

# Serving notice

In his second article on developments in party wall issues, Andrew Smith looks at retrospective awards and works carried out by consent

It had long been assumed by surveyors that the case of *Louis v Sadiq* [1996] EWCA Civ 935 is the authority for the proposition that there is no jurisdiction for them to make retrospective awards, i.e. to make an award in respect of works carried out before notice was served or before the award was made. This has always been an erroneous assumption as borne out in another case: *Rodrigues v Sokal* [2008] EWHC 2005 (TCC).

It had long been believed... that if consent for the works is given under section 3(3) of the Party Wall etc. Act 1996, then it is not possible to appoint surveyors to deal with any issues that might subsequently arise. This is another misconception

In this case, the defendant started some substantial works of redevelopment and only later, on 15 May 2004, served the required notice in respect of those works. The adjoining owner claimed that damage was done to their property by those works. On 1 June 2007, the third surveyor made an award. He found, broadly speaking, that no damage had been caused to the adjoining owner's property. The adjoining owner claimed that the award could not be conclusive in respect of work carried out before the date of the notice, 15 May 2004, but that contention was not upheld. The third surveyor had approved the pre-notice works in his award, his conclusion was a reasonable one and the award was accordingly perfectly valid in respect of those earlier works, even though it was retrospective.

The difference between this case and *Louis v Sadiq* is that in *Louis v Sadiq*, the works would never have been capable of being approved by the surveyors because they were so clearly unsatisfactory. For example, no shoring was provided when the front wall of the house was removed. This case appears to indicate that retrospective awards are perfectly valid, contrary to common belief. As the judge said:

*"If the building owner subsequently obtains authority for the building works which were started without authority, that authority abates the common law rights from the time of the subsequent consent or when the Party Wall etc. Act procedure was successfully invoked."*

## Works carried out by consent

It had also long been believed by some surveyors that if consent for the works is given under section 3(3) of the Party Wall etc. Act 1996, then it is not possible to appoint surveyors to deal with any issues that might subsequently arise. This is another misconception which was also dealt with in *Onigbanjo v Pearson* [2008] (unreported)\* where the judge expressed the view that the ability to appoint a surveyor is not limited to the situation where there is dissent from a notice. There are a number of other sections which provide specifically that matters may be resolved under section 10 without making any reference to service of a notice. They are:

1. section 7 and especially 7(5)
2. section 11(2) and (8)
3. section 12(1) security for expenses.

All of these sections refer to section 10 without making any reference to service of a notice. The inference is that a notice does not need to be served in order to engage the provisions of section 10.

The received view now seems to be that surveyors can be appointed even if no notice has been served and certainly that the consent to the works in a notice is no bar to the subsequent appointment of a surveyor should a dispute later arise.

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\* For Andrew Smith's first article on party walls, see *No blank cheques*, page 27, *Building Surveying Journal*, Oct/Nov 09



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