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# The appointed surveyor as arbitrator

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## The author

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## Keywords

Party walls, Arbitration, Surveyors

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## Abstract

This paper considers the legal status of a surveyor appointed under section 10 of the Party Wall etc. Act 1996. By reference to that Act as well as to the Arbitration Act 1996, the European Convention and to rules of natural justice it argues that the section 10 procedure is a statutory arbitration. It therefore argues that the appointed surveyor is an arbitrator who must be independent, act impartially, and be immune from suit. It also suggests that surveyors' awards can be adopted as judgments by the courts and that they can only be appealed against provided the strict appeals criteria of the Arbitration Act are met.

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## Introduction

Party wall legislation has changed little since the nineteenth century, except for having been extended from Inner London to England and Wales, but the codification of the law of arbitration has progressed significantly.

It is clear that a surveyor appointed under section 10 has to determine matters in dispute by an award, with or without another surveyor so appointed. He/she may have a contractual obligation to his/her appointing owner to do this, or he/she may have the statutory duty.

Ultimately, he/she considers the rights of the parties, statutory and otherwise, and makes a judgment. If each party has his/her own surveyor, the surveyors will ascertain the parties' intentions and concerns and debate them in an adversarial manner, tempered with a degree of inquisition. They will either reach a conclusion or one or other or both of them will repeat the exercise with the third surveyor, or one of them or one of the parties will request the third surveyor to determine the matter on his/her own.

Whatever route is followed, the result is the same: an award is made determining the right to do the work and the time and manner of doing it. Subsequent awards, usually less formal, will determine other matters coming into dispute during the course of the works such as variations or liability for damage and subsequent making good or payment in lieu.

The building owner's surveyor initially advises his client and will usually serve the notices for him/her. Once a dispute has arisen, the adjoining owner's surveyor will similarly advise his/her client with respect to the notice and the statutory procedures. Here, they are clearly giving advice and acting as agents to the parties under contract. At about this time the formal appointments will be made and a third surveyor selected.

The surveyors then act as advocates for their respective clients to the tribunal which they themselves constitute. They then, as the tribunal, have to determine the matters in dispute, by making an award which "shall be conclusive and shall not except as provided by [section 10] be questioned in any Court"[1].

## Analysis

So, initially, the surveyor will be beholden only to his/her client, and liable to him/her in contract and tort. By the time the award is made, he/she may no longer be. He/she will be making judgments affecting his/her client's and the other party's rights with neither fear nor favour, with immunity from dismissal and, he/she may hope, immunity from suit. Or will he/she?

In this (hopefully) short flight from servant to judge, what has become of him/her other than to become perhaps a little more arrogant and more certain of his/her fee? Let us consider what the procedure for dispute determination set down in section 10 actually is. There are rules as to what is to be determined, and what may be determined. There are, in the Act, no rules as to how they should be determined. The procedure the surveyors follow is to:

- serve the notice, and agree its validity, that a dispute has arisen, and that they have been properly appointed;
- select a third surveyor;
- consider whether the proposed works are works that can be executed as of right under the Act, including estimating as to whether the wall is a party wall or not and such like, and what effect they might have on the rights of the adjoining owner;
- consider when and how the building owner wishes to carry them out;
- consider any concerns expressed by the adjoining owner with respect to any of the foregoing;
- determine what work may be carried out, how and when it may be carried out, and any other matters such as security to be paid and also who should pay the costs of the works and the surveyors' determination, all neatly bound up in a document called an award.

In doing this, they will act progressively more impartially within the constraints of the Act, the rules of natural justice and the scope of their contractual appointments. While they will allow their initial advice to be accepted or declined, they will not allow their determinations to be controlled by either party. The Act will only allow their award to be reconsidered by a Court.

In deciding whether the building owner has the rights he claims, they will determine the status of the wall, which means they

determine the extent of their jurisdiction. There is no authority for this in the Party Wall etc. Act, although there is in the Arbitration Act. This authority was confirmed in *Loost v. Kremer*[2] which was, perhaps unfortunately, only a County Court case, and therefore not a binding precedent.

## Arbitration or expert determination?

Is this procedure for the making of an award an arbitration, as accepted by McCardie J in *Selby v. Whitbread & Co*, or “*sui generis* and more in the nature of an expert determination” as suggested by Judge Humphrey Lloyd QC in *Chartered Society of Physiotherapy v. Simmonds Church Smiles*[4]?

If it is arbitration, then the Party Wall, etc. Act will be an arbitration agreement for the purposes of the Arbitration Act, and the procedure will be a statutory arbitration subject to the Arbitration Act as modified by the Party Wall etc. Act. The Arbitration Act in section 94(1) states:

The provisions of Part I apply to every arbitration under an enactment (a “statutory arbitration”), whether the enactment was passed or made before or after the commencement of this Act, subject to the adaptations and exclusions specified in sections 95 to 98.

If it is not arbitration, then the rules and procedures laid down in the Arbitration Act will only be persuasive in attempting to understand the Party Wall etc. Act procedure. If it is a “*sui generis* statutory expert determination”, nothing much will matter as by its nature it will be a unique process subject only to its own rules within the generally silent framework of the statute.

## Case law

There are two cases which are particularly relevant, both relating to previous incarnations of the Party Wall etc. Act, although the wording of the relevant sections is little changed.

In *Selby v. Whitbread & Co*[3], as noted above, McCardie J accepted that appointed surveyors were arbitrators. In most cases of around that time they were referred to as arbitrators as a matter of course. Following from that Leach[5] concluded that they were arbitrators and that their appointment could

only be rescinded with the leave of the Court under the (1950, now 1996) Arbitration Act. Section 10 of the Party Wall etc. Act merely says the appointments “shall not be rescinded by either party”.

However, as also referred to above, Humphrey Lloyd J in his judgment in *Chartered Society of Physiotherapy v. Simmonds Church Smiles*[4] said, once again where the main question was a different one, that if asked, he would say they were not arbitrators:

...the Act envisages that if three surveyors are to be appointed, a party-appointed surveyor while no doubt retaining his professional independence is not obliged to act without regard to the interests of the party who appointed him.

Further:

In the absence of authority I would not conclude from section 55(a) to (l)...that an award under the Act was an arbitration award...The Act does not require the award to be a “speaking” award and there is no apparent obligation for the award to contain findings of fact or conclusions of law and, of course, awards are customarily and commendably direct and to the point.

Furthermore, section 55(m) plainly excludes the Arbitration Acts.

I see no difficulty with his first point in that a surveyor could be regarded as acting as an arbitrator-advocate. This is particularly common in shipping arbitrations where each party to the dispute appoints an assessor to act for him and put his case but with the final determination being an award[6]. It is a little naive of him to assume that the professional independence of a surveyor, who can be any unqualified person other than a party, would meet the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms (for which see below) regarding impartiality.

In his second point I do not think he is making a judgment. He is making a passing comment. He does not refer to the Arbitration Act 1950 which would have brought the London Building Acts (Amendment) Act 1939 in as a statutory arbitration. Similarly he infers that section 55 of the 1939 Act does not make it a statutory arbitration by reference to various aspects of section 55 which do not appear relevant nor contradict the Arbitration Act 1950. I think he missed the point and I do not know whether it was argued before him. I fail to understand the reasoning behind his interpretation of section 55(m). It states:

The award shall be conclusive and shall not except as provided by this section be questioned in any Court.

It seems to me that if that excludes anything it is the jurisdiction of the Court, not the Arbitration Act.

The fact that lawyers are generally not taught arbitration, in addition to Parris’s[7] assertion about “those who make their fortunes out of the misfortunes of others”, will undoubtedly lead to a general misunderstanding of the concept of arbitration and anything inquisitorial, and hence “foreign”, and not completely under the control of lawyers. Whether they are as ignorant of arbitration as of levantine cooking[8,9]. I have no idea, but they are certainly likely to be more suspicious of it and courts are run by lawyers[10,11]. Had Humphrey Lloyd J considered the wording of the Arbitration Act, particularly section 94, he would not have been able to conclude anything from the lack of requirement for the award to be a speaking award.

Unfortunately, much as Parliament failed to define the status of the party wall dispute determination procedure, it has also failed to define arbitration so we have to approach the concept by considering what others have written, what characteristics it is generally agreed to have, and what it does not.

## What is arbitration?

Arbitration is a very old concept, predating our legal system as we now know it[7,10,11]. It started as a simple and easy way of settling disputes in contract. Parties agreed that any dispute that might arise between them would be referred to a friend or someone whose decision they would both respect for determination. This had the advantages of both giving a quick decision and reducing the cost of going to Court.

The law did not come into it as it was a private matter between the parties and, as the law was being developed, there was initially no way of suing in contract. One could go to the King and somehow get him to understand that it was a matter over which he should take control, initially on the basis of the alleged cheating reducing the ability of the claimant to pay his taxes, or increasing the likelihood of a breach of the King’s peace, or one could go to the Church, claiming that the defendant

had somehow committed an unconscionable act. As time went on, a whole body of contract and tort law developed which are now more or less integrated.

Similarly, the law has tried to impose itself on arbitration but has, so far, only really encoded a set of rules as to its procedure, following from the need first, to restrict it as being outside the control of the Courts, and then to enable enforcement of foreign arbitrations under international treaties. Hence, the lack of definition.

Mustill and Boyd[6] do not attempt to define arbitration but after pointing out that there is no statutory definition nor any cases in which the matter has been tried as a primary issue, say that there are many concepts which can be recognised as arbitration in the light of experience or intuition but that there is no complete list of the necessary characteristics. After saying that a procedure may be arbitration even if it lacks some of the features consistent with arbitration, they go on to give a suggested list of attributes which must, although not all, be present, and I paraphrase:

- the tribunal's decision must be expected to be binding on the parties;
- the process will be carried on between those persons whose substantive rights are determined by the tribunal;
- the jurisdiction of the tribunal must stem from agreement of the parties or a statute which makes it clear that the process is to be an arbitration;
- the tribunal must be chosen by the parties or by a method to which they have consented;
- the tribunal should be impartial owing an equal duty of fairness to both parties;
- the agreement must be enforceable at law;
- the tribunal should determine a dispute already in existence at the time of its appointment.

And factors which are relevant:

- whether the tribunal will receive evidence from the parties or at least give them the opportunity of putting it forward;
- whether the wording of the agreement is consistent with the view that the process was intended to be arbitration;
- whether the identity (or the method by which it is chosen) of the tribunal shows

that the process was intended to be arbitration;

- whether the agreement requires the tribunal to determine the dispute according to law.

Of these, it is submitted that there are only two questionable points in considering the section 10 procedure as a statutory arbitration:

- (1) the jurisdiction of the tribunal must stem from agreement of the parties or a statute which makes it clear that the process is to be an arbitration; and
- (2) whether the wording of the agreement is consistent with the view that the process was intended to be arbitration.

The Party Wall etc. Act does not make it clear in as many words that the process is to be an arbitration but its wording is consistent with the view that it was intended to be. It uses terms such as “parties”, “dispute”, and “award”, and it also states the award to be conclusive, subject to appeal. It is perhaps interesting to note that the term “difference” used in previous incarnations of the Party Wall etc. Act has been replaced by “dispute”, which is the term used in the Arbitration Act.

The Chartered Institute of Arbitrators[12] describes arbitration as:

a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties.

It adds that:

As a dispute resolution procedure arbitration is the only means of dispute resolution which is an alternative to litigation because an arbitrator's award is final, binding and enforceable summarily in the Courts.

The RICS[13] in its advice on dispute resolution gives the following explanations:

*Arbitration.* A procedure whereby two parties in a dispute agree to be bound by the decision of a third party acting as Arbitrator.

*Independent expert determinations.* A process whereby the parties to a dispute agree to be bound by the decision of a third party who has expert knowledge of the subject matter in dispute.

Mustill and Boyd's criteria are completely satisfied and, if one allows for the degrees of oversimplification in the RICS description, and proselytizing in the CI Arb definition, it remains clear that the procedure may well be arbitration. There is no requirement in the

Party Wall etc. Act that the surveyors be experts. Although the term “surveyor” is used, there is no reference, as in say the Housing Act 1996[14], as to any professional qualifications being necessary.

### European convention and rules of natural justice

It is also important to consider that the Party Wall etc. Act gives rights over other people’s land in order to facilitate efficient use of land by removing or circumventing the restrictions that would otherwise be imposed on development of it through conflict with adjoining owners’ common law rights. The restrictions it imposes on the exercise of the granted rights alleviate the extent of interference with the adjoining owners’ rights. As a result, we are here dealing with civil rights, and hence the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms is involved.

Article 6 of the Convention states that:

In the determination of his civil rights and obligations... , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Since 2 October 2000 public authorities (including courts and tribunals) have been made expressly subject to this duty in English law[15].

Rules of natural justice must surely also be relevant. Natural justice was originally a concept applied to justice meted out by bodies other than the Courts and applies to every arbitration. There are two rules of natural justice:

- (1) *audi alteram partem* (every person has a right to a hearing); and
- (2) *nemo debet esse index in propria causa* (no man shall be a judge in his own cause).

### Conclusion

Whether the Party Wall etc. Act forms a statutory arbitration with the section 10 procedure governed by the Arbitration Act or not, the Convention and the rules of natural justice must surely apply, meaning that the surveyors must be independent and impartial and they must together constitute a tribunal

established by law. This they would not be if they were merely party appointed experts.

The Party Wall etc. Act only addresses the question of impartiality to the extent that it defines “surveyor” as any person not being a party to the matter appointed or selected under section 10 to determine disputes in accordance with the procedures set out in this Act.

If the appointed surveyors (the two or three, or sometimes just one, of them) do not constitute a tribunal, then the Party Wall etc. Act, and its preceding legislation, must be bad. If they do constitute such a tribunal, then what governs it? It must, in my opinion, be arbitration law. If the Party Wall etc. Act is to be regarded as standing on its own and having some form of unique procedure for determination of disputes, how can the requirements of the Act be enforced without resorting to civil proceedings for injunctive relief or whatever at proportionately high cost? There is no longer any offence for failure to comply with the Act or an award made under it; there are only offences for hindering a building owner in exercising his/her rights (of access)[16] against another, which would not on its own be fair and hence would contravene the Convention and the rules of natural justice.

Appointed surveyors generally consider themselves immune from suit. As a matter of public policy they must have some immunity as they are required to make determinations which the appointing parties may not like. Even Humphrey Lloyd, in *Chartered Society of Physiotherapy*, considered that they should exercise a degree of detachment from their appointing parties. Such immunity would be granted by the Arbitration Act, but not by the Party Wall etc. Act. However, even in an arbitration, the arbitrators have a contractual obligation to the parties. That obligation is to make a fair determination in accordance with the arbitration agreement within the terms of the Arbitration Act. It is only if they step outside that duty that they become liable.

If the section 10 procedure is not a statutory arbitration, then the immunity from suit will not be clear at all. We could have the situation where an aggrieved owner decides to sue his/her surveyor for failing to carry out his/her instructions where the surveyor reasonably considered there to be a conflict between his/her client and his necessary impartiality. His/her defence would be that his/her contractual

obligation was merely to make an award within the confines of the section 10 procedure, but, as shown above, that procedure is not clear.

Appeals are made against awards made under the Party Wall etc. Act by use of Form 8A under Practice Direction 49G of the Civil Procedure Rules 1998, which relates to appeals against arbitration awards.

I have had awards enforced as if they were County Court judgments under the 1950 Arbitration Act simply by sending them to the local County Court on an *ex parte* application asking that they be adopted as judgments of that Court. The Courts raised no objection to this. I have also had the Land Registry postpone the registration of a charge against a property on the basis that it had no power to do so until an award had been concluded under the 1939 Act.

Without the protection of the Arbitration Act, enforceability of the award (including payment of the costs of the award), immunity from suit of the surveyors, and the degree of impartiality to be adopted by the surveyors is open to question. Could that really be what Parliament intended?

In conclusion, I consider that the dispute resolution procedure laid down in the Party Wall etc. Act is arbitration and that that Act is a statutory arbitration within the meaning of the Arbitration Act 1996. It is not clear that this would be accepted by the Courts, which is perhaps more important when advising clients. However, whether the Party Wall etc. Act procedure is a statutory arbitration or not, there are so many similarities that surveyors

should take appointments and make determinations within the rules set down in the Arbitration Act, and could be held to be at fault if they failed to do so.

## References

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- 12 Chartered Institute of Arbitrators, *General Information Handbook*, Chartered Institute of Arbitrators, London, 1996, p. 3.
- 13 Royal Institution of Chartered Surveyors (undated), *Solving Property Problems: A Guide to the RICS Dispute Resolution Service*, RICS, London, pp. 4, 8.
- 14 Housing Act 1996, s. 84.
- 15 Human Rights Act 1998, s. 6.
- 14 Party Wall etc. Act 1996, s. 8.