

Compensation, Disturbance, Inconvenience

Under the Party Wall etc. Act 1996

Compensation

The compensation provisions in section 7(2) are new in as much as they now refer to any work in pursuance of the Act:

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.

Under the 1939 Act, compensation was covered by section 50(2)(b) which applied only to work done in pursuance of what is now section 6. The scope of these new provisions is considerably more wide.

Prior to the 1996 Act, it was established that no compensation would be payable to an adjoining owner or adjoining occupier in respect of the normal consequences of work lawfully executed under a party wall award unless those consequences arose from excavation works - *Adams v. Marylebone Borough Council [1907] 2 KB 822*. This case had previously been popularly cited as authority for the proposition that there can be no compensation in respect of matters such as loss of trade to a restaurant consequent on awarded works. That principle now appears to have been overturned. Surveyors will now need to think about whether adjoining owners and occupiers will suffer a financial loss as a result of the awarded works and to include a figure or a formula for compensation in respect of such works in the award.

The compensation provisions obviously do not relate to losses arising as a result of the building contract as a whole; they take effect only in respect of losses which arise from work ‘executed in pursuance of this Act’. What is the meaning of that expression?

In *Sleep v. Wise* [2007] PLSCS 59 the judge considered the meaning of those words in the context of the question whether access could be required under section 8 for line of junction works under section 1(4).

The judge approached the appeal on the basis that it turned upon whether or not the works in question could be said to be works ‘in pursuance of this Act’. She was referred to *Saul v. Norfolk County Council* 3 WLR [1984] 84 which dealt with the interpretation of the phrase ‘in pursuance of the said Part III’ in the Agriculture Act 1970. In that case, the Court of Appeal said: -

The draftsman...chose to add the words ‘in pursuance of the said Part III’ these words cannot be in our judgment otiose. Some force must be given to them. The ordinary and natural meaning of the words ‘in pursuance of the said Part III’ is, in our judgment, “in exercise of the authority conferred by Part III...”.

In *Sleep v. Wise*, the judge accepted that the court must attach that natural and ordinary meaning, i.e. “in exercise of the authority conferred”, to the words “in pursuance of”, appearing in section 8 of the Party Wall etc Act 1996.

It follows from this that surveyors may only award compensation under section 7(2) in respect of works which are authorised by the Act, i.e. works which would be unlawful if not so authorised. It may be difficult in practice to distinguish between losses caused by the

works authorised by the award and losses caused by works for which an award is not required but this is a difficulty which surveyors will need to tackle.

In most cases, the calculation of the compensation figure will be relatively straightforward – it will be linked closely to the cost of putting right damage caused during the conduct of the work. However, the wording of the section may be wide enough to cover other categories of loss, in addition, such as loss of trade and diminution in value of the adjoining owner's property, if diminution can be established. For example, the raising of a party wall may ruin a beautiful view or reduce the light available to an adjoining owner's house or garden in a way which would not be actionable at common law, but which would nevertheless have an impact on the value of the property. Surveyors will need to consider whether losses of that sort should be taken into account when awarding compensation.

Strictly speaking, compensation under section 7(2) is limited to work which is lawfully carried out under the award and would not include losses arising from, e.g., the negligent conduct of the works by the building owner or the failure by the building owner to avoid unnecessary inconvenience. In any given case, party wall surveyors will need to decide how strictly to apply those principles, but will no doubt be guided by the fact that the underlying purpose and spirit of the Act is to resolve disputes by straightforward and pragmatic means and that fine distinctions are often better avoided. Judges at county court level are unlikely to be attracted by such distinctions, e.g., *Naismith v. Bletchley Property Holdings Limited* [unreported Central London Civil Justice Centre, Technology and Construction Court, November 2006 HHJ Brian Knight QC]. It is unattractive for a building owner, in effect, to say “the reason that I do not have to pay compensation under the Act is that I was negligent. Because I was negligent, you will have to take me to court instead”.

Similar principles apply to section 7(1). It has been argued that surveyors have no power to award compensation in respect of unnecessary inconvenience because this would only arise where the building owner is in breach of his obligations and is therefore liable only at common law for breach of statutory duty. Such technical points should be resisted. It appears that surveyors may have jurisdiction to award compensation for losses arising from breaches of section 7(1) – ***Adams v. Marylebone Borough Council [1907] 2 KB 822:***

‘I am disposed to think that in all the cases in which the Act provides for compensation the intention is that the amount of compensation is to be determined by the [surveyors] ... it would be extremely inconvenient if two inquiries were necessary, one by the [surveyors] to ascertain whether the conditions precedent to the right to compensation existed and another before some other tribunal to determine the amount of the compensation’.

Compensation under section 1(7) follows different principles. This is limited to compensation for damage arising to the property of the building owner or the adjoining owner. For practical purposes, the sensible approach to take may be to calculate such compensation in the same way as calculating money in lieu of making good under section 11(8). The wording of section 1(7) is considerably more restrictive than the wording of section 7(2) and is limited to damage to the adjoining owner’s or adjoining occupier’s property occasioned by:

- i) the building of the wall; or
- ii) the placing of footings or foundations under section 1(6).

Although there is no conclusive authority on the point, surveyors may have jurisdiction to award compensation for unnecessary inconvenience arising from the building owner’s breach

of section 7(1). If so, this would include unnecessary inconvenience arising from works to footings and foundations under section 1(6).

The calculation of section 7(2) compensation

In the majority of cases, compensation under section 7(2) will be payable because damage has been caused and needs to be put right. In those cases, there is a significant overlap between the compensation provisions of section 7(2) and the building owner's obligation to pay money in lieu of making good, if requested, under section 11(8). The obligation to make good (or, if requested, to pay money instead) only arises, however, where the Act specifically says so. It is limited to the following:

- Underpinning etc – section 2(2)(a);
- Demolition etc – section 2(2)(e);
- Cutting into a party structure – section 2(2)(f);
- Cutting away projections and overhangings – sections 2(2)(g) and (h);
- Flashing – section 2(2)(j)

Compensation arising from any other works may be covered by section 7(2). Surveyors are well equipped to deal with the cost of making good damage but the calculation of other forms of compensation – under section 7(2) – may be unfamiliar territory. Such compensation may fall into the following categories:

Financial losses

These may consist of loss of trade or diminution in value of the adjoining owner's property. If the figures are substantial, it would be wise to appoint an accountant or valuer to calculate the appropriate figure. It may be necessary to obtain legal advice in respect of the applicability of the principles of mitigation, remoteness and foreseeability.

Unnecessary inconvenience

Although surveyors may have jurisdiction to make an award of compensation in respect of the building owner's breach of section 7(1) any award to reflect mere inconvenience is likely to be modest. There will be some cases where it would be inappropriate to make any award at all. An award may only be made in respect of the works within the Act and, only then, in respect of those works which cross the line by causing inconvenience which can be said to be unnecessary:

One must be careful not to penalise the defendant company by throwing into the scales against it the loss...caused by operations which it was legitimately entitled to carry out. It can be made liable only in respect of matters in which it has crossed the permissible line.

Per Sir Wilfred Greene MR in *Andrae v. Selfridge & Company Ltd* [1937] 3 All ER 255, CA.

By way of guidance, there is a 2006 case, *Eiles v. Southwark London Borough Council* [2006] All ER (D) 237 where a homeowner suffered significant inconvenience as a result of having to move out of her property whilst repairs to subsidence damage were carried out. When considering the question of general damages, the judge reminded the parties that the court's approach to the question of damages for vexation, distress and worry is to provide compensation which is "not excessive, but modest". That case indicates that damages of only about £200 per year would be appropriate for mere inconvenience resulting from matters such as correspondence, monitoring and site investigations and that a figure of £1,000 might be appropriate to compensate a claimant for the inconvenience of having to move into alternative accommodation.

Disturbance and Inconvenience – section 11(6)

The inclusion of a specific provision to pay a fair allowance for disturbance and inconvenience where premises are lawfully laid open indicates that payments for disturbance and inconvenience may be excluded from the scope of section 7(2). Where it applies under section 11(6) surveyors should apply the same principles as above.

Security – section 12(1)

The surveyor's power to give security is expressed in terms wide enough to include security for any compensation which they predict may be payable under the Act but not, of course, in respect of any claims relating to works which are outside the scope of the Act.

Appeals against awards

Awards for compensation will need to involve significant sums of money in order to justify the costs and risks of litigation and each case will need to be considered on its own merits. Following the case of *Zissis v. Lukomski [2006] EWCA Civ 341; [2006] 30 EG 104*, such appeals will need to be brought under Part 52 of the Civil Procedure Rules. In any given case, a careful cost/benefit analysis will need to be conducted before an appeal is brought.

The above note is based on lecture notes prepared by Andrew Smith to accompany a presentation to surveyors and solicitors.

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