the overspill not something Cecily could realistically now remove.

Indeed Cecily might say that in relation to the overspill, she did not commit any trespass at all. It was her contractors who did so, and if she employed competent contractors, she did not authorise them to do works beyond the award, and hence to create the overspill. In using her basement, unlike in the kitchen use case where she must know that the kitchen is surrounded by a wall, she likely does not know of the overspill, but only knows that the basement is surrounded by basement walls which she would have no reason to know did not comply with the party wall award.

That seems an unattractive argument, however, not least because trespass does not depend on intent or a particular state of knowledge. In any event, if Cecily's contractors carried out the works competently but the concrete overspill was unavoidable, then Ed would say Cecily should be fixed with the consequences of her contractor's works. Equally, even if she is unaware of the presence of the overspill, the fact remains that there is a trespass onto Ed's land. Were Cecily's contractors negligent, then that should not deprive Ed of a cause of action in trespass against Cecily — it is Cecily's property that constitutes the trespass. If Cecily is aggrieved by the work of her contractors, she would have a cause of action against them in contract, rather than being able to escape liability entirely.

One problem with the fixture analysis when applied to concrete overspill is that it could lead to different results depending on whether the wall was built across or only up to Ed's boundary. If it was the latter, such that no part of the wall could be said to become part of Ed's property, one might argue that the concrete overspill could not attach to something belonging to Ed and would remain attached to Cecily's property if it were not enough that it had become part of Ed's subsoil. Presumably, therefore, it would be a continuing trespass (much like the cornice example referred to above). This would be the converse of the result if the wall was built across Ed's boundary. But that seems a somewhat artificial distinction when the works undertaken by Cecily would be virtually identical. The continuing trespass analysis, in contrast, provides a more consistent framework.

It is also a major feature of overspill cases that the overspill is not readily discoverable. This has implications when it comes to limitation (discussed below), which could be seen as leading to an unfair result if there is no continuing trespass. In any event, as said above, there is a natural difference between the house built by Cecily on Ed's land and concrete overspill, but there does not seem to be a justification for treating them differently simply because

one is visible/ discoverable and the other is not. If that is not the distinction, then what is? The better analysis would be that one (the house) is entirely independent and detached from Cecily's land whereas the other (concrete overspill) remains attached to and originates from Cecily's land. The former can more readily be seen as a fixture to Ed's land than the latter, which suggests the application of the fixture analysis to concrete overspill is less apposite and the conclusion that the trespass constituted by it is a one-off event is questionable.

Nevertheless, it is safe to say that there are issues with whether the overspill is a continuing trespass and the point is capable of being argued either way.

We now turn to the limitation consequences. The limitation period for a claim for an injunction to remove the overspill, or damages, for example the cost of its removal, based on trespass (or indeed nuisance) is 6 years under s2 of the Limitation Act 1980. There is no extended limitation period as there is with negligence. Thus, if it were right that there is no continuing trespass, then Ed, discovering the overspill years after Cecily's works, might have difficulty in succeeding on his claim.

In *Jalla v Shell International Trading and Shipping Company* [2023] UKSC 16, the Supreme Court addressed the question of continuing nuisances, and said at paragraph 26:

> *"In principle, and in general terms, a continuing nuisance is one where, outside the claimant's land and usually on the defendant's land, there is repeated activity by the defendant or an ongoing state of affairs for which the defendant is responsible which causes continuing undue interference with the use and enjoyment of the claimant's land. For a continuing nuisance, the interference may be similar on each occasion but the important point is that it is continuing day after day or on another regular basis."*

In *Jalla*, the question was whether there was a continuing nuisance, because otherwise the claim was limitation barred. The claim arose out of an oil spill off the coast of Nigeria on 20 December 2011. For the purposes of the limitation issue it was assumed that the oil reached the Claimant's land within weeks. The claimant applied to amend the claim after the end of the limitation period, if one calculated that from the spill. The claimant argued there was a continuing nuisance because the defendant had not cleared the spill on their land up, i.e., there was a continuing obligation to remediate the damage.

The Supreme Court concluded that there was no continuing nuisance. The oil arrived on the claimant's land because of the defendant's activity, but the continuing damage caused by it remaining on the claimant's land was not due to an act or omission by the defendant, or a continuing state of affairs for which it was responsible, once the oil leak had been ended. To conclude otherwise would, wrongly, suggest that nuisance included an obligation on the defendant to clear up the spill.

In so far as the *Jalla* decision and discussions are relevant to a trespass claim (a claim in nuisance requires damage, trespass does not, and the damage issue was central to the discussion in *Jalla*) what it makes clear is the care with which one has to analyse the constituent parts of the cause of action in trespass to determine if it is continuing, just as in nuisance. It may well not be enough to say that there is a continuing nuisance or trespass just because there is a continuing problem. That is an observation made in paragraph 24: *"One can naturally describe the oil still being on the claimants' land as a continuing nuisance. But that is wholly misleading when one is trying to clarify the meaning of a continuing nuisance in the legal sense"*.

Likewise, the reference to *"a continuing state of affairs for which the defendant is responsible"* in the quote above can be misleading. The 'continuing state of affairs' description comes from *Delaware Mansions v Westminster City Council* [2001] UKHL 55, in which there

was a continuing nuisance because a tree on the defendant's land had roots on the claimant's, and the roots caused *"by extraction of water through its encroaching roots, continuing undue interference with the claimant's land"* (paragraph 30).

On the one hand, that is not exactly equivalent to the concrete overspill case. The concrete overspill was put into the adjoining owner's land. That was likely a trespass. If it was a nuisance, however, the damage occurred, that is the change in the condition of Ed's land, when the overspill was put into it. The issue with the overspill is usually simply that it costs to remove it when the adjoining owner wants to do his own basement works. It is not usually the case that the presence of the overspill leaches water from the adjoining owner's ground or otherwise causes cracking; if it does that will usually be discovered in time. Even if the overspill did have that effect, that would not be like the tree root case. The extraction of water through tree roots is for the tree on the defendant's land, and that is why there is a continuing nuisance. If overspill causes cracking after it was put onto the land it is not because of its connection to the building owner's land. It is simply because of the interaction of that concrete with the soil around.

On the other hand, a trespass can be (and arguably should be) viewed differently to a nuisance. By the very presence of overspill on Ed's land the trespass can be said to be continuing — the essence of trespass is the unauthorised presence of someone or something on land it is not meant to be on, and the overspill continues to be there; whereas nuisance is focused on the use of one's land affecting the use of another's (and use is necessarily an ongoing state of affairs).

That difference is emphasised by the fact that the mere presence of a trespass gives rise to a cause of action, whereas nuisance must cause damage. And so an actionable nuisance will be discoverable because it must be causing loss. But an actionable trespass, such as overspill, may go unnoticed for many years until Ed decides to excavate his own basement. That passing of time will not diminish

the consequences Ed faces and the costs he would have to bear. Why, one might ask, should the common law fail to provide a remedy because Cecily had the means/ desire to carry out works 6 years before Ed and (on the assumption that trespass is once-and-for-all) limitation has therefore expired before Ed even has a chance to bring his claim?

One take away from this discussion is that there are surprisingly few cases on the effect of trespass by permanent building on another's land, and what use of that building will constitute a continuing trespass. It appears we may need a *Jalla* for trespass claims.

REMEDIES FOR CONCRETE OVERSPILL — THE PWA

We now turn back to the remedies for the overspill under the Act and in common law.

First things first — 'No Notice, No Act'. The new mantra from *Power & Kyson v Shah [2023] EWCA Civ 239* is as relevant here as it is with any other matter concerning party walls. In the event that no notice was served, the remedies under the Act have no application. The aggrieved property owner would need to revert to common law remedies.

But assuming that a notice has been served. There would seem to be three primary remedies. The first is perhaps less contentious — Ed would bring a claim for compensation against Cecily pursuant to s.7(2) of the Act.

In *Davis v Trustees of 2 Mulberry Walk* (Unreported, Central London County Court, 26 January 2012), HHJ Bailey held that s.7(2) *"should be interpreted so as to cover any work executed in pursuance of or purported pursuance of work under the Act … even where the strict terms of that award are not complied with."* Thus it would not be open to Cecily to say that as the concrete overspill was not permitted/ contemplated

by the terms of any award, any works to remove the unforeseen overspill are outside the scope of the Act.

The second remedy may be under s.11(11) of the Act. Where Cecily carries out works at their sole expenses, and Ed subsequently makes use of those works (for example by enclosing their basement wall against a basement wall already constructed), Ed has to pay Cecily "a due proportionate of the expenses incurred" by Cecily in carrying on her work.

In the case we were involved in, the Party Wall Award determined a sum payable in accordance with s.11(11), but went on to say:

> *"This payment is due once enclosure has occurred but will be subject to variation following accurate site measuring and taking into account the condition of the underpinning and removal of any spillage."*

Simple enough? Perhaps not. It is not clear whether there is jurisdiction to make such an adjustment under s11(11) of the Act. One argument is that the cost of Ed making good the overspill affects the *"due proportion"* of expenses incurred by Cecily. But "due proportion" appears on first reading to mean that the calculation is about the percentage of the wall that Cecily built which Ed has enclosed on. Subtracting a sum based on Ed's costs of spillage removal from a percentage of Cecily's costs doesn't seem to be part of the s11(11) exercise.

In any event, the jurisdictional issues and the inherent uncertainty added to an award using terminology such as *"subject to variation", "taking into account",* and *"condition"* (What? How?) are perhaps avoided where s7(2) provides a more sensible remedy.

There are additional considerations that apply to these remedies under the Act.

Who is the correct party to sue where there have been dispositions since the original works were carried out? What happens if Cecily sells her property to Nick before Ed discovers the concrete overspill? Who does Ed have recourse against? It seems most likely that the identity of the building owner is fixed as at the date the party wall notice is served so that the building owner for s7(2) will remain Cecily. Ed could still seek compensation from Cecily under s7(2). Of more uncertainty is where both the properties have been transferred i.e., Cecily sells to Nick, and Ed sells to Stephen. Where Stephen uncovers the issue, is it still Ed who is the 'adjoining owner' who has recourse against Cecily even though Ed has no interest? Since s7(2) refers to "any adjoining owner" it appears that Stephen can still rely on s7(2) against Cecily. It does not appear that Ed, or if he has sold Stephen, could use s7(2) to get compensation from Nick.

Second, what limitation period applies to claims under s7(2) of the Act? It would appear that the 6-year time limit under s9 of the Limitation Act 1980 runs from the date of the breach of the duty, rather than the date of damage. In *K Group v Saidco* (2021, Central London County Court, HHJ Parfitt), HHJ Parfitt concluded that the limitation for a claim for compensation under s7(2) was the 6-year period under s9, and time ran from when the damage for which compensation was sought occurred. That would be the date the overspill was created. If that's right, which has been doubted, Ed would have a short period in which to do basement works before he would be out of time to seek compensation under the Act.

The third possible route is that Ed is doing s2(2)(b) work to the basement wall in removing the overspill. S2(2)(b) is work "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". The overspill, one might say, especially if not what was permitted under Cecily's award, is a defect and its removal by Ed is work to make good. On that basis, Ed's expenses of so doing are s11(5) expenses

which "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."

The benefit of this route is that is brings the issue into the present, so that issues about limitation under the Limitation Act 1980 are far less likely. It also appears that successors in title have rights afresh. Stephen can seek expenses from Cecily in this way, just as Ed could have. Ed or Stephen (depending on whether there has been a sale) could seek expenses from Nick, though Nick is less likely to be said to have responsibility for the defect, so the benefit to Ed or Stephen will not be as great.

There is a limitation issue for such expenses however, under the Act itself, and a much shorter one than under the 1980 Act. S13 of the Act sets out a process for the person doing the s2(2)(b) work to 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 …". That account must be served "within the period of two months beginning with the day of 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 adjoining owner has 1 month to serve a notice of objection, with any such objection to be resolved under s10. Otherwise he is deemed to have no objection to the account.

DEALING WITH CONCRETE OVERSPILL IN PRACTICE

In addition to the foregoing legal considerations, practical considerations are abundant. Primarily, there will need to be clear evidence as to (1) the existence and extent of any overspill, and (2) the cost of removal. Without those, even if Ed were to get home on the law, he could still lose the case if they unable to satisfy the judge on the balance of probabilities what costs/ losses had been incurred. Thus the takeaway on the concrete overspill case might be the need for detailed evidence on the cost of removal. That may be the more practical route to avoiding the detailed legal arguments outlined in this article.

CONCLUSION

Our case settled before the Judge gave judgment, such that some of the foregoing arguments were not determined or fully ventilated in Court. But there is plenty of room for argument on jurisdictional, legal and factual matters. Whilst this is somewhat undesirable in respect of a piece of legislation that is meant to simplify the procedure for dealing with disputes, it seems to us that there is much scope for Judges to reach the conclusion they consider 'correct' via one route or another. We hope that it will not be too long before these points are resolved authoritatively.

10. THE PEOPLE WHO HAVE PARTY WALL DISPUTES

Anthony Fieldhouse

One of the interesting things about being a party wall surveyor is the variety of people you meet. I don't mean my fellow surveyors who are, without exception, knowledgeable, cooperative and keen to do the right thing.

No, I mean the owners and occupiers of the properties we come across.

BUILDING OWNERS

Young, upwardly mobile couples

They have children or a child is on the way. Typically they have owned their house for a short time. They 'need' a larger home to accommodate their increasingly large family. They also need larger and better reception areas to cater for their expected need to entertain in their chosen lifestyle.

They are prepared to accommodate the requests of the neighbours and are conscious of the fact that they will have to live as neighbours in the future — but only up to a point. If the neighbours opposed their planning application, and made the development more expensive, and then complain too much while the works are in progress, they will be labelled 'difficult', and their requests will be brushed aside.

Comfortably off, Middle-aged Couples

They want to enlarge their home.

They have usually lived in this house for years and finally have the time and the money to alter it in the way they have always wanted.

They are disagreeably surprised when the neighbours of many years try to oppose their modest attempts at improvement, "after all we have done for them". They have tolerated their awkward children over many years, or walked their dog, or fed their cat. All these minor irritations are resurrected and added to the general resentment.

Developers — Nice

These are people who make a living as developers who take pride in doing a good job and in leaving an upgraded property which improves the neighbourhood. They wish to complete the building work as fast as possible, so they can move on.

They are anxious not to upset the neighbours (a) because they are nice people and (b) because they are conscious of the fact that unhappy neighbours cause problems in all sorts of unforeseen ways.

They take the lead in talking to the neighbours and offering alternative incentives where some feature is causing difficulty.

Developers – Nasty

Typically, they are only concerned about the neighbours if they are likely to cause 'trouble'. Otherwise they are indifferent.

A common ploy is to introduce themselves to the neighbours telling them that the development will be to their benefit and often try to persuade them not to bother with party wall procedures because they are not necessary.

If the neighbours ignore their advice, dissent and appoint their own surveyor, they are irritated at the prospect that this will cost them money and delay ("Oh that's how they want to play it!") and try to persuade their appointed surveyor to adopt all punitive measures permitted 'by law'.

ADJOINING OWNERS

Co-operative

They are resigned to the development. They hope it's not going to be too disruptive. They may even be pleased that the previous ghastly neighbours have left at last.

It is worth spending some time persuading the building owners that it is to their advantage to maintain this positive interaction with the neighbours by bending over backwards to accommodate their requests.

Obstructive

They know their rights or at least they think they do. The new neighbours had better not think they are going to be a walkover.

They take pride in arguing every last point, because they believe (I presume sincerely) that if they don't, they will be put at a disadvantage. "No-one is going to tell me what to do", is a commonly heard reaction.

Eddie Hearn, son of Barry Hearn, sports promoters both, summed up this attitude (on Radio 5) "You don't let people take liberties with you". And, unfortunately, that is the guiding principle of the obstructive adjoining owner.

What can the surveyors do about it? Well, plod along, I'm afraid, following the Party Wall Act to the letter, and hope that they eventually run out of breath.

WE SURVEYORS

And finally, some comments about how we surveyors might interact with our appointing owners and of course, with each other.

I can do no better than quote Thomas Jefferson, third president of the United States, who considered that, based on his experience of men and of politics, that direct conflict was unproductive and ineffective.

"Good humour is the practice of sacrificing to those whom we meet in society all the little inconveniences and preferences which will gratify them, and deprive us of nothing worth a moment's consideration; it is the giving a pleasing and flattering turn to our expressions which will conciliate others and make them pleased with us as well as themselves. How cheap a price for the goodwill of another!"

"When this is in return for a rude thing said by another, it brings him to his senses, it mortifies and corrects him in the most salutary way, and places him at the feet of your good nature in the eyes of the company.

"But in stating prudential rules ... in society I must not omit the important one of never entering into a dispute or argument with another.

"I never yet saw an instance of one of two disputants convincing the other by argument. I have seen many, on their getting warm, becoming rude, and shooting one another."

11. 10 (4) APPOINTMENTS

HELPFUL OR UNNECESSARY?

Irene Moore

The Party Wall etc. Act 1996 came into force on 1st July 1997 and applies only in England and Wales. It has been defined as an enabling Act because it allows owners a mechanism for preventing and resolving disputes in relation to party walls, party structures, boundary walls and excavations near neighbouring buildings and many are exempt from it including The Crown, The Government and Local Authorities,[31] except lands as defined in 18 (1) of the Act.

Once a Notice is served the process to undertake proposed lawful works is instigated. It cannot be stopped unless by injunction. If upon 14 days there is no response to the Notice/s, a Building Owner or their appointed surveyor acting on their behalf sends a 10-day

31 https://www.gov.uk/government/publications/preventing-and-resolving-disputes-in-relation-to-party-walls/the-party-wall-etc-act-1996-explanatory-booklet

Request to the adjoining owner requesting that they appoint a surveyor and if at this point there is no response received, then the Building Owner or the Party Wall Surveyor acting on their behalf can appoint a Surveyor for the Adjoining Owner. A Section 10(4) appointment essentially allows the process to carry on, thereby preventing owners from frustrating the Building Owner's (Developer) works by simply ignoring a Notice/s and since surveyors are called upon to act *impartially*[32] it is *hoped* that they will represent their owners accordingly. It should be noted that once a surveyor is appointed by or on behalf of an owner they cannot be 'de-instructed,' and can only by their own accord *stand down* by deeming themselves incapable of acting.

REASONS WHY 10(4) APPOINTMENTS ARE IMPORTANT:

- The Act is known as an enabling Act as it allows works to shared walls or within close proximity with neighbours to carry on with reasonable expedition as long as an award is agreed by the appointed surveyor/s. Even unforeseen instances, such as the standing down or death of a surveyor, do not stop the process as long as a Notice has been correctly served and there is a dispute. The Act ensures that works can take place without unreasonable interference whilst at the same time safeguarding the adjoining premises from the effects of that work.

- Keeps costs under control so that unwilling neighbours cannot delay or frustrate the process and therefore impact the programme.

- Ensures that a non-responsive owner is represented by a surveyor and their interest upheld.

32 Welter v McKeeve and McKeeve

DISADVANTAGES OF THE 10(4) APPOINTMENT.

- A Building Owner's surveyor could potentially appoint under section 10(4) (b) a surveyor who does not uphold the correct conduct to rubber stamp an agreement. There has been an occasion where a father appointed his son which raises questions of *impartiality* or *conflict of interest.*

- Can be open to abuse e.g., The example above and when surveyors serve Notices during festive periods when many families are known to travel for holidays so as to appoint a surveyor of their choosing and progress with works.

- Can create a bad relationship between neighbours where there haven't been enough reasonable efforts made to contact an owner at both their registered address, Companies House or undertaken some due diligence to reach them via email or allow a little more time so that an owner can appoint their own surveyor who they feel would *represent* them in the best manner. A reasonable Building Owner's surveyor may allow two or more extra days to each notice period, enquire if their appointing owner has any other contact details for the neighbour especially where a property is vacant or rented out, and door knock.

- Often, surveyors will serve an award with no communication with the Adjoining Owner. The opportunity to safeguard the Adjoining Owner's rights may be limited. The Surveyors may not be able to undertake a Schedule of Condition, or get access to the Adjoining Owner's property, meaning they may serve an award with limited information, meaning the award may not be as effective as it could be. Safeguarding measures such as security for expenses and monitoring may not be used without the Adjoining Owner's permission or input.

Case Law – *Property Supply & Development Ltd Claimant V Mr Graham Verity & Mrs Julie Verity [2015]*

This dispute arose on claimant's appeal that the addendum award should be declared invalid because one of two surveyors purporting to make the award was not validly appointed under the Act. In this scenario the initial Adjoining Owner's surveyor deemed themselves incapable of acting and so did the Building Owner's surveyor. The newly appointed Adjoining Owner's surveyor should have invited the original Third Surveyor to either make an award by himself or one with him; instead, he decided to appoint a new surveyor for the Adjoining Owner and proceeded to then select a different Third Surveyor and in due course the Two (new) Surveyors made an addendum award which was challenged by The Building Owner.

The judge in this case stated, "In the circumstances the addendum award was made only by one validly appointed surveyor, the adjoining owners' surveyor, which is not permissible under any provision of section 10 of the 1996 Act. Accordingly, and with no little reluctance, I must declare the addendum award invalid."

LESSONS FROM THE ABOVE CASE:

- Only the party who appointed the surveyor in the first place may appoint a replacement.

- A surveyor appointed under 10(4)(b) should make contact with their *'appointing owner'* and take necessary steps to engage as appropriate.

- The replacement surveyor is not under the same obligation as the originally appointed surveyor to select a Third Surveyor where one has already been validly selected by the initially-appointed surveyors.

All in all, the 10(4) appointments keep the *world going around* as it ensures that lawful/permitted works can still progress without undue hinderance from antagonistic neighbours as long as the appointed surveyor is not conflicted, inexperienced, and abides by the protocols of their professional bodies which include being impartial, honest, professionally and with integrity. The alternative to 10(4) appointments would be 'deemed consent' whereby after the 14-day notice period, a Building Owner could simply proceed with the work. Instead, section 10(4) incentivises the Building Owner to make contact with the Adjoining Owner, so that they may avoid having to pay two sets of Surveyor's fees associated with the 10(4) appointments. Without this, we could easily see Building Owners acting improperly, by serving notices when their neighbours are on holiday, or by not serving notices at all — but saying that they did! The Party Wall Act is a safety net for both the Building Owner, and the Adjoining Owner, and section 10(4) is a vital part of this safety mechanism, benefitting all parties concerned.

12. CRITIQUING SECTION 10(4) OF THE PARTY WALL ACT

AN OPEN DOOR TO ABUSE

Ben Mackie

The Party Wall etc. Act 1996 is designed to provide a clear framework for resolving disputes that arise when building works affect shared walls, boundary walls, or excavations near neighbouring properties. While the intention behind the Act is commendable, section 10(4) has come under scrutiny for being susceptible to misuse. This section, which addresses the appointment of a surveyor on behalf of a party which has refused or neglected to respond to a request to appoint a surveyor, is particularly vulnerable to exploitation. This article explores some of the ways in which section 10(4) can be abused, highlighting the urgent need for reform.

SECTION 10(4)

Section 10(4) of the Party Wall Act allows one party to appoint a surveyor to act on behalf of the other, to allow a dispute to be settled under section 10 of the Act. This is a powerful piece of the Act, with far-reaching implications to both parties.

Section 10(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.

There can be different ways to arrive at this scenario:

- An adjoining owner is unaware of the notices, perhaps because the property is tenanted and they didn't receive the mail, having not updated land registry with their correspondence address. It is not uncommon for an adjoining owner to be completely in the dark until sometime after an award has been served.

- An adjoining owner refuses to acknowledge the notice, wishing to obstruct the works. They may think that by ignoring the paperwork, the building owner cannot proceed without their consent. How wrong they are.

- An adjoining owner dissents to the notice but doesn't appoint a surveyor.

- An adjoining owner says that they will consent to the notice, but fail to provide written consent, stringing along the building

owner who becomes increasingly desperate and frustrated chasing this elusive consent.

- An adjoining owner dissents to a notice, and the building owner, who expected consent, decides to just ignore their horrible neighbour and get on with the build.

The Act sorts out all these different scenarios, and more, by allowing the appointment of a surveyor on behalf of the other party.

LACK OF OVERSIGHT AND REGULATION

One of the primary issues with section 10(4) is the lack of oversight and regulation in the appointment of surveyors. The Act does not specify the qualifications or experience required for surveyors, nor does it provide a robust mechanism for monitoring their conduct. This gap allows for the appointment of surveyors who may not be adequately qualified, potentially leading to biased or incompetent decisions. Without stringent oversight, unscrupulous parties can exploit this lack of regulation to appoint surveyors who may favour their position. This issue is not restricted to appointments under section 10(4) but it is likely to concern the public that an inappropriate individual may be appointed on their behalf.

POTENTIAL FOR COLLUSION AND BIAS

The process for appointing the third surveyor is particularly vulnerable to collusion and bias. Since one of the surveyors, or the party themselves, choose the surveyor, there is a significant risk that this individual could be chosen based on personal relationships or prior agreements, rather than impartiality and expertise. This can lead to biased decisions that unfairly benefit one party, undermining the fundamental principles of fairness and neutrality that the Act seeks to uphold.

In *Property Supply & Developments Ltd v Verity*, the President of the Faculty of Party Wall Surveyors, Alex Frame, appointed under section 10(4) the vice President of the Faculty of Party Wall Surveyors, Steven Campbell, and they selected a Director of the Faculty of Party Wall Surveyors as the Third Surveyor, Alan Bright. The issue here is one of perception. Do these actions instil confidence in the process?

THE THIRD SURVEYOR ISSUE

What happens if the two surveyors make a referral to the Third Surveyor?

Firstly, it is unlikely to happen. If we look back at Property *Supply & Developments Ltd v Verity*, it is unlikely that the President and the Vice President of the Faculty of Party Wall Surveyors would make a referral to their fellow Director — it would have been an uncomfortable situation for all involved. The point here, is that when appointing a surveyor under section 10(4), the surveyor choosing their counterpart for the appointment is likely to select someone with similar views to their own. This is perfectly reasonable, as clearly a professional and ethical surveyor would want to have a counterpart of similar ilk.

The Third Surveyor issue lies in the fact that an adjoining owner may have to pay the costs associated with a losing referral, because a surveyor who they didn't appoint acted unreasonably. Should the adjoining owner be put to costs? Should the adjoining owner be liable for the actions of a party wall surveyor chosen by the building owner / building owner's surveyor? The Third Surveyor is at liberty to apportion costs as they see fit, and ordinarily, if the adjoining owner's surveyor loses the referral, the adjoining owner would be liable for costs. At the very least, this has to make people uncomfortable, and it is hard to find another comparable example whereby liabilities are forced onto them.

LIMITED SCOPE FOR DISPUTE RESOLUTION

A 10(4) appointment is made when one party 'refuses' or 'neglects' to appoint a surveyor following service of a request giving them ten days to do so. This is mostly the adjoining owner, who having received a notice and then a request, refuses or neglects to appoint a surveyor.

A surveyor appointed under section 10(4) ideally should reach out to the party that they are acting on behalf of. This may sound obvious but in Property Supply & Developments Ltd v Verity the Judge stated *'I note in passing that it is an unfortunate feature of the facts of this case that after Mr Steven Campbell accepted appointment by Mr Frame on behalf of the building owner, he did not trouble to make any contact whatsoever with the building owner before making an award. In this regard Mr Campbell could doubtless point to the fact that the Act does not expressly require a surveyor appointed on behalf of either party to be in communication with the party concerned but it would be surprising if by failing to put in an express requirement to that effect, parliament was intending to encourage surveyors to have no regard whatsoever to their appointing party, even where that party is only nominally the appointing party. Mr Campbell's behaviour in this regard cannot have helped progress matters in a positive way.'*

A lack of contact can come about because the surveyor is not proactive in reaching out to their appointing owner, or because there are simply no means of contact i.e. an absent freeholder. The lack of contact can also be because the appointing owner does not want to engage with the process or their surveyor.

This can serve to limit what a surveyor appointed under section 10(4) can achieve. To what extent can the surveyor define and settle the dispute? In ordinary cases, for there to be a dispute, it is on the basis that there is a disagreement, a rejection of a position, or an argument. Without any of this, the surveyor may be in a difficult position.

Does the surveyor drive the dispute? Alternatively, should the surveyor agree an award with minimal fuss?

The limited scope for dispute resolution often comes about because the surveyor has to second-guess their appointing owner's concerns. Decisions are made with limited information and to some extent blindly. Quite often, surveyors are unable to get access to the adjoining owner's property, and this could give rise to the surveyors missing things.

There are further limits, in terms of what the surveyor can achieve. For example, a request for security for expenses must come from the adjoining owner, not the surveyor appointed on their behalf.

Monitoring may not be permissible as it is a form of surveillance, and it requires accessing the adjoining owner's property. A surveyor may feel unable to offer their appointing owner that safety net without first obtaining their consent, and yet the surveyor could be criticised for not properly safeguarding their appointing owner's property.

The lack of contact with the surveyor and their appointing owner will limit what any award can achieve.

CONCLUSION

Section 10(4) of the Party Wall etc. Act 1996, while well-intentioned, is fraught with vulnerabilities that open the door to abuse.

An unqualified and entirely unsuitable person can be appointed on behalf of a party that fails to respond to a request under section 10(4) to appoint a surveyor. The ability of that surveyor to settle the dispute is inhibited by the lack of contact between the surveyor and their appointing owner. Having one party appoint a surveyor on behalf of the other is open to abuse, with inappropriate appointments made,

and to rub salt into the wound, the party on which the appointment is forced upon, can be found liable for their surveyor's conduct.

To protect the integrity of the dispute resolution process, it is imperative to reform section 10(4), introducing stricter regulations, clearer guidelines, and more robust oversight mechanisms. Only through such reforms can the Act truly fulfil its purpose of fair and impartial dispute resolution.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13. THE ROLE OF THE THIRD SURVEYOR

David Maycox

It is a fact that there is very little guidance available to assist a selected Third Surveyor in fulfilling his statutory duties under the provisions of the Act. This chapter is not intended to constitute a definitive guide, but to give some assistance, based on my experience to those wishing to involve the Third Surveyor and the way in which the selected Third Surveyor should act.

The role of the Third Surveyor is not one that should be undertaken lightly, and it is important that the selected surveyor has a good knowledge of the workings of the Act, together with a general knowledge of associated statutes, building construction and the law. In section 10 (1) (b) the Act advises the first two named surveyors that it is their first duty to select a Third Surveyor, and they must be fully aware of the capability and experience of the surveyors being put forward for selection. The selected surveyor must be able to maintain total impartiality throughout the process. It will be appreciated that the surveyors who have all of these attributes are

few and far between, and hence the band of 'usual' Third Surveyors is relatively small.

It is important at the outset to draw the distinction between the position of the appointed surveyors and that of the Third Surveyor who is "selected". The Act requires in section 10 (1) that once a dispute arises or is deemed to have arisen, the parties must **appoint** surveyors. This may be one for each of the parties, or a single surveyor acting as an Agreed Surveyor. Difficulties frequently occur with the appointment of an Agreed Surveyor when the matter in dispute is relatively complex, and particularly where section 12 (1) is involved. In appointing an Agreed Surveyor, the parties must be made aware that there will be no Third Surveyor to whom they can turn in the event of dispute. I will not dwell at length on this issue to avoid straying from the subject.

The appointed surveyors are charged with the duty of acting impartially and upholding the provisions of the Act. They do not have "clients" as this would require that they act in their client's best interests, which could conflict with their statutory duty. The first duty of the appointed surveyors is to select a Third Surveyor, the selection of which completes the tribunal.

The Third Surveyor's role is a complex one. Attempts have been made to define the role of the Third Surveyor using terms such as arbitrator, umpire, mediator and others. None of these terms accurately fit the bill. The Latin *sui generis* is the closest to an accurate description of the role and translated means "of its own kind". The Third Surveyor is not selected by the parties but by the first two named surveyors and has an obligation to the Act.

How does a surveyor become a recognised Third Surveyor? I hear you ask. A difficult one to answer. Putting up a sign over the office door or making a note on your letter head will not cut the mustard. "Gain respect" is the only advice I can give. As to the role of the Third Surveyor, there is very little reference to the Third Surveyor

in the Act, or indeed any surveyor (apart from a brief reference in section 8) until section 10 — Resolution of Disputes. The resolution of disputes is of course the function of the tribunal of surveyors.

As I become older it is apparent to me that there is a move not only amongst party wall surveyors but amongst society in general towards confrontation and litigation. As a young surveyor a reference to the Third Surveyor was a rarity and a Third Surveyor's Award almost unheard of. Most of the selected Third Surveyors at that time; John Anstey, Keith McDonald, Donald Ensom and others were more content to settle arguments over the phone and without fee. A gentlemanly approach, but sadly denying the parties the right of appeal against an Award. In those days there was a respect for senior surveyors who carried with them monstrous reputations sufficient to kill a dispute stone dead.

As a young surveyor I became involved in a dispute with the late and much respected John Anstey — I called him Mr Anstey, he called me David! The dispute arose around the meaning of the phrase "a wall standing astride a boundary". Briefly, we were appointed as the first two named surveyors in respect of the demolition and reconstruction of two adjoining commercial buildings in Leadenhall Street. The old party wall was at least 90cm thick at its base and on demolition we duly marked the centre line being the boundary with steel pegs. My owners came to reconstruct first, which involved the reconstruction of the party wall. I argued that the new much thinner wall could be located largely on the Adjoining Owner's side of the boundary as it would still constitute a party wall. You will appreciate that over ten stories the space gained had a considerable value. John Anstey's argument was that "astride" meant that the boundary had to be in the centre of the wall. I was adamant that this is not the case and wanted to take the matter to the Third Surveyor. I advised my Appointing Owners, a substantial London developer who, seeing that my opposite number was John Anstey, immediately backed down as his reputation was sufficient to force me to capitulate. Such was life at the time!

Times are now very different. References to the Third Surveyor are common and Awards are required to provide the owners with the facility for appeal. The legal profession are becoming more and more involved in a statutory procedure which was originally designed to be operated by surveyors. Case law relating to Third Surveyor involvement and Awards was virtually nil prior to the 1996 Act and has increased exponentially since then. It is perhaps a forlorn hope and one borne out of old fashioned values, but I would love to see a return to a time when litigation was a last resort and not a constant threat effectively undermining the role of the Third Surveyor.

I receive a number of references which constitute little more than a spat or grievance between the first two named surveyors. The answer to the dispute between them is easy to find in the Act, but the two of them have lost sight of the wood for the trees and as such are not fulfilling their statutory duty to resolve the dispute. I have lost count of the number of times I have written to the first two surveyors along the lines of "cut out the vitriol and concentrate on the dispute". This type of reference is no good to anyone, least of all the parties, and gives our profession a bad name. I find the attitudes expressed in this form of dispute frequently arise from a lack of mutual respect and as such are unprofessional and inappropriate.

A common subject referred to the Third Surveyor these days is the quantum of the Adjoining Owner's surveyors' fees and I must admit, being old fashioned, I find some of the fees requested eye-wateringly huge. My approach to such matters is invariably the same in that an Award to facilitate the Building Owner's work should not be delayed over a dispute relating to the quantum of the Adjoining Owner's surveyor's fee. The approach should be for the first two named surveyors to make an Award to include the quantum of the Adjoining Owner's surveyor's fee that can be agreed with appropriate wording in the Award, to the effect that the balance claimed by the Adjoining Owner's surveyor will form the basis of a reference under section 10 (11) to the Third Surveyor. Such an Award will

allow the notifiable works to progress. Never forget that the Act is a facilitating Act designed to facilitate the Building Owner's works whilst protecting the interests of the Adjoining Owner.

Another issue commonly resulting in a Third Surveyor reference is whether damage to an Adjoining Owner's property was caused as a consequence of the execution of the notified works and if so, the quantum of the costs involved. The Third Surveyor must form his/her own opinion as to the cause of damage which I frequently find comes down to "the balance of probabilities". The Third surveyor must never be frightened of calling in his/her own consultants they consider it necessary.

"Betterment" is often cited to limit the Building Owner's liability in respect of damage to the Adjoining Owner's property arising from the execution of the notified works. In my opinion, if the Adjoining Owner's claim for damage is found to be appropriate, then the betterment is not an issue.

As to establishing the level of cost involved in essential remedial works to an Adjoining Owner's property, remember Judge Bailey's words in *Welter v McKeeve*, Central London County Court, 2018:

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.

As mentioned above, there is precious little in the Act relating to Third Surveyor's references or the way in which a Third Surveyor should act. There are two subsections under which the Third Surveyor may become involved, being section 10 (10) and section 10 (11). I find reference made under section 10 (10) difficult. This is where the Third Surveyor is asked to effectively step in to make an Award as "two of the three surveyors". I am asked reasonably

regularly to act in this way, and surveyors are often surprised that my first reaction is to enquire as to whether everything is agreed and may I see confirmation of same. If not, there must be a dispute and the reference should be under section 10 (11).

Surveyors ask me to countersign an Award when the other surveyor has gone on holiday or is otherwise indisposed — which is not so simple! My other dislike of section 10 (10) is that if I put my name to an Award in place of the Adjoining Owner's surveyor for example, I am sanctioning the content of that Award, and that as such the parties cannot refer a dispute to me as the Third Surveyor as I have nailed my colours to the mast and if they are dissatisfied with the Award, the only route is a section 10 (17) appeal — which means lawyers again!

One of my more memorable section 10 (10) Awards was where, as Third Surveyor, I joined with the Adjoining Owner's surveyor in making an Award which required the Building Owner to pay the Adjoining Owner's legal fees arising out of injunction proceedings which were obviated by a settlement made at the last minute on the courtroom steps. Our Award was appealed, and the court took umbrage at a surveyor having the temerity to award legal fees. The Award was overturned and the widowed elderly Adjoining Owner was made personally bankrupt. This was the case of *Blake -v- Reeves*, 2010. Given the same set of circumstances today I think I would proceed in the same way, and hope that the court would have more sense on appeal.

As a general guide to those making reference to the Third Surveyor, please do not assume that the Third Surveyor knows anything at all about the subject matter of the dispute. References should provide all of the necessary background information, starting with the written appointments of the first two named surveyors. Without this written authority, the first two named surveyors are not able to select the Third Surveyor, who in turn is unable to act. All of the background documentation is required by the Third Surveyor.

When an initial enquiry is addressed to the Third Surveyor, he/she should establish details of the parties, properties and other surveyors before accepting the reference in order to avoid any conflicts of interest. The procedure is set down in the Act for the first two named surveyors to select a different Third Surveyor in such a situation. If the first two named surveyors are not talking to each other — which is frequently the case — the selection comes from the Appointing Officer of the local authority, not the president for the time being of any particular professional body.

Before accepting a referral, the Third Surveyor will have to consider his/her workload relative to the urgency of the dispute, planned holidays etc to establish whether or not he/she can accept the reference. If the Third Surveyor is unable to deal with the matter expeditiously, the first two surveyors should be so advised and given the opportunity to select a different Third Surveyor.

Having accepted the reference, the Third Surveyor should next ask for confirmation that the parties have been advised that a reference has been made and that they will be responsible in part or in whole for the costs involved. This will include the Third Surveyor's fees, the fees of the first two named surveyors in preparing their submissions and the fees of any co-opted consultants. It is appropriate at that point for the Third Surveyor to advise as to the basis on which his/her fee will be charged.

The Act states in section 10 (15) that the Third Surveyor shall serve the Award following payment of the fee. Either of the parties may pay the fee in the first instance or agree between themselves an appropriate proportional split. The eventual responsibility for the costs will form part of the Third Surveyor's Award and may result in one of the parties having to refund monies to the other.

This is not always as simple as it sounds. I had a situation where a Building Owner paid half the fee and demanded that the Adjoining Owner pay his half, which the Adjoining Owner would not do.

The Building Owner's surveyor told me to "make an order" for the Adjoining Owner to pay half. The Act gives the Third Surveyor no such power such that any order would be unenforceable and absolutely useless. The net result of the situation is that the Building Owner was reimbursed and my Award remains unserved. I could serve the Award and seek legal redress for the fee, but frankly life is too short.

One way around such an impasse — which is practiced by at least one Third Surveyor I am aware of — is to state that the estimated fee be deposited in the Third Surveyor's bank before he/she acts, and that any over-payment will be refunded on the service of the Award — or presumably request a balance should there be a shortfall. "Foul" I hear you say, or "unprofessional", but understandable if you have a shelf full of unserved Awards held back against unpaid fees.

Impartiality is the byword in acting as the Third Surveyor — do not be browbeaten and stand by your principles. The outcome of most references will mean that you will become a champion to one of the surveyors and an idiot to the other. You will be removed from the disappointed surveyor's list of preferred Third Surveyors, and given enough time, will be removed from practically everyone's list!

As a senior member of the profession, surveyors often call for verbal advice. When this happens, my first question to them is always "am I the Third Surveyor?". You cannot give advice to one of the surveyors and remain impartial in the event of a subsequent reference. Verbal advice to one of the surveyors in a dispute must always be avoided if you are the selected Third Surveyor.

There are no hard and fast rules as to how a Third Surveyor reference should progress. I generally favour written submissions to start with. If I receive one before the other I will hold it until the two surveyors' submissions arrive and then copy the submissions to the first two named surveyors to each of them. I will as a norm allow counter-submissions as I believe that both surveyors should have every

opportunity to make their case. I will generally draw a line under submissions when either the surveyors have nothing else to say, or the counter-submissions become no more than repetitive drivel.

If there is a need to inspect either or both of the properties, care again must be taken to remain impartial. I prefer no one to be present when I make an inspection. If one of the parties is to be present, then the other must be given the opportunity to be there and the same with the two surveyors. My preamble to such a meeting is to state that I will not accept any verbal submissions given on the day. I may ask questions, but do not expect to receive an ear bashing from either party or surveyor.

Once a reference has been accepted the Third Surveyor should advise both surveyors that all of the correspondence pertaining to the dispute from that point on will be "open," i.e. copied to each member of the tribunal. There will be no communication with one of the surveyors to which one of the surveyors is not privy.

Occasionally I have organised a meeting or hearing between the first two surveyors and their professional consultants as an expedient way of moving forward. I will proceed in this way only if I feel that the risk of verbal confrontation is negligible and that there is a benefit to such a procedure.

As a general guide to surveyors electing to make a reference to the Third Surveyor, please stick to the following golden rules:

(1) Remain courteous to your counterpart and especially the Third Surveyor at all times.

(2) Make every effort to avoid the reference — and hence the additional cost — and make your efforts transparent.

(3) Do not delay in making an Award that facilitates the Building Owner's works with a dispute over the Adjoining Owner's surveyor's fees.

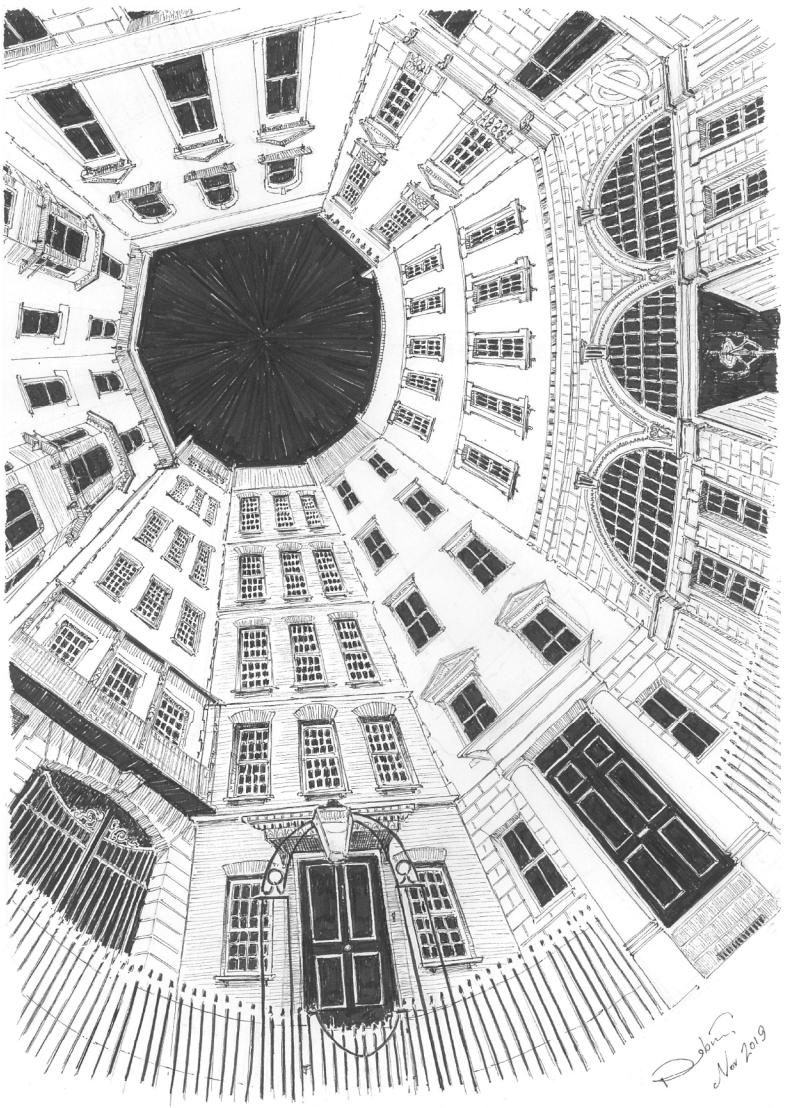
To prospective Third Surveyors may I suggest:

(1) Maintain professionalism and decorum at all times.

(2) Keep things as simple as you are able. The first two surveyors will do everything they can to make a simple issue confusing.

(3) Be clear as to the precise nature of the matter or matters in dispute, and confirm the subject matter of the reference to all concerned at the outset.

The foregoing advice has been accumulated over an extended working lifetime. It is not a definitive guide, but I nonetheless trust that it will prove to be of some benefit to those contemplating making a reference to the Third Surveyor and to prospective Third Surveyors who have not yet developed a procedure for fulfilling statutory duties under sections 10 (10) and 10 (11) of the Act.


Robin
Nov 2019

14. SECURITY – HOW TO SPEND IT

Michael Kemp

This chapter is based on a talk presented at The Pyramus and Thisbe Society National Conference in March 2023. It looks at situations where access would be necessary onto the building owner's land to carry out works in respect of which security is being held.

SCENARIO

An Award is in place which includes a security clause.

The building owner has abandoned the works and is either not contactable or is not cooperating. Engineering advice has been obtained and backfilling of excavation on the building owner's property is required and/or underpinning to the party wall is required to safeguard the neighbour's property and foundations.

The question is: can an adjoining owner instruct these works and enter the building owner's land to undertake them, recovering reasonable costs from the security?

A typical instance would be where basement excavation is incomplete but there are many alternative situations which could arise in more ordinary circumstances. For example, the excavation of shallow foundation trenches close to or adjacent to the line of junction where these have been abandoned and are not properly or durably supported and the failure to weather a newly exposed party wall.

Where rectification work can be undertaken from the adjoining owner's property, issues are usually straightforward to resolve. This article concentrates on a situation where the only practical way of completing the notifiable works requires access into or onto the building owner's property.

In all cases owners and their appointed surveyors should carefully consider both the statutory basis for holding security[33] and the actual wording of the security agreement. This chapter assumes that the Award allows "*Release of security to the adjoining owner for the completion of any notifiable works described in this Award, commenced by the building owners and left incomplete".* This may be insufficient to cover some desirable courses of action, e.g., temporary propping, backfilling of excavation etc. if not referred in the original Notices or the Award itself.

Does the Adjoining Owner Have a Right to Enter the Building Owner's Land?

No. Section 8 of the Act deals with rights of access for building owners and does not grant a right of access to an adjoining owner. The Access to Neighbouring Land Act does not apply and there is no general right of access at common law. See discussion below.

33 Graham North: "Security for Expenses — Whatever For?" See the predecessor publication to this "Party Walls" edited by Benjamin Mackie

Can the Party Wall Surveyors, Under the Original Award, Issue a Further Award Under Section 10 (12) Enabling the Adjoining Owner to do the Work on the Building Owner's Property?

Section 10 (12) states:

> 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.

On the face of it this might seem a neat solution but, as discussed above, Section 8 does not allow access for an adjoining owner. The problem with this approach would be that the surveyors would be granting a right of access which neither the Act nor common law allows. The surveyors would be acting beyond their jurisdiction and such an Award would be *ultra vires*.

Can the Adjoining Owner Serve a Notice and Thus Become a Building Owner and Use Section 8 for Access?

This would be a possibility for work that falls under Section 2 of the Act. Examples would be s2(2)(a) and (b) where the Act, at Sections 11(4) and 11(5) respectively, of the Act dictate how expenses shall be defrayed.

Section 7(1) requires that rights under the Act shall not be exercised in such a manner as to cause unnecessary inconvenience to any adjoining owner or occupier. This is why it is normal for notifiable work to be carried out from the building owner's land. The original adjoining owner, now building owner, wants to carry out works

on the original building owner's (now adjoining owner's) property so are they bound by 7(1) to work from their own side, however inconvenient this may be?

I would say that they are not so bound. What would the inconvenience be to an absent building owner if work was carried out from their side? It would be cheaper and faster to work from the original building owner's land and any objection (if he comes out of the woodwork at this point!) from the building owner almost certainly means that more of the security will be spent if the work has to be done from the other side of the boundary.

It does therefore seem possible for the original adjoining owner to serve Notice and to become a building owner in circumstances where work is limited to the party wall and its foundations.

Where excavations have been left open it will often be cheaper and more effective to simply backfill them, subject of course to engineering advice, rather than complete the actual notifiable works. Unfortunately, it would appear that the adjoining owner cannot serve Notice now as building owner, to do this. Section 6 does not envisage safeguarding works being done on a neighbouring property unless the building owner is proposing an excavation. Here the new building owner (former adjoining owner) is not proposing to excavate on his land and so does not seem to have any valid reason to serve a Section 6 Notice.

Consequently, there does not seem to be a way for the former adjoining owner to use the Act to gain lawful access to backfill excavations on the building owner's property. Awards that calculate security on the premise that it would cover the costs of backfilling excavation on the building owner's property are not soundly made.

DANGEROUS STRUCTURE NOTICES

Where appropriate the Local Authority could be encouraged to serve a Dangerous Structure Notice on the building owner. Where the building owner fails to comply with such a Notice the Local Authority may step in at their own expense to make safe. They would then seek recovery of costs from the building owner. Such works are usually of a limited and functional nature and, for example, might not address weathering issues and the like. Section 3(3)(b) of the Party Wall etc. Act allows dangerous structure works to proceed without the need for prior service of a Party Structure Notice. The Local Authority is not constrained by Section 8 and the question arises: could or should such works be funded from the security sum?

Where they can truly be described as "completion of notifiable works" this may be possible. Unfortunately making safe works e.g., shoring, demolition of unstable parts of the building owner's property etc. are unlikely to fall within this description.

The discharge of a Dangerous Structure Notice may improve a situation but is unlikely to result in "completion of notifiable works".

THE ACCESS TO NEIGHBOURING LAND ACT 1993

The ANLA might also seem a useful tool but this only allows access to neighbouring land for preservation works to the dominant land i.e., the original adjoining owner's land and buildings. It does not allow one owner to enter another owner's land to undertake construction work on that land.

ADVANCE AGREEMENTS

Another option might be for advance agreements to be drawn up between owners, with legal advice, the objective being to permit the adjoining owner to enter the building owner's property in order to carry out work to safeguard the adjoining owner's property, using the security funds, if they were to be abandoned. There would be no obligation on a building owner to agree such a document and it is unlikely that a lawyer would advise a building owner to proceed in such a way. Drafting and agreeing such documents would be a standalone process and not part of the dispute resolution.

SELF-HELP

There is a common law doctrine of self-help which in theory would allow one to gain access to undertake work to mitigate loss. Careful legal advice should be sought when considering this option. Lawyers consulted during the preparation of this article all indicated that they would rarely advise such an approach due to the associated practical difficulties and risks, but it is a possible option

CONCLUSION

I have researched this subject over several years and during that period despite enquiry to most of the leading solicitors, barristers and third surveyors in the world of party walls I have not come across anyone who has ever heard of anyone ever expending security of expenses to undertake work on the original building owner's property.

Even if a way were to be found to enter onto the building owner's land to carry out work, numerous practical difficulties arise. If such an approach were ruled *ultra vires*, or if any of the works went beyond what was strictly necessary, there could be issues

of trespass or criminal damage due to unauthorised interference with the building owner's property. Appointed contractors might experience difficulties obtaining valid insurance for the works where carrying out of the works required a trespass. There may be planning issues both in terms of the actual work itself and also in relation to the conditions of the original Planning Consent. The presence of temporary propping, scaffolding etc. might make execution of the work extremely complex. Numerous other issues can be envisaged.

When security sums are negotiated it is incumbent on both surveyors to ensure that the sum is sufficient for what is reasonably achievable rather than based on an impractical and unachievable scope.

15. CARE AND IMMUNITY, OR HOW LIABLE MAY A PARTY WALL SURVEYOR BE?

Edward Bailey

(1) A party wall surveyor, whether appointed by an owner or selected by the appointed owners to be a third surveyor, would only be human if he preferred the law to state that he could not be sued in negligence by a disappointed owner, and he would be happier still to learn that he had immunity from suit of any description. So what does the law say?

DUTY OF CARE

(2) In this regard the party wall surveying community owes a debt of thanks to the redoubtable Russell Gray. Mr Gray is a successful builder, restorer, and developer, and he has, or did have, strong views on basement construction. These views included the firm conviction that basements should be constructed without engaging the rights afforded building

owners who serve party structure notices. Rather than excavating beneath a party wall a building owner should, maintained Mr Gray, employ contiguous piling installed just within the curtilage of the property in question, thus leaving the party wall resting (all being well) quite happily on the solid ground on which its foundation rests. The result will, of course, leave the building owner with a somewhat smaller basement than he would have had enjoyed had excavation taken place directly beneath the party wall. The loss of space — which Mr Gray estimated as amounting to 500mm around the perimeter of his particular basement — aside, this has the advantage that the party wall is left undisturbed. That, at least, is the theory.

(3) Mr Gray put his views into practice, and his theory to the test, when, in 2001, he constructed a basement in one of his own properties, a mews house at 7 Ennismore Mews London SW7. Some years later, in 2006, the adjoining property at 9 Ennismore Mews was acquired by Elite Town Management Ltd in the person of Mr.Hill. In 2011 Mr.Hill decided to construct a basement and, perhaps conscious that his new Mews house somewhat lacked in width what it had in kudos, wished to employ a 'standard' basement construction with reinforced concrete walls on a mass concrete foundation.

(4) The subsequent history makes for some interesting reading (I hope) which cannot be given justice in this article. This history may be found set out in the decision in *Gray v Elite Town Management Ltd* CLCC 23 July 2015 which is available on Nick Isaac's boundaries website at www.boundariesbook.co.uk (together with two other judgments in this long running matter). In due course an Award was made by the third surveyor, James Crowley, authorising the construction of a basement in the standard manner. The scheme of construction authorised by the

award ("Scheme C") involved laying reinforced concrete up to the contiguous piling installed by Mr Gray for his basement. Mr Gray was very unhappy with the award, and he appealed it under s 10(17). He also, incidentally, torpedoed Mr Hill's scheme first by drilling holes in his piling (sufficient in size to let concrete through) and then by removing the piling altogether, for which latter act he had the benefit of an award!

(5) The proceedings leading to the judgment on 23 July 2015 involved both a party wall appeal and a CPR Part 7 claim for damages. Mr Gray instructed Nick Isaac whose pleading included the assertion that a party wall surveyor owed an adjoining owner "a duty not to approve any scheme which caused the adjoining owner more inconvenience that a viable alternative scheme". The duty thus asserted, it will be noted, is a development of the obligation imposed on a building owner under s7(1) 1996 Act: "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 …".

This was an ingenious approach to the problem facing Mr Gray, namely the award of a standard scheme in circumstances where there was an alternative scheme available to Elite Management — which was arguably one which would cause less inconvenience to Mr Gray if employed in practice. In argument at the hearing Mr Isaac developed the scope of the suggested duty, as is summarised at paragraph 56 of the judgment, and the court considered the arguments raised as to the extent that a party wall surveyor needed to consider the adjoining owner's convenience when making a party wall award, at paragraphs 62 to 70. Ingenious though the argument was, the suggested duty did not find favour with the judge. For this and other reasons Mr. Gray sought permission to appeal.

(6) The county court judge gave permission to appeal. In doing so, the judge knew perfectly well that it was unlikely that he had the necessary authority, but at the time there was debate at the Bar as to whether an appeal from a county court judge's decision on a party wall appeal under s.10(17) was a first or second appeal for the purposes of the Civil Procedure Rules. Giving permission resolved that debate. The Court of Appeal held that the appeal was a second appeal and converted the appeal hearing into an application for permission to appeal. In the event permission was refused.

(7) In giving the judgment of the Court of Appeal Jackson LJ at para [38], having expressly approved the statement of Brightman J in *Gyle-Thompson* [1974] 1 WLR 123 that party wall surveyors are in a quasi-judicial position with statutory powers and responsibilities, dealt with the suggested duty of care owed by the party wall surveyor as follows:

> "The statutory procedure is intended to be a simple, inexpensive dispute resolution mechanism. It enables reasonable and common sense solutions to be reached to the problems which inevitably arise when adjoining owners share a party wall. Whatever the surveyors decide is likely to cause some degree of inconvenience to both parties. *The surveyors are not assuming a design obligation towards the adjoining owner.* Both the building owner and possibly the adjoining owners may engage their own designers. They may put before the surveyor whatever submissions they wish." (emphasis added)

There is thus Court of Appeal authority that party wall surveyors are under no design duty toward the adjoining owner. It may be noted that Jackson LJ makes the point that both the building owner and the adjoining owner may engage their own designer. It follows that the party wall surveyor is under no design duty to the building owner also.

(8) Undaunted by his loss of his party wall award appeal and his CPR Part 7 claim, and his failure to obtain permission to appeal to the Court of Appeal, (together with losses in further proceedings involving the Ennismore Mews party wall) Mr Gray then launched proceedings against Mr Crowley, the surveyor making the award, asserting negligence on Mr Crowley's part in approving Scheme C in making his award. As might be expected with Mr Gray, the damages claimed were not modest. The claim was for £221,000 made up of (i) £62,000, the cost of dealing with Mr Crowley's award, (ii) £23,000, the cost of frustrating the award by drilling holes and obtaining an award to remove piling (what chutzpah!), and (iii) £136,200 litigation costs incurred in contesting the award in the county court and Court of Appeal.

(9) In his claim against the party wall surveyor, Mr. Gray, again represented by Nick Isaac QC, relied on a duty of care in rather wider terms than that suggested in the earlier CPR Part 7 claim:

> "The Defendant accepted the said selection and thereafter owned the Claimant a duty to carry out his dispute resolution function under Section 10 impartially, in good faith, and with the care competence and skill reasonably to be expected of an experienced and competent party wall surveyor."

(10) In December 2021 the proceedings in *Gray v Crowley* came before Judge Parfitt, sitting at Central London County Court, on an application by Mr Crowley, represented by Mr Wygas, to strike out the claim as disclosing no reasonable cause of action. The suggested duty of care was analysed with reference to the threefold test adumbrated in *Caparo v Dickman* [1990] 2 AC 605,618. This test involves three requirements to be present before a

defendant in any given situation is held to owe a duty of care to a claimant.

There must be:

(1) Forseeability of harm.

(2) Proximity (which involves reliance or dependence by the claimant on the defendant).

(3) It must be fair, just and reasonable to impose a duty of care on the defendant.

These requirements are recognised by the courts as being imprecise, to be regarded as little more than convenient labels.

(11) Dealing with these three requirements, Judge Parfitt found as follows:

(1) As the purpose of the party wall award is to resolve a dispute, there is no reason to foresee harm if the award is made without proper care or skill. Should damage result from the work undertaken under the award, the adjoining owner may claim compensation under s 7(2). The award itself may be appealed, an appeal being by way of rehearing if the appellant wishes to demonstrate failings in the award.

(2) As to proximity, Judge Parfitt was uncertain. He was not persuaded either that there was the necessary proximity or that there was not. He contented himself with the observation that "Mr Isaac has the better of the argument at this interim stage", while not disagreeing with Mr Wygas' analysis that the quasi-judicial role meant that there was no relationship akin to one or reliance or dependence, and therefore the necessary proximity was not present.

(3) It was not fair, just and reasonable to impose a duty of care on the party wall surveyor. The role of the party wall surveyor is simply that of dispute resolution. The owners may take their own advice and make submissions to the party wall surveyor. The owners may appeal and adduce whatever evidence they wish in that appeal. Accordingly, while awards were final, see s 10(16), parliament had balanced the finality of the award with access to the court, under s 10(17), an appeal being available "if the parties were unhappy so that matters could be reconsidered in a more formal context."

(12) Accordingly, there being no foreseeability of harm and it not being fair, just or reasonable to impose a duty of care on the party wall surveyor (even if there might be the necessary proximity) the Judge held that it was wrong to introduce private law rights in favour of owners against a party wall surveyor exercising a statutory dispute resolution function. Mr Gray's claim for damages in negligence was therefore struck out.

(13) It is important to stress the exercise of the statutory dispute resolution function in this finding that no duty of care was owed by the party wall surveyor. It is possible for such a surveyor to give advice to his appointing owner outside the dispute resolution function. For example, an appointed owner may give advice on the operation of the Act, or answer queries relating to the design of the proposed works, or advise on the manner in which the work is carried out. When acting outside the award making role the party wall surveyor may well find that the courts hold that he does owe a duty of care to his appointing owner. Indeed, if advice is given outside the dispute resolution role to one owner in circumstances where, to the knowledge of the party wall surveyor, the other owner knows about the advice and is reasonably relying on the advice given, the surveyor may

well be held to owe a duty of care to the other owner, as well as to the appointing owner.

IMMUNITY FROM SUIT

(14) In holding that the party wall surveyor exercising the statutory dispute resolution function imposed by the 1996 Act does not owe a duty of care to an owner, the author considers that Judge Parfitt was on firm ground. In *Gray v Crowley* however, counsel for the surveyor went further and submitted that in making an award the party wall surveyor enjoyed complete immunity from suit. Judge Parfitt upheld that submission and concluded that, when carrying out his statutory function, Mr Crowley had the benefit of such immunity. In making this immunity finding the author considers that the ground beneath Judge Parfitt may not be so sound.

(15) It is a rule of public policy that Judges and Arbitrators have immunity from suit, although in the case of Arbitrators that immunity is lost where it can be shown that the arbitrator acted in bad faith, see s 29(1) Arbitration Act 1996. The party wall surveyor is neither Judge nor Arbitrator, and cannot therefore rely on the immunity from suit expressly enacted in s 29 Arbitration Act 1996. He may however be reasonably characterised as a quasi-arbitrator.

(16) The immunity of an arbitrator extends to persons acting as arbitrators outside formal arbitration ("quasi-arbitrators") where it can be shown that the functions exercised by the quasi-arbitrator are, in reality, judicial in character. This extension is established by two decisions of the House of Lords: *Sutcliffe v Thackrah* [1974] AC 727 where the House of Lords considered the position of an engineer acting pursuant to clause 66 of the ICE Conditions, and *Arenson*

v Casson Beckman Rutley [1975] AC 405 where the House of Lords considered the position of an accountant and auditor carrying out a valuation of shares in a private company.

(17) In considering whether any individual quasi-arbitrator is immune from suit, Lord Diplock identified four aspects for consideration in *Trapp v Mackie* [1979] 1WLR 377:

> (1) Whether the tribunal in which the quasi-arbitrator is acting is recognised by the law;
>
> (2) whether the issue being determined is akin to that of a civil or criminal issue in the courts;
>
> (3) whether the tribunal's procedures are akin to those in civil or criminal courts;
>
> (4) whether the result of the tribunal's procedures lead to a binding determination of the civil rights of a party or parties.

Do these aspects apply in the case of a party wall surveyor making an award? There is no difficulty with aspects 1, 2 and 4. The tribunal is indeed recognised by the law: it is set up by the 1996 Act. The issue(s) determined in the making of an award is/are akin to that of an issue/issues arising in a civil court. The award (i.e., the result of the tribunal's procedure) leads to a binding determination of the owner's civil rights: s 10(16) says so in terms.

(18) The difficulty arises in aspect 3; whether the party wall surveyors' procedures are "akin" to those in a civil court. How should the party wall surveyors' procedures be compared with the procedures of a civil court? There is no simple approach to this question. As Auld LJ said in *Heath v Commissioner of Police* [2004] EWCA Civ 943:

> "The nature of the exercise in determining whether a body is to be regarded as "judicial" for the purpose of giving absolute immunity to those involved in its proceedings is not a technical or precise one. It is one of determining its similarity in function and procedures to those of a court of law. It is a matter of fact and degree, one, as Lord Atkin said in O'Connor v Waldron [1935] AC 76, at 81, "not capable of very precise limitation".

(19) In *Gray v Crowley* Nick Isaac QC argued that determining similarity for the purpose of aspect 3 "would require an investigation of the facts and the details and make up and procedures of party wall surveyors," this echoing the words of Auld LJ: "It is one of determining [the] similarity in function and procedures to those of a court of law." In other words, Nick Isaac was submitting that consideration of aspect 3 was not suitable for a strike out application where there is no evidence adduced and witness examined; the onus on the applicant being to show that there was no basis for bringing the claim whatever the evidence at any trial might show. Rather, Mr Isaac suggested, the issue should wait for determination at a trial where evidence could be given as to the similarities and dissimilarities of the party wall dispute resolution process and court proceedings. The court would then be enabled to make its decision on the basis of such evidence and argument in relation to that evidence.

(20) Judge Parfitt disagreed with that submission and went on to consider aspect 3 within the context of the strike out application. The essence of the judgment, at [68]:

> "[68] .... However, in general the courts expect party wall surveyors prior to making decisions to comply with basic natural justice requirements (see for

> example HHJ Bailey in *Mills v Savage* (15.6.2016) at [131]: *They are bound by the rules of natural justice. It is axiomatic that in considering and making an award a party wall surveyor … must enable the parties to make submissions if they wish and must give due consideration to any submissions made).* In my experience these core natural justice requirements are generally met. If an award does not meet those requirements, then that failure becomes a ground of appeal — i.e. it is expected that those requirements are met.
>
> [69] I conclude that the Defendant had the benefit of immunity when carrying out his statutory function which led to the Third Award the subject matter of this dispute and such would negative any duty of care that might otherwise arise."

(21) The author's comments in *Mills v Savage* have been quoted and relied on by Judge Parfitt in other cases, and by other judges determining party wall appeals. These comments have not been tested in the Court of Appeal but it would be surprising, to put it mildly, were the Court of Appeal to hold that a party wall surveyor was not bound by the rules of natural justice. But is this sufficient to provide a positive answer to aspect 3? There is, after all, rather more to "the procedures of a court of law" than compliance with the rules of natural justice.

(22) The issue whether a party wall surveyor is immune from suit arose in the disciplinary proceedings brought by the RICS against Philip Antino. Mr Antino argued that he was immune from suit and should not therefore be subject to certain charges levied against him under the Institution's disciplinary procedures. The disciplinary appeal panel was chaired by Sir Michael Burton, previously Mr Justice Burton. In giving the decision of the appeal panel on 10

May 2019, Sir Michael Burton noted that arbitrators have the duty under s 33(1)(a) Arbitration Act 1996 to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". He observed that no similar duty is applicable to party wall surveyors.

(23) The author takes issue with that observation. Certainly, there is no express provision in the Party Wall etc Act 1996 to compare with s 33(1)(a) Arbitration Act 1996. But that does not mean that the party wall surveyor is not under a similar duty. Such a duty arises, I suggest, by reason of the fact that the party wall surveyor acts in a quasi-judicial manner (per Brightman J, approved by Jackson LJ) or in a quasi-arbitral manner (per Lord Lytton when introducing the Party Wall etc Bill into the House of Lords). It is this quasi-judicial or quasi-arbitral statutory role that lies behind the author's holding in *Mills v Savage* that the rules of natural justice bind the party wall surveyor.

(24) In the event however, Sir Michael Burton and the appeal panel went rather further and investigated the procedures applicable to the dispute resolution process under s 10 of the1996 Act and those applicable to court proceedings, thus following the thrust of Auld LJ's comments in *Heath v Commission of Police*, quoted in paragraph 18 above. In giving the decision of the appeal panel Sir Michael Burton stated:

> "We considered the differences and similarities between the procedure under the Party Wall Act and judicial proceedings, assisted by schedules prepared by the parties at our request. … the list of differences identified by the [RICS] far exceeded the number of similarities. The differences included:

> 1. No procedure in the Party Wall Act for hearing evidence or submissions.
>
> 2. No procedure in the Act for disclosure.
>
> 3. Not clear what evidence the PWS will rely on, the PWS is not limited to the information the parties put before him.
>
> 4. There is no requirement for a hearing in public or otherwise.
>
> 5. No witness called on oath or otherwise.
>
> 6. No ability to compel evidence.
>
> 7. No judicial training or assistance.
>
> 8. No formal qualifications needed at all.
>
> 9. The PWS investigates rather than just adjudicates, which is a non-judicial function.
>
> 10. Unlike a judge or arbitrator he can rely on an opinion which has not been ventilated before the parties to reach his decision."

With so many differences between party wall dispute resolution procedures and judicial proceedings (most, although not all, of which apply in a comparison of party wall procedures with arbitration procedures) the disciplinary appeal panel concluded that Mr Antino did not have immunity from suit as a party wall surveyor.

(25) The author considers that the differences in procedure identified by Sir Michael Burton are compelling (especially

those at 3 and 10), and that were the question of a party wall surveyor's immunity from suit to come before an appellate court, the decision is rather more likely to follow that of Sir Michael Burton than that of Judge Parfitt. It was, perhaps, unfortunate that Judge Parfitt proceeded to reach his conclusion with regards to immunity in the course of a strike out application when, as appears from Mr Isaac's submission quoted at paragraph 19 above, the ground had not been laid for a thorough consideration of aspect 3. It was in any event unnecessary for Judge Parfitt to reach a decision on immunity from suit to determine the application before him. The claim was already going to be struck out on the basis that Mr Crowley did not owe the duty of care asserted by Mr Gray.

(26) It should perhaps be noted that it would not be enough for a party wall surveyor claiming immunity to show that in any particular award he had indeed followed procedures which met the differences listed by Sir Michael Burton. It would sit uneasily with public policy to adopt an approach under which a party wall surveyor had immunity from suit in the case of some awards but not others depending on the procedures adopted in the particular instance. As a matter of law the procedural differences highlighted by the RICS Appeal Panel exist, and the fact that these differences might be remedied in any particular award-making process has no relevance to the general issue of immunity. In the author's view, for a party wall surveyor to be able to claim immunity from suit there do need to be statutory changes. Were the 1996 Act ever to be amended, provision for the Secretary of State, or Lord Chancellor, to approve a procedural code for party wall surveyors to follow when making awards would be sensible, quite irrespective of the impact that might have on questions of immunity. Not every difference identified by the RICS appeal panel might need to be dealt with, but in the author's experience not

every party wall surveyor is as alive as he should be to the sense of grievance an owner will feel when an award goes against them on the basis of material which they have not had a proper, or any, opportunity to deal with, or where immaterial matters are referred to in the award (often the result of using poorly edited templates).

(27) The difficulty for the party wall surveyor is perhaps that the overwhelming majority of awards proceed perfectly satisfactorily without anything approaching a dispute resolution process akin to a court or arbitration process being necessary or advisable. Following carefully considered procedures in reaching an award will rarely be required in practice. The good party wall surveyor recognises those disputes ("hot disputes") which will or are likely to require a more thorough process for resolution, and makes sure that proper procedures are followed. At the very least the party wall surveyor should ensure, when he has a hot dispute to deal with, that:

(a) the disputing owners are given every reasonable opportunity to put forward all the material and argument that they wish to present;

(b) the award demonstrates that the party wall surveyor has considered this material and argument;

(c) in making the award there has been no reliance on any material or argument that has not been identified and put before the owners to deal with before the terms of the award are determined, and;

(d) the award makes clear that there has been no reliance on any irrelevant material. These last two matters are achieved by a statement to that effect, having first ensured that such a statement is true!

(28) Of course, one way of dealing with many hot disputes is for the owner-appointed surveyors to select a lawyer as third surveyor, if necessary as a replacement for a surveyor who accepts that he himself is no lawyer. Such a third surveyor may well be better placed to set out and follow appropriate procedures for dealing with the issues in question. But such a suggestion involves self-interest and perhaps ought not to come from this author!

VOLUME 2

PARTY WALLS

This book contains articles concerning the law and practice of the Party Wall etc. Act 1996.

With contributions from HH Bailey, Tom Weekes KC, Nicholas Isaac KC and more, there is a wealth of material for the reader to explore and discuss. The second book of party wall articles is a collection of contributions from authors and artists.

The book aims to encourage debate and the exchanging of ideas on party wall matters and construction dispute resolution, providing new ideas and a better understanding of the party wall act, while promoting respect for differing opinions.