Validity of process under the Party Wall etc. Act 1996

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Keywords

Party walls, Notice, Disputes, Surveyors, Awards, Appeals

Abstract

This paper considers the entire process leading to the making of a valid award under section 10 of the Party Wall etc. Act 1996. The powers and duties of the appointed surveyors, the validity of their appointment, and the effect of their awards are examined. The validity of some of the commonly used award clauses is also commented upon. The paper also considers agreements between the parties insofar as they might affect a dispute and the subsequent award. Finally, examples are provided as to where liability might lie for failure to produce a valid award, with important warnings for appointed surveyors.

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Introduction

For an award under the Party Wall etc. Act 1996 to be valid, it must have been properly made by properly appointed surveyors. It must also determine matters properly in dispute under the Act. While this appears straightforward, there is potential for error, fatal or otherwise, at any stage en route. If just one error has occurred in the process, the award may well be invalid, unenforceable, and hence meaningless.

The parties will then have lost months, if not years, in time and legal costs, simply to find themselves back where they started. While both parties will have lost time, the building owner will have also lost the cost of the delay to his project which could be tens of thousands of pounds per week. Either or both of them will start looking around to find someone to pick up the bill and their eyes most likely will settle on one or other of the appointed surveyors.

It is essential that disputes under the Act are properly and fully identified. In *Woodhouse* v. *Consolidated Property Corporation Ltd*[1] an otherwise perfectly good award was thrown out by the courts on the basis that the dispute being determined by the third surveyor was not a dispute within the meaning of the London Building Acts (Amendment) Act 1939, and hence not for determination by the appointed surveyors. Personally, I doubt the validity of this decision given the circumstances of the case, but that is another matter, and it has been suggested by John Anstey that the change in wording of the relevant section in the 1996 Act was designed to enable the decision to be distinguished[2]. For a dispute to be valid, it must follow from a valid notice, validly served by a valid building owner on a valid adjoining owner, unless it follows another route within the Act. In this context, *Gyle-Thompson* v. *Wall Street (Properties) Ltd*[3] related to notices not being served on the adjoining owner but on his surveyor who was not authorised to accept service and not simply, as is commonly understood, to the question of reduction in height of a party wall.

Without a valid primary dispute (by which I mean one following directly from the notice) any purported appointment of surveyors will be invalid and they will have no power to make an award. In addition to this, the

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absence of such a dispute also means that surveyors cannot properly deal with any subsequent disputes, such as variations occurring or damage arising during the works. (Disputes arising where agreement has been reached between the parties or there is no automatic initial dispute, as under section 1, will be considered later.)

> The White Rabbit put on his spectacles. "Where shall I begin, please your Majesty?" he asked. "Begin at the beginning", the King said gravely, "and go on till you come to the end: then stop"[4].

And with that, I shall.

Notice

The requirements for a valid notice vary from section to section within the Act. Under section 1, a line of junction notice must be served by the building owner on any adjoining owner describing the wall he desires to build and be served at least one month before the work is intended to start.

A *party structure notice* must be served, under section 3, by the building owner on any adjoining owner and state his name and address, the nature and particulars of the proposed work (including plans etc. in the case of "special foundations"), and the date on which the work will begin. It must be served at least two months before the work is to begin and will become ineffective if the work is not begun within 12 months or is not prosecuted with due diligence. A counter notice may then be served, under section 4, by an adjoining owner on the building owner setting out certain further work as may reasonably be required for his own convenience. Where he has consented to "special foundations" the notice may also require that they be placed at a greater depth or be constructed so as to be able to support any columns of his own intended building, or both. It must specify the works required and be accompanied by plans, sections and particulars of them, and be served within one month of service of the party structure notice.

Under section 6, a *foundation notice* must be served by the building owner on any adjoining owner at least one month before beginning to excavate to specified depths and state whether he intends to underpin or otherwise strengthen or safeguard the foundations of the adjoining owner's building or structure. It must be accompanied by plans and sections showing the site and depth of the excavation and the site of any proposed building or structure. It will become ineffective if the work is not begun within 12 months or is not prosecuted with due diligence.

Within 14 days of service of a party structure notice or foundation notice, a *consent notice* may be served by an adjoining owner on the building owner under section 3 or 6, or a dispute is deemed to arise.

Under section 8, a *right of entry notice* must be served by the building owner on any adjoining owner and occupier at least 14 days, or in case of emergency, such notice as may be reasonably practicable, before exercising the statutory right of entry onto adjoining land. This applies whether or not an award specifically allows work to be carried out from the adjoining land.

A *requirement for security notice* may also be served, under section 12, by an adjoining owner on the building owner before he begins any work, the right to which is granted by the Act, to give such security for expenses as may be agreed or determined under section 10. Such a notice may be similarly served by the building owner on the adjoining owner with respect to any work the subject of a counter notice, in which case if the security is not given after agreement or determination, the counter notice will become ineffective. Finally, under section 13, a *notice of objection* must be served by an adjoining owner on the building owner within one month of service of an account of expenses claimed by the building owner, whereupon a dispute arises, failing which he loses any right to object.

Under section 15, all the above notices must be served by an owner, although he can authorise his surveyor or any one else to serve it for him. Service may be made by delivering the notice in person or by sending it by post to the intended recipient's usual or last-known residence or place of business in the UK. Where the intended recipient is a body corporate, service may be effected by delivering or sending the notice by post to the body's secretary or clerk at its registered or principal office. Any notice may alternatively be served on an owner by addressing it "the owner" of the premises (naming them), and delivering it to a person on the premises or, if no person to whom it can be delivered is

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found there, fixing it to a conspicuous part of the premises.

If a notice does not satisfy all the above requirements, it will be invalid. Despite the ambiguity in the wording of the Act, it is submitted that all notices must be in writing, state the name and address of the owner serving it, and be signed and dated.

> "If you didn't sign it", said the King, "that only makes the matter worse. You MUST have meant some mischief, or else you'd have signed your name like an honest man"[4].

Any notice will remain ineffective until it is served and service is generally understood to occur when the notice comes into the possession of, or to the attention of, the recipient. Therefore, if a notice is not served on the recipient in person, the date of service will be at least initially unknown and, may never occur. This could result in an aggrieved alleged recipient of a notice later halting the proceedings or having an award set aside on the basis that service was not effected.

Dispute

> Alice began to feel very uneasy: to be sure, she had not as yet had any dispute with the Queen, but she knew that it might happen any minute, "and then", thought she, "what would become of me? They're dreadfully fond of beheading people here; the great wonder is, that there's anyone left alive!"[4].

Disputes arise by default with respect to notices served under sections 3, 4 and 6. Disputes can also arise under section 1, section 7 (where reference is made to any dispute arising following agreement on the works by the parties), section 11 (concerning responsibility for expenses, or the amount to be paid to an adjoining owner in lieu of making good damage), and under section 12 (where agreement cannot be reached by the parties on the amount of security to be paid).

Where a dispute arises a surveyor or surveyors have to be appointed (section 10(1)) and they are then required to settle it by award (section 10(10)). However, section 10 also adds the somewhat vague requirement that the surveyors settle "any matter. . .which is connected with any work to which this Act relates, and. . .which is in dispute between [the parties]" (section 10(10)). It continues to say that "an award may determine. . .the right to execute any work. . .the time and manner of executing any work; and. . .any other matter arising out of or incidental to the dispute including the costs of making the award" (section 10(12).

So, once a primary dispute has arisen and surveyors been appointed, they must determine that dispute and any other matter in dispute and connected with the works but they may determine the right to do the work, how and when it is to be done, and any other matter arising out of or incidental to the primary dispute. This leads to the slight anomaly that issues such as alleged damage resulting from the works may be determined, but the amount to be paid in lieu if the adjoining owner so requests must be determined. It could lead to a party having any legal proceedings initiated by the other halted on the basis that he has not first exhausted the procedure laid down in the Act.

It also leads to the difficulty that, strictly, surveyors must be appointed with respect to each and every dispute arising. There is no power to consolidate disputes and so the situation could arise where each new dispute is referred to a new surveyor. It is advisable, therefore, for both surveyors to obtain letters of appointment which also authorise service and acceptance of service, appoint with respect to each and every dispute arising out of or incidental to the works being undertaken on that site at that time, and, if the surveyor is to be proactive during the course of events, authorise him to make appointments on his party's behalf in the event of default by the other party to a request served on him.

Surveyors

Once a dispute has arisen, whether following a notice or otherwise, surveyors must be appointed to settle it (section 10(10)).

The appointments must be made by the owners and be in writing (section 10(12)). While solicitors generally have the automatic power of agency, managing agents, architects, etc., generally do not. If an appointment is made on behalf of the owner, the surveyors must ascertain that the power of agency has been confirmed in writing. If the purported agent does not have the owner's authority, and the surveyor can show that he had reason

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to believe that he had, subsequent liability will at least in part be that of the agent.

The Act only requires that a surveyor shall not be a party to the dispute. I have argued elsewhere that he must also be impartial and independent, and this is reinforced by the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms into English law by the Human Rights Act 1998.

This, together with the principle of natural justice that no man shall be a judge in his own cause, means, I would argue, that employees and close relatives of an owner could not be validly appointed. I would also argue that in insurance cases, the insurer's loss adjuster could not be appointed to act for one of the owners due to the pecuniary interest of his principal in the outcome of any determination. It has been held that an owner's architect can be sufficiently impartial, so the line will presumably lie somewhere between the two. However, a surveyor owes his appointing owner a duty of care, the more so if he has been appointed by the other party in default, and to take an appointment that might later be overturned would be a failure in that duty for which he could be wholly liable.

Disclosure of all the pertinent facts to the parties, and their written acceptance, would of course, obviate any subsequent question of lack of impartiality:

> "I quite agree with you", said the Duchess; "and the moral of that is – be what you would seem to be – or if you'd like it put more simply – never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise than what you had been would have appeared to them to be otherwise."
>
> "I think I should understand that better", Alice said very politely, "if I had it written down; but I can't quite follow it as you say it"[4].

The first duty of the surveyors is to select a third surveyor (section 10(1)(b)). This must be before they even start discussing the issues, as once a disagreement has arisen between them, they would be less able to select with impartiality:

> Alice thought it would never do to have an argument at the very beginning of their conversation, so she smiled and said, "If your Majesty will only tell me the right way to begin, I'll do it as well as I can"[5].

The third surveyor has, perhaps, a special position in that he has further duties imposed on him. He is also the only one of the three surveyors who can make an award without reference to another (s.10(11)), and who can withhold his award until his fee has been paid (s.10(15)). The party-appointed surveyors have a duty of care in making his selection and would, I think, be liable if the third surveyor's award were later overturned in Court and it was found that he had little experience of the legislation and that his selection had come about through the hope of favouritism on the part of the proposer, and indifference on the part of the other.

Agreement

The adjoining owner may choose to agree to the notified works, in which case, he must do so in writing and within 14 days. But he may choose to agree to part of the works or the building owner may subsequently change his proposals as work proceeds, and in each case a dispute will remain or will arise. His agreement may be conditional, in which case a dispute may still exist or arise and the surveyors will need to decide on this. It is clearly problematic for the parties if a dispute arises without surveyors already appointed and capable of determining it when it arises.

With minor works such as excavating 200mm below the level of the adjoining owner's foundations 2,900mm away from them, there is little justification for determination by award except that it is a requirement of the Act. In such cases, it is perhaps incumbent on the surveyors to recommend agreement between the parties. Where surveyors recommend agreement, they should also advise incorporation into that agreement of appointment of surveyors to be on hand in the event that a further dispute occurs. The potential cost in delay to a building owner's works can run into tens of thousands of pounds per week. The building owner's surveyor would not want to find himself being looked at with respect to any such loss.

Any agreement between the parties before a dispute is settled will reduce the extent of that dispute, thereby removing the agreed part from the surveyors' jurisdiction. Any agreement after the award has been made will

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effectively modify the award. The parties are always free to agree anything they care to. The surveyors, who are their servants, can only settle that which is not agreed. Anything else would be *ultra vires*. Agreement after an award has been made will not alter the award but will affect the extent to which it can be enforced by either party, and therefore, will modify the effect of the award.

There may be covenants attached to the deeds of the properties which allow the works, or part of them, in which case, no dispute would arise with respect to the allowed works. There may be a landlord and tenant relationship with similar effect. The surveyors should always enquire as to the extent of any such agreements and establish their validity with respect to the Act.

Award

Aside from the issues of validity already mentioned, an award must be certain for it to be valid. If it is not clear as to what rights the building owner may avail himself of (i.e. what work he might carry out and in what manner, or what conditions he must satisfy with respect to the adjoining owner) it will be bad. An uncertain award is invalid on its face.

If the Arbitration Act 1996 were to apply, then the surveyors would have the power to determine the extent of their jurisdiction. It is fair to assume that surveyors effectively do this as a custom in any event. They must, for example, satisfy themselves as to the status of a wall before making an award determining the rights of the parties over it. A strict interpretation of the Act would lead to the anomaly that one party could frustrate the exercise of the granted rights by the simple expediency of requiring him to prove in Court the position of the boundary. This could hardly, in my view, have been Parliament's intent. The determination by a third surveyor of matters relating to the jurisdiction of the surveyors was upheld in *Loost* v. *Kremer*[6] but this was only a County Court case, and does not therefore set a binding precedent.

There are several standard draft awards in circulation, ranging from that produced by the Institute of Civil Engineers in the nineteenth century, and on which my own standard draft is ultimately based, to the one produced by John Anstey and adopted with modifications by the Pyramus & Thisbe Club and the RICS. There are then numerous others drafted by various individuals, usually similar to the John Anstey model. No standard form is prescribed by the Act, but it is undoubtedly more convenient for surveyors to use standard forms as it reduces the amount of time necessary to reach agreement. It is unfortunate, but thankfully inevitable, that none has become universally accepted.

Any award should include a basic preamble identifying the dispute, with reference to the notice, any agreements extant, etc., confirming the appointments, and settling the matter in dispute. It should normally settle all matters in dispute, unless any associated delay would not be in either party's better interests. It would be unfair, for example, to delay the making of an award to allow demolition to proceed until the abutment details had been made available. It would also be unfair to delay making an award where matters cannot be immediately agreed on, but can be separated out for determination later or by the third surveyor, such as, for example, the amount of the fees to be paid to the adjoining owner's surveyor.

The award should not include any attempt at changing anything prescribed in the Act, such as seeking to alter the method for selection of a third surveyor. The surveyors have a very clear role, but the degree of arrogance that might accompany this will not allow them to override Parliament.

The award should not include determinations that the parties are to comply with other statutes or regulations as the obligation will already exist and cannot, therefore, be a matter in dispute. They should, however be taken into account. An award which, for example, determines that all noisy work shall be carried out outside normal working hours will not sit well with the almost standard requirement of local authorities under sections 60 or 61 of the Control of Pollution Act 1974 that work audible at the site boundary only be carried out between 8:00 a.m. and 6:00 p.m., Monday to Friday, 9:00 a.m. to 1:00 p.m., Saturdays, with no work at all on Sundays or Public Holidays.

Without good reason for the benefit of the parties, an award should not include a clause delaying the works to allow the appeal period

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of 14 days to run. The Act does not require a 14-day delay; it limits the period in which an appeal may be made against an award to 14 days. The building owner should be able, with advice if necessary, to decide whether to suffer the risk of an appeal, or to incur the additional cost of that delay. The surveyors' duty is to settle disputes, not decide how the building owner might choose to turn risk into profit.

Appeals

The Act provides that once an award has been made, "it shall be conclusive and shall not except as provided by (section 10(17)) be questioned in any court" (section 10(16)).

I have argued elsewhere that the section 10 procedure is a statutory arbitration. If it were to be, then the grounds for appeal would be limited and, if not brought to the Court without delay, or while allowing the arbitration to continue, lost. However, it was held in the case of *Chartered Society of Physiotherapy* v. *Simmonds Church Smiles*[7] that an appeal allowed the Court to completely reopen the dispute and admit evidence not before the surveyors at the time the award was made.

The making of an appeal does not prevent the work from proceeding. Although it may be wise for the building owner not to risk his work having to be undone, nor to risk offending the Court by not awaiting its judgment, he only need stop if an injunction is obtained.

While I know of only one case where a surveyor was made a party to the action as defendant, as the award is a determination of the rights between the parties, it is for one party to seek to have the award overturned or modified, and the other to defend it. If they were both agreed it was wrong, they would reach agreement between themselves and would not need to appeal. The surveyors have the right to make written representations to the Court but the Court does not have to hear them.

Liability

If the appointed surveyors are arbitrators then they would enjoy immunity from suit under the Arbitration Act 1996, s.29(1). In arbitration, the tribunal has generally been regarded as being immune from suit as a matter of public policy. Determinations have to be fair and impartial, so it would be unreasonable to expect arbitrators to make decisions without fear or favour if they could be held personally liable for their decisions. The 1996 Arbitration Act clarified the extent of immunity.

However, it has never been considered that an arbitrator, or anyone acting in a quasi-judicial capacity such as an appointed surveyor, would be immune from suit where he had failed in his duty. If he is regarded as being contracted to make a fair determination, and does not do so, he could be liable in tort and contract.

An appointed surveyor performs many functions, or at least one function that can be broken down into clearly definable parts. When giving advice at the outset, he will be liable for that advice. When making his award, he will most likely be liable for anything that leads to a loss and cannot be shown to be what a reasonably competent surveyor might be expected to have done. I have suggested above that surveyors could also be liable for improperly taking an appointment or improperly selecting a third surveyor.

It is clear that, in this increasingly litigious society, and where the lead from the higher echelons of government is often no more than a knee-jerk reaction and the finding of a scapegoat, that surveyors will have to be increasingly careful in the carrying out of their functions.

To act as a party wall surveyor might appear to have been simplified by the availability of draft notices, selection of third surveyor forms, and draft awards from the RICS and others. However, the ability to apply a sound knowledge of the law of agency, contract, tort, evidence, arbitration, and of building construction, is more necessary than the ability to fill in *pro-formas* for a surveyor to act properly, and to be seen to be acting so.

It is also, I hope, clear from the foregoing, that an error at any stage can lead to an award that is invalid or just simply wrong and that to produce such a document fails both parties and so liability will attach to the surveyors making it.

> The White Rabbit put on his spectacles. "Where shall I begin, please your Majesty?" he asked. "Begin at the beginning", the King said gravely, "and go on till you come to the end: then stop"[4].

And with that, I shall.

Notes and references

1 *Woodhouse* v. *Consolidated Property Corporation Ltd* (1993), 1 EGLR 174.
2 Anstey, J. and Vegoda, V., *An Introduction to the Party Wall etc. Act 1996*, Lark Productions Limited, 1996, p. 135.
3 *Gyle-Thompson and Others* v. *Wall Street (Properties) Ltd* (1974), 1 All ER 295.
4 Dodgson, C.L., *Alice's Adventures in Wonderland*, Macmillan, Basingstoke, 1865.
5 Dodgson, C.L., *Through the Looking Glass, and what Alice Found There*, Macmillan, Basinstoke, 1871.
6 *Loost* v. *Kremer*, unreported, but see discussion in Anstey, J., "Party wall surveyors can decide the law", *Structural Survey*, Vol. 17 No. 1, 1999, pp. 42-4.
7 *Chartered Society of Physiotherapy* v. *Simmonds Church Smiles* (1995), 1 EGLR 155.