

# **The Right to Damage Other People's Property in England and Wales**

by carrying out foundation works

**revisited**

under the Party Wall etc Act 1996

A Short Article for Whispers

**David Bowden**

7 December 2013

The legislation that is the Party Wall etc Act, 1996, is a straightforward expropriation of basic property rights in order to facilitate the continued maintenance and redevelopment of property following its successful use in one of the world's oldest and most important cities which has continued through several reincarnations over the last century with little variation.

Essentially it takes away the rights in the ownership of a party wall from each of the adjoining owners and gives in return specific rights over the totality of the wall, and to an extent over the other's land beyond the wall subject only to complying with certain procedures.

The rights given by the Act supercede any common law rights<sup>1</sup>, but not agreements between the owners.

*Inter alia*, the Act gives the right to underpin<sup>2</sup> a party wall.

This is subject to very few conditions, assuming the procedure (of service of notice, and either written agreement or the appointment of surveyors and the obtaining of, paying for, and complying with an award, etc) to have been followed. The conditions, which are mainly for the protection of the adjoining owner during the works, include not causing any unnecessary inconvenience<sup>3</sup> and making and maintaining hoardings etc where the adjoining land or building is laid open.

---

<sup>1</sup> Standard Bank of British South Africa v Stokes 1878

<sup>2</sup> Section 2 (a)

<sup>3</sup> Section 7 (1)

## The Right to Damage Other People's Property

Continuation: page 2

In the absence of written agreement between the owners, the surveyors have to settle by award any matter in dispute between the owners<sup>4</sup> which is connected with any work to which the Act relates, and which is in dispute between the building owner and the adjoining owner, and the award may determine the right to execute and 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<sup>5</sup>. If the surveyors fail to act in the making of an award within the time laid down, then it is open to one or other of them, or one of the owners, to approach the third surveyor and ask him to make the award. Parliament did not intend to allow much delay in the exercise of these statutory rights. The right of appeal it gave is limited by the Act<sup>6</sup> and even more so by subsequent legislation.

The surveyors are arbitrators<sup>7</sup> and their function is to administer the provisions of the Act. They have no right to attempt to change what the judiciary might think Parliament intended.

The Act is pretty nasty. It gives the right to go onto other people's land<sup>8</sup>, moving furniture and fittings and even breaking in to do so, if necessary, thereby removing a basic human right in property. The mention of inconvenience only being restricted to the extent that it is unnecessary<sup>9</sup> shows that our dear leaders presumed that inconvenience would be caused and reduced the adjoining owner's cause of action to just so much of it as is unnecessary.

I think there are only two questions, firstly whether knowing that damage would be caused by the underpinning could make the carrying out of it unnecessarily inconvenient, and secondly whether the need for the underpinning indicated a defect or want of repair rendering its cost partly the responsibility<sup>10</sup> of the adjoining owner.

This first must be a question of degree, but some minor cracking could hardly be regarded as unnecessarily inconvenient relative to the greater inconvenience that could be suffered by both owners through inadequate support of their buildings by the party wall. I suppose the surveyors might need to satisfy themselves as to the necessity of the underpinning, but then I think they would be entering that grey world *ultra vires* the Act, the proper domain of the legal profession.

---

<sup>4</sup> Section 10 (10)

<sup>5</sup> Section 10 (12)

<sup>6</sup> Section 10 (17)

<sup>7</sup> *Selby v Whitbread & Co* 1917

<sup>8</sup> Section 8

<sup>9</sup> Section 7 (1)

<sup>10</sup> Section 11 (4)

## **The Right to Damage Other People's Property**

Continuation: page 3

The second would follow from the facts, which might upset the adjoining owner even more, but it should be remembered that both owners have the same rights under the Act, it applying as it does to everyone except some royalty and certain other established entities.

The surveyors would no doubt determine that, within reason, any resultant damage be repaired, and they should take account of the anticipated damage when determining the manner of the execution of the underpinning, but I do not see that they, humbly administering the Act in determining the time and manner of the carrying out of works under it, and perhaps a little more arrogantly determining the amount of their fees<sup>11</sup>, can do anything but facilitate a building owner in his exercise of the rights given him by the same higher authority that gives us our work.

Under Section 2, a building owner would, therefore, have the right to cause damage.

However, piling, for the foundations of an independent building, is governed by a whole different set of rules with a completely different basis to them.

Section 6 requires that where a building owner proposes to carry out work on his own land that might affect an adjoining owner's building (by virtue of involving excavation to specified depths within specified distances), he should first serve notice. In serving a foundation notice the building owner does not claim the right under the Act to do the work, but notifies the adjoining owner of his intent. This gives the adjoining owner the opportunity of claiming his right under the Act to have (or not have) underpinning or other safeguarding at the building owner's expense. The building owner has to send drawings with the notice and has to state the depth to which he proposes to excavate. This is to assist the adjoining owner in making his decision. It is only here that a difference can arise to be settled by appointed surveyors.

No right to do the work is given to the building owner by the Act, although he is given certain rights over the adjoining land for such ancillary work as erecting scaffoldings, and he is also given the right, after a determination by appointed surveyors if necessary, to enter the adjoining owner's land to underpin or otherwise safeguard the adjoining owner's building whether either owner likes it or not.

The only way a building owner could have the right to pile whilst causing damage would be if the adjoining owner were unable to stop him either by persuading the surveyors to award that so much underpinning be done as to render the proposed foundations uneconomic, if such were fair, thereby encouraging an alternative solution, or by obtaining an injunction restraining the building owner from carrying out the work on the basis that damage would inevitably be caused to his property. But this would be to accept the law of the jungle, which, although generally acceptable under

---

<sup>11</sup> This must be common knowledge but is section 10 (13)

## The Right to Damage Other People's Property

Continuation: page 4

international law<sup>12</sup>, is not generally considered acceptable behaviour in England and Wales.

Whilst the court might agree that the Act anticipates that damage would be caused by works under Section 6, and makes allowance for it by providing a framework under which an adjoining owner can have his building strengthened, I do not think could agree that this would exclude his basic right to an injunction to protect his property.

It is, perhaps, interesting that the Act only refers to an adjoining owner's building, and not to his land. I think this must be because whilst he has a natural right to support to his land he would, in the natural course of events, only acquire a right to the support of his building after twenty years<sup>13</sup> and, during this period, unless the excavation work were carried out without due care, the adjoining owner would have no claim against the building owner (unless, perhaps, he were the Coal Board or covered by some other legislation) if damage were to be occasioned to his building as a result of the excavation works *per se*.

Therefore, a building owner can have no absolute right under the Act to excavate where the adjoining building is independent, and would only have the right to do so if he could show that he had the right under section 6 (underpinning or some such of a party wall).

David A Bowden BSc MRICS ACI Arb  
Urban Building Surveyors  
8 Devonshire Row EC2M 4RH  
020 7377 9494  
david@davidbowden.co.uk

Note this article is an updated and slightly revised version of one I wrote for the Pyramus & Thisbe Club in 1996 as an update of a paper prepared for John Anstey some years previous.

---

<sup>12</sup> United States of America v Col Gaddafi c1986 for example, and numerous subsequent examples

<sup>13</sup> Dalton v Angus 1877-81