



A resolution to the section 1/section 8 debate?

Party wall surveyors have been debating for years the question of whether service of a notice under section 1(5) has the effect of triggering the rights of access to an adjoining owner's land provided for by section 8(1), which, readers will recall, confers a right of access '*for the purpose of executing any work in pursuance of this Act*'. Most surveyors agree that the answer to the question of whether or not section 8 rights apply following service of a notice under section 1(5) depends upon whether or not it can be said that the works under section 1(5) are 'in pursuance of this Act'.

A significant proportion of party wall surveyors had taken the view that any notifiable works could be described as works 'in pursuance of this Act' and that, since section 1(5) works are notifiable, such works would attract the benefits of section 8. The difficulty with this view is that it is hard to see how the erection of a structure entirely on the building owner's land (albeit up to the boundary) can be described as being work conducted pursuant to the Act – no authority is required by a building owner who wishes to erect a structure entirely on his own land. He has a pre-existing common law right to do so.

A judicial decision is now finally available on this issue in the case of *Sleep v. Wise*, an unreported decision of Her Honour Judge Pearl in the Barnet County Court. The facts of that case were as follows:-

The building owner wanted to demolish an existing garage on the boundary with the adjoining owner and to erect a single storey extension in its place. On 15th December 2005, the building owner's surveyor served notice under section 1(5) relating to the erection of the extension. The section 1(5) notice included the following information:

"The proposed works are:

- i Demolish the existing garage;
- ii Excavate for and cast new foundations for a single storey rear and side extension;
- iii Erection of side wall to single storey rear and side extension in facing brick on the Line of Junction"

In the accompanying letter the building owner's surveyor stated that the adjoining owner need take no action in response to the section 1(5) notice and that the reason for serving the notice was to enable the building owner to benefit from the section 8 right of access in order to build the wall in question.

On 22nd February 2006, the building owner's surveyor gave notice of his intention to exercise rights of access under section 8(4). On 2nd March, the adjoining owner's solicitors objected, saying:-

Neither you nor your contractors are entitled under the Act or otherwise to enter our client's premises for purposes associated with the construction of

a building on your land and access will accordingly be denied.

The question whether the Act conferred a right of access under these circumstances was referred to the third party surveyor who, on 5th June 2006 awarded that:-

An order was made which included a declaration that section 8 of the Party Wall etc. Act 1996 did not authorise the respondents to enter into the appellant's property for the purposes of carrying out the works specified in the section 1(5) notice.

This decision was, of course, a decision of the county court, and is therefore not binding authority. Many surveyors continue to take the view that, notwithstanding this decision, rights of access can indeed be conferred by serving a notice under section 1(5). Those surveyors will need to be able to justify that interpretation but will, no doubt, in response to this judgement, point out that:-

- (i) the building owner in this case was not legally represented and the judge did not therefore have the benefit of a legal argument in support of the contrary view;
- (ii) the judge stated specifically in her judgement that she was not concerned with the making of a general declaration as to meaning of the Act for the general purposes of surveyors;
- (iii) the judge was not a specialist in property matters and, in any event, decisions of circuit judges in county courts are not binding on other courts.

Nevertheless, party wall surveyors need to take the decision seriously. Any surveyor who advises his appointing owner that a notice under section 1(5) will confer a right of access will be at risk of an action in negligence if access is subsequently denied. The proper advice to give is that there is a possibility that as a matter of law no right of access is available and that there is authority to that effect in the form of a county court judgement. That authority may not be binding for the purpose of other cases, but it will nevertheless be persuasive and cannot be disregarded. Surveyors may wish to advise their appointing owners in the following terms:-

You cannot safely assume that service of a notice under section 1(5) will automatically give you a right of access to adjoining owner's land under section 8. There is a respectable body of opinion amongst party wall surveyors that holds that an entitlement to access does arise but there is also legal authority, in the form of a county court judgment, to the effect that a right of access does not arise. It is possible that the adjoining owner will refuse to give access and, in that event, you may be forced to try to negotiate an access agreement. If the adjoining owner is not prepared to negotiate, you would either have to change your proposals such that access is not required or, alternatively, embark on litigation with an uncertain outcome.

In conclusion, it is no longer safe for a party wall surveyor to advise his or her appointing owner that access is available under section 1(5).

Andrew Smith, Child & Child

Mark Walsh, Tanfield Chambers

December 2006

The above article was written for publication in Whispers, the journal of the Pyramus and Thisbe Club – an organisation for party wall professionals.

The information in this article is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances please contact us.