Party walls in case law

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Since its introduction, the Party Wall etc. Act 1996 has only been amended by virtue of the Party Wall etc. Act 1996 (Electronic Communications) Order 2016 and not been adapted in any other way – despite developing construction techniques, and many surveyors wonder how such techniques fit with the legislation. Over the past two years, though, party wall practitioners have benefited greatly from various judicial decisions steering them towards correct administration and application of the legislation.

In the case of Basu v Baron, heard by Judge Bailey, an appeal was lodged two minutes after close of business on the last day for issuing it, and without enclosing a means of paying the issue fee. This was struck out as being out of time under section 10(17) of the 1996 Act, which might appear a little harsh given that the courts closed at 4pm.

Nevertheless, the case confirms that the period defined by the act for appeals to be lodged ends on the 14th day, and is a reminder to be prompt in making any appeal. It also illustrates why a surveyor should not step into the role of a solicitor in administering post-award matters, such as appeal documentation. An owner determined to appeal should be supported by legal representation and warned of litigation procedural pitfalls that can see a case struck out.

Thanks are due to Judge Bailey for his decisions in Welter v McKeeve in late 2018 as well. In the original determination, he gave a detailed decision that made it a requirement when dealing with damages to mitigate the loss on the part of the adjoining owner. More pertinently, the judgment at paragraphs 165-74 provides useful commentary on how party wall surveyors should approach their task of dispute resolution under section 10 of the 1996 Act. On appeal in 2019, Lord Justice Coulson gave a reasoned refusal for permission to appeal the judgment.

In Masters v 6 Bolton Road Limited [2016], meanwhile, a cornice fell and damaged the balcony of the adjoining home, and again this judgment dealt with surveyors' behaviour. Judge Bailey's decision in this case was a reminder that the award must offer a proper explanation of the implementation of the remedial works it authorises so the owners are not left with matters that are not expressly covered. He said: "It is ... straightforward for the award to meet the adjoining owners' concerns either by requiring a method statement or a sketch sufficiently annotated to amount to a method statement or ... by specifying a particular crafts[person] or contractor, or preferably both a method statement and an identified contractor."

Perhaps the greatest contribution to professional practice came in Mohamed & Lahrie v Antino & Stevens [2017]. This is an example of protagonists in a party wall dispute becoming disillusioned with the cost and inadequacies of the mechanism for determining and resolving issues under section 10(2) of the 1996 Act, which prevents them from rescinding the appointment of a party wall surveyor. So what can the two owners do when a surveyor is the problem rather than the means of resolving dispute? Judge Bailey provides the solution.

First, the court can stop the surveyor before the publication of rogue awards via the power of injunction. Judge Bailey used this measure so the threats of ongoing awards and escalating fee charges could be stopped immediately.

Second, the courts have accepted the concept of agreement between the two owners as overriding the surveyors' authority to resolve a dispute. Central to this concept is that, for the surveyors to hold power, a dispute for determination must exist. Should the owners confirm in writing that no dispute exists, then the surveyors' authority is immediately ended. This follows the legal logic of the High Court decision in Dillard v F&C Commercial Property Holdings Limited [2014] EWHC 1391. The agreement does not need be complex, such as a legally drafted document, but can be a simple joint communication to the surveyors of two owners' agreement on a specific point or an entire dispute.

Third, this case confirms that surveyors can be joined in the proceeding and even exposed to the risk of an award of costs against them.

This has prompted wider discussion in the profession. Could rogue surveyors be sued for professional negligence? Current legal thinking is that the party wall surveyor has no special protection or status against such a claim, although the bar might be set higher than purely being on the wrong side of an appeal or third surveyor's decision. But legal opinion is becoming firmer in situations where it encounters malpractice.

It is good business practice that, for practitioners to defend themselves from unlimited liability in a claim, they must set out in the original terms of business the tasks to be performed and any liability cap. RICS is launching an updated scope of service for all neighbourly matters service lines: this is scheduled to be published later this year and will comprise three similar documents relating to England and Wales, Northern Ireland, and Scotland. These should define the function of the party wall practitioner and importantly, when they are operating outside the legislation as a wider consultant.

Judge Parfitt is responsible for several relevant 2019 judgments as well. At the end of last year there was an uncommon result in Yamin v Edwards, a case in which surveyors were appointed and an award made and upheld in the absence of any party wall notice being served. The issue will no doubt arise before the courts again; it is unclear whether Yamin properly explored the extent of the surveyors' jurisdiction under section 10 of the 1996 Act in the absence of party wall notices.

We have some useful determinations in other cases, too. One such example from 2018, heard in the Royal Courts of Justice by Lord Justice Hickinbottom was Group One Investments Ltd v Keane. Although this concerned demolition of a property and development of new houses, an issue arose that led to a threat of an injunction. Subsequently, a third surveyor refused to award related legal and professional costs. That award was successfully appealed in the county court.

Group One obtained permission to appeal the county court's decision in the Court of Appeal. Lord Justice Hickinbottom applied the decision in Blake v Reeves [2009] EWCA Civ 611, to the effect that the costs of threatening an injunction were not within the jurisdiction of the surveyors to award under section 10 of the 1996 Act.

The judgment discusses the meaning of dispute under section 10, states that such a dispute "... refers to, and only to, a dispute arising under the act, including a deemed dispute under section 6(5)" and distinguishes these from disputes "... deriving from common law or equity". This makes clear that surveyors dealing with the act shouldn't step beyond the bounds of that appointment.

Finally, Ormiston-Kilsby v Fatahi was a case where the building owner's contractors commenced work that included notifiable works; the owner had agreed in the building contract to take responsibility for serving the requisite notices but had not done so and damage was caused as a result. The court was distinctly unimpressed both with the defendant's representation and their

failure to acknowledge their responsibilities under the 1996 Act. It concluded that the defendant was liable both in trespass and nuisance, and awarded the claimant a mandatory injunction, requiring the building owner to remove their extension and pay damages.

Building owners who fail to comply with the obligations to serve notices under the 1996 Act often say that they were not aware of them, and their failure is merely a technical default with no actual consequences. Ormiston-Kilsby shows that the court will rarely be impressed with this argument. A building owner who has acted in such a way is generally well advised to comply retrospectively as far as possible. They should take steps to put the adjoining owner in the position they would have been in but for their default.

Will there be further changes this year? It's very unlikely that the act will be amended, but case law may change the way it is implemented and interpreted as it did in 2019. We may see it amended by virtue of newer legislation.

What do we wish for? How about having the administration of the surveyor's role given back to those with the appropriate competence and training? This will protect the general public from abuse of the system and provide clear regulatory redress against rogue practitioners. A clearer definition of a surveyor in the legislation is long overdue.