Averting disaster

In his final article on recent developments in party walls, Andrew Smith discusses a case study that provides some useful guidance for building surveyors

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The case of *Manu v Euroview Estates Limited* [2008], an unreported county court decision, is full of useful information but it is necessary to summarise the facts before considering the conclusions that can be drawn from it.

The facts

The building owner proposed excavation works on its own land and wished also to underpin the party wall. As is common practice, the building owner's surveyor's appointment preceded service of notice. The building owner served notice in a single document under sections 3 and 6 of the Party Wall etc. Act 1996 and the notice was accompanied by a plan and an indicative section and method statement. At trial, the plan was found to be insufficient in that it did not comply with the section 6(6) requirement to show the site and depth of the excavation.

The adjoining owner appointed Mr Lai as party wall surveyor. It appears that the judge (HH Hazel Marshall QC at the Central London County Court) did not approve of this choice as she commented in her judgement:

"*Mr Lai is a barrister and a solicitor and he also told me that he has a Master's degree in nuclear physics. His practical experience of building was derived from five years' manual work with Higgs & Hill… he has no qualification as either a surveyor or an engineer.*

"*The 1996 Act does not say that an appointed 'surveyor' must be a person qualified in building surveying or engineering, but it is usual to appoint such a professional because of the nature of the functions the 'surveyor' is required to perform under the 1996 Act. Mr Lai, however, is a lawyer – he has also acted throughout as Mr Manu's solicitor as well as his party wall surveyor – and he brought a lawyer's approach to the matter.*"

After various difficulties relating to fees, and the selection of a third surveyor (ultimately appointed by the local authority in exercise of its default powers), the building owner eventually sent Mr Lai a draft award. This provided that Mr Manu, as adjoining owner, should pay 50% of the costs of underpinning, as this was required as a result of the condition of the wall. Mr Lai said that this was contrary to section 6(3) which provides that underpinning shall be carried out at the building owner's expense.

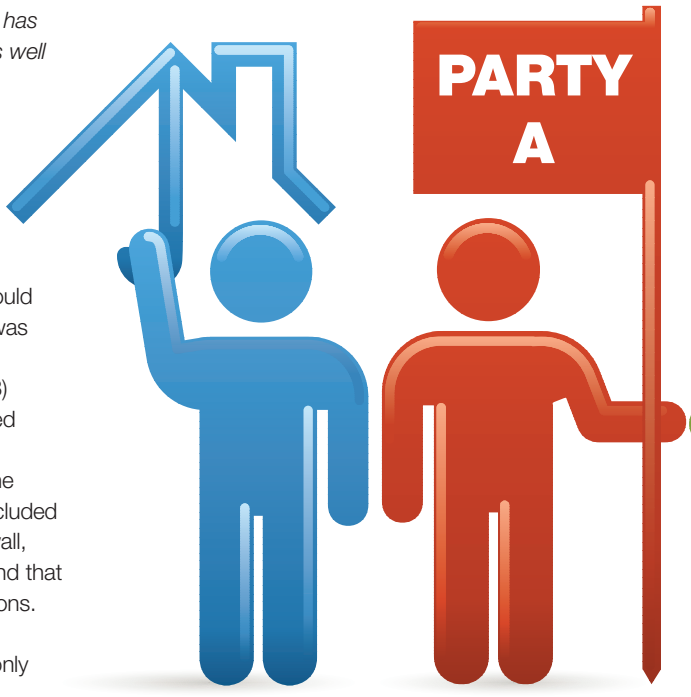
This was fundamental to the proceedings. The building owner said that the section 3 works included all the works necessary to underpin the party wall, including the excavations required to get to it and that the section 6 notice covered the other excavations. Mr Lai said that section 3 does not mention 'excavations' but only 'underpinning' and that only the underpinning but not the excavation was covered by section 3. The significance is that, if works are carried out under sections 2 and 3 of the Act, the cost is potentially divisible between the two owners, whereas if they are carried out under section 6, they are carried out at the cost of the building owner. The more works falling under section 6, therefore, the less the adjoining owner might have to pay.

All of this took time. The notices were served on 12 May 2004 and on 12 January 2006, Mr Lai first took issue with the adequacy of the drawings which accompanied the section 6 notice and required a new notice to be served. Mr Lai said: "*Once I receive the new notices, I shall discuss these with the engineers…*"

Mr Lai also claimed that the reason the party wall was in a poor state was that it had been damaged by the roots of trees removed from the site before the building owner even purchased it and Mr Lai was also continuing to demand undertakings in respect of his fees.

On 19 January 2006, the building owner's surveyor wrote to Mr Lai stating that, in all the circumstances, he regarded Mr Lai's conduct as entitling him to act *ex parte* and enclosing an award in respect of the section 6 works. The award stated specifically that it did not relate to the party wall. Mr Manu appealed that award. He appointed Mr Lai as his solicitor in the appeal.

The third surveyor later made an award in respect of the party wall, stating that it required underpinning and the cost of the underpinning should be borne by



the building owner and the adjoining owner equally because they were equally 'responsible' within the meaning of section 11(4). He stated specifically that nothing in his award would prevent Mr Manu from seeking to exercise his right to damages under common law in respect of any neglect by the building owner or its predecessor. This award was also appealed. The two appeals were heard together.

The judgement

The trial lasted four days and the principles which emerged from the seven key questions are summarised below.

1. Was the building owner's surveyor's appointment invalid on the ground that it preceded the notice?

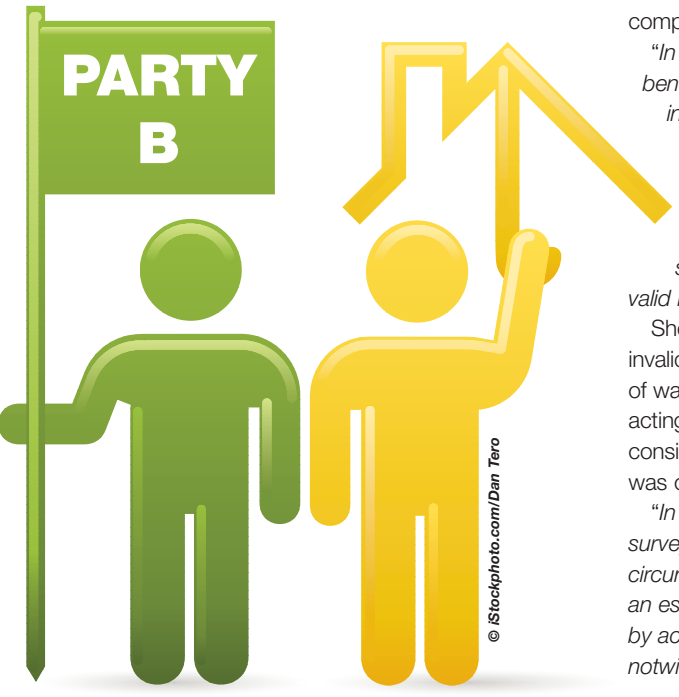
The judge said:

"*Given that… the building owner in particular is likely to engage the services of its party wall surveyor before serving a party wall notice, it would be nonsensical in my judgement, to hold that he could not make a valid appointment until after any difference had actually arisen.*"

It is accordingly entirely acceptable for a building owner to appoint a surveyor prior to service of notice.

2. Does the word 'underpin' in section 2(2)(a) include the excavation works necessary to access the underpinning?

This concerns the interpretation of section 2(2)(a) and the meaning of the word 'underpin'. Mr Manu's argument was that underpinning is the installation of the concrete pin itself and that the word is not apt to refer to the 'excavation' that is necessary to access the underpinning. The judge was unimpressed by that argument. She said:



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"*I have no hesitation in rejecting this argument. It seems to me to be perfectly clear that by 'underpinning' section 2(2)(a) contemplates also whatever works are required in order to effect underpinning, including the obvious need to excavate, in order to be able to get at the location for the underpinning.*"

The judge found that the section 3 part of the notice was the part that governed those excavations which were necessary to install the underpinning. It follows that 'underpinning' for the purpose of section 2(2)(a) includes not merely the underpinning itself but also the excavation works required to get to the underpinning.

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3. Was the notice invalid regarding section 6 works because it was not accompanied by plans and sections which complied with the requirements of section 6(6).

The judge found that the section 6 part of the notice (relating to adjacent excavations) was invalid because it was not accompanied by plans and sections which complied with section 6(6). This is despite the fact that all parties accepted that they could work out for themselves what was intended by the notice and that no difficulties had arisen as a result of non-compliance. She said:

"*In my judgement, even construing this notice benevolently with regard to the fact that it is an instrument intended to take effect between practical men for a practical purpose, this document cannot fairly be regarded as including the information that section 6(6) requires it to include. The drawings are sloppy in this regard, and the notice was not valid insofar as it related to section 6 works.*"

She also took the view that, while the notice was invalid, it was nonetheless redeemed by the doctrines of waiver and estoppel. The surveyors had been acting in reliance on this notice for a very considerable period of time before its validity was challenged. The judge said:

"*In my judgement, therefore, a party wall surveyor can by his acts or conduct in appropriate circumstances waive a defect in a notice or create an estoppel that would bind his appointing owner by accepting to act as though the notice was valid, notwithstanding.*"

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It follows from this that if surveyors want to take points on the validity of notices or of appointments, it is incumbent on them to take those points quickly. The court will take a dim view if such points are saved for later ambush.

4. Did Mr Lai's letter of 12 January 2006 constitute a 'refusal to act effectively'?

The *ex parte* award in this case was based on Mr Lai's alleged refusal to act under section 10(6). His demand that a fresh notice be served in circumstances where (it was subsequently held) no fresh notice was needed were said to constitute that refusal. By itself, this may not appear to be enough to constitute a 'refusal' such as to justify an *ex parte* award. Context, however, is everything. The judge commented:

"*Although the bare refusal contained in the letter might, in a different context, have amounted to no more than a statement of position, given the combined facts that it was raised so late in the day, more as part of a negotiating strategy than for genuinely good reasons and against the background of taking a succession of pedantic and difficult points, I find that, in this situation it did not do so… I therefore hold that Mr Lai's letter of 12 January 2006 was, in all the circumstances, a refusal to act effectively.*"

It follows that a party wall surveyor whose conduct is perceived by the court as being inappropriate may find that his actions inadvertently amount to a refusal to act, justifying the making of an award *ex parte*.

5. Was the building owner's surveyor entitled to act ex parte *under section 10(6) or does that sub-section confer no power on the other surveyor to act alone?*

There was what appears to have been a rather incoherent argument to the effect that section 10(6) does not permit an appointed surveyor to make an *ex parte* award without the third surveyor joining in. This argument was not pressed.

6. Was the third surveyor wrong in holding that the building owner was not 'responsible' for the defect requiring underpinning of the party wall?

The award provided that the owners should share the cost of underpinning equally because they were equally responsible for the want of repair. The adjoining owner argued that the condition of the wall arose as a result of matters for which he was not to blame (namely tree roots from next door) and that third parties (i.e. the building owner's predecessor) may be responsible. So far as third parties are concerned, the judge said:

"*The 1996 Act is quite clearly contemplating that the question of 'responsibility' is decided as between the actual parties to the procedures, and not with regard to other persons, such as predecessors in title or third parties.*"

The judge clearly took the view that the Act is not intended to require the surveyors to embark on a legal analysis encompassing the possibility that third parties might be responsible for the condition of the wall. She went on to emphasise, again, that the surveyors' job is to apply a practical and commonsense approach.

7. Is the third surveyor's award challengeable on the grounds of internal inconsistency or of allocating costs illogically?

It was argued for the adjoining owner that the award should also be set aside because it contained some apparent minor internal inconsistencies and because the costs of the work had been allocated illogically. Those arguments were given short shrift by the judge.

Conclusion

Thousands of party wall awards are made each year and only a tiny minority lead to litigation. This is because surveyors discharge their duties in a sensible and pragmatic manner and rarely adopt a technical or legalistic approach. Their objective is to ensure that works are carried out efficiently and economically and with adequate safeguards. This approach has no doubt spared many property owners from the consequences of litigation which might otherwise have arisen. When they arise, neighbour disputes can be extraordinarily expensive and distressing. As the judge said in *Bradford & Bradford v. James & Others [2008] EWCA Civ 837*:

"*There are too many calamitous neighbour disputes in the courts… litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum, the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, or possibly both. The extreme acrimony between these neighbours is nothing new.*"

By continuing to bring a sensible and co-operative approach to bear on party wall issues, surveyors can protect their appointing owners from a great deal of unnecessary difficulty and expense.

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