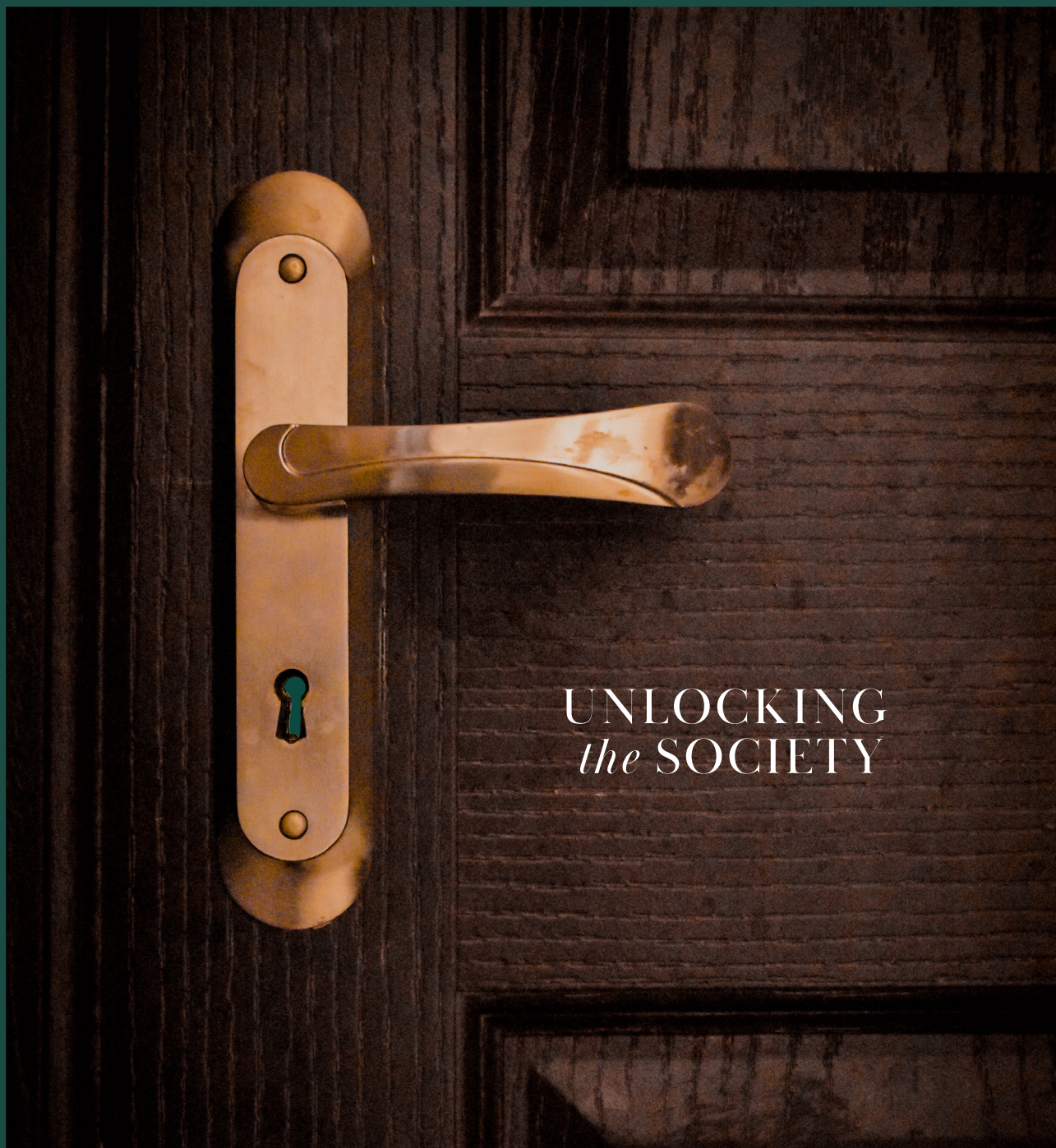


The Pyramus & Thisbe Society

JOURNAL

2023



UNLOCKING
the SOCIETY



The Pyramus & Thisbe Society

LEARNED IN PARTY WALL & NEIGHBOURLY MATTERS

Foreword

*To all to whom these presents shall come we,
The Pyramus and Thisbe Society, send greeting.*

THIS CENTURIES OLD FORM OF WORDS, still in use for letters patent, proclamations and deeds are occasionally to be found in a form of surveyors' award rarely used today. They are however, a fitting way to introduce the proceedings of the P&T Society in this first edition of the Society's Journal.

As the Society completes its first session, what follows provides a backdrop to the formation of the P&T Society in the history of the Club from which it sprang

The Pyramus and Thisbe Club was founded in 1974 at the instigation of the late John Anstey, following widespread misreporting of the case of Gyle-Thompson v Wall Street (1973). The Club was formed to exchange news and opinions about interesting party wall cases. John Anstey's letter inviting participation follows this foreword. The original membership of 46 active party wall surveyors agreed to meet quarterly and these early meetings took place at the Little Ship Club in the City of London. Membership grew but was then limited to 100 and the Club moved its meetings to The Cafe Royal in Regent Street.

The Club took its name from Shakespeare's Pyramus and Thisbe, the lovers in "A Midsummer Night's Dream" who whispered through a chink in a wall. The Club's motto, a quotation from the play, was "The wall is down that parted their fathers." The Club's quarterly newsletter "Whispers", continues to be produced by the P&T Society.

Until 1997, the Club's activities were confined to inner London, where the London Building Acts (Amendment) Act 1939 applied only to party walls in the former LCC area. In 1993, with the demise of the GLC, a Club working party began drafting a Parliamentary Private Bill for England and Wales. The Bill which was sponsored through Parliament by The Earl of Lytton (now a past chairman of the Club) received Government support and became the Party Wall etc. Act 1996. It came into force in July 1997.

The Club's pivotal role in framing the Act was acknowledged by The Earl of Kinnoull during the debate

following the Bill's second reading in the House of Lords, when he said of the Club, "I know that that club of professionals has done tremendous work. I pay particular tribute to its chairman, John Anstey, who, like other colleagues has been active in helping to draft the Bill."

The Pyramus and Thisbe Club continued to maintain relationships with Government and Parliament. Members of the Club have formed advisory panels to consider the Subterranean Development Bill and the Property Boundaries (Resolution of Disputes) Bill. The Club has assisted the Government in producing a guide to the Act and Club members have advised overseas governments on party wall and neighbourly matters as they continue to do, now as members of the P&T Society.

In a 2008 case in Romford County Court, His Honour Judge Platt acknowledged the Club's members when he said, "It is a tribute to the surveyor's profession as a whole and to the members of the Pyramus and Thisbe Club in particular that issues over party walls have generally been resolved by a pragmatic and cooperative approach to the provisions of the Act and consequently appeals to the County Court have been extremely rare."

The Club's, now Society's membership is drawn from a mixture of surveyors, architects, engineers, other construction professionals and lawyers, all of whom have an interest in party wall matters. Today there are some 1200 members practising throughout England and Wales.

The Club has become a Learned Society. It promotes the highest standards of professional conduct among its members. The Club published two volumes of "Collected Papers" from the first 20 years of its proceedings and "The Party Wall Act Explained", now in its third edition and presently under review by a working party of the P&T Society towards publishing a fourth edition. 📖

David Moon Dip BS; FRICS; FPTS (Retd)
Publications Officer
The Pyramus & Thisbe Society
May 2023



Founded 1795

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& CO.** Chartered Surveyors

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Bournemouth, Hampshire

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~~Anthony Anstey BA FRICS~~

Consultant
Bryan Anstey BSc FRICS FIArb

Our ref
Your ref

T. Leach Esq.,
George Head & Co.,
10 Carlos Place,
London W.C.1.

19th April, 1974

Dear Mr. Leach,

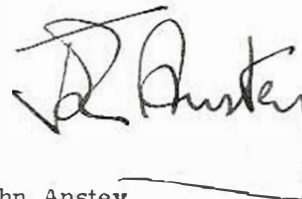
My incompetent and incomparable assistants have suggested that it might be rather fun to form a Party Wall Surveyors Club, the Chairman of which would be known, of course, as "The Third Surveyor." Subscriptions, naturally, would be "a reasonable fee."

The number of specialists in party walls seems to be growing and it is apparently a concomitant fact that party wall work is becoming more concentrated in the hands of specialists. I thought, therefore, that there might be many advantages in some sort of informal association in which those practitioners could exchange views and perhaps meet for an occasional lunch or supper. Interesting papers, awards and notes of tricky situations could be circulated and there might be considerable scope for settling of differences.

I would not propose that it should be a body with an examination qualification nor indeed that entry should be otherwise than by invitation, nor would I propose that entry be limited to principals, but that assistants (I am sure you will understand why I have to insert this sentence) who take an active hand in party wall matters should also be eligible.

If you would be interested and if you can think of other people who might be, and whom you would recommend for invitation, perhaps you would like to write back and give me your views in general.

Yours sincerely,



John Anstey

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Welcome from the Society Chairperson

FAREED FETTO

I AM VERY HONOURED TO BE WELCOMING YOU to our very first Journal, to be read by a thriving group of learned experienced and respected professionals who take pride not only in their profession, how they exercise it, but how they are seen to exercise it.

As you read through the pages of this very fine document I am sure you would wish to join me in thanks to the team which made the Journal possible and informative. In this Journal you will find many helpful articles and much information about the structure and formation of the Society.

The Journal exudes a spirit of professionalism and dignity, representing in so many ways the nature and purpose of the Pyramus & Thisbe Society, recounting the Society's history, vision and mission.

Humble Pride

In this Journal you will find many reasons to be proud to be a member of the Pyramus & Thisbe Society, and with that pride the 'humbleness' which I share with you as we will never be "know-it-all" but will be always on the fervent search for knowledge and for constant betterment, holding on to the prize of being the very best of our kind.

Here you will also discover the names of the great teams and persons who devote to the Society being inspired and inspiring about the Society's vision and purpose. In addition there are interesting articles tackling the sorts of various challenges of interpretation and application of the Act in the everyday life of a party wall surveyor.

The Journal also takes on the nature of a ready handbook, a sort of Who's Who, enabling one to know who to contact for what. If your name is not already on one of the construction and maintenance teams of this Learned Society, is not time you saw to it that it is?

I take humble pride in being a member of the Pyramus & Thisbe Society and take great delight in welcoming you again to this, the first ever Journal. 🏡

Fareed N Fetto FPTS CEng MStructE
CBuildE MCABE MFPWS AaPS
National Chairperson
The Pyramus & Thisbe Society
February 2023

Management Board



CHAIR
Fareed Fetto
✉ email



SECRETARY
Andrew Schofield
✉ email



FINANCE OFFICER /
TREASURER
Graham North
✉ email



EDUCATION OFFICER
Stuart Birrell
✉ email



PUBLICATIONS OFFICER
David Moon
✉ email



IT / WEBSITE OFFICER
Hannah Boyd
✉ email



MEMBERSHIP OFFICER
Derek Bate
✉ email

Membership summary

IN NUMBERS

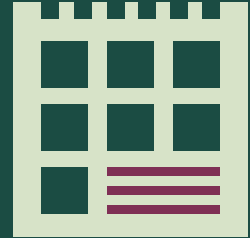


868

MEMBERS MPTS

45

FELLOWS FPTs



106

ASSOCIATE
MEMBERS

37

AFFILIATE
MEMBERS

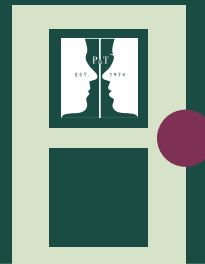
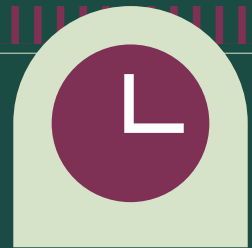


8

STUDENT
MEMBERS

50

RETIRED MPTS(RET) OR FPTs(RET)



1214

TOTAL
MEMBERS

Membership levels of the society

THERE ARE SEVERAL LEVELS OF MEMBERSHIP OF THE SOCIETY DESIGNED TO BE INCLUSIVE FOR ALL persons who have an interest in the Party Wall etc. Act 1996 and a desire to further their understanding and know best practice. The levels of membership are:

Student

An Individual engaged in study of a recognised professional construction qualification.

Associate

All new applicants to the Pyramus & Thisbe Society required to complete a minimum probationary period of two years after joining (the date of joining the Pyramus & Thisbe Club if relevant), before applying for promotion to become a Member, subject to meeting the relevant criteria.

Member

- a) Previous members of the Pyramus & Thisbe Club with two years membership at the transition, entitled to use the post nominal MPTS.
- b) An Associate who has made a successful application to be a Member of the Pyramus & Thisbe Society, and who is entitled to use the post nominals MPTS
- c) Fellows of the Society who have relinquished their Fellowship status, entitled to use the post nominal MPTS

Affiliate

Individuals involved in the administration Party Wall etc. Act 1996 other than as appointed or selected surveyors, such as lawyers and engineers.

Fellow

- a) Members of the Pyramus & Thisbe Club with two years membership at the transition and who are involved at branch level as Chairman, Secretary or Education Officer or, in the case of the London Branch only, a member of the committee. Entitled to use the post nominal FPTS
- b) Individuals who have been Members of the Society for at least two years and are preferably, but not necessarily professionally qualified members of a construction industry recognised organisation e.g.: the RICS, RIBA, IStructE, and who have been involved in the Society as a Member at local or national level and making a positive contribution to the Society. Entitled to use the post nominal FPTS

Honorary Fellows

Individuals who have demonstrated exceptional commitment to the Society. Entitled to use the post nominal FPTS (Hon).

Retired

Individuals who were previously Members or Fellows of the Club or Society, who retire from practice and wish to continue their membership and contribution to the Society. Retired Members and Fellows members are entitled to use the post nominals MPTS (Ret) and FPTS (Ret).

Annual reports

Chairperson

FAREED FETTO

Chairperson's Annual Report for The Society Fellowship Annual Meeting February 2023

THINKING THAT MY CHAIRMANSHIP commenced sometime in February 2022, I reverted to my files and discovered that, in fact, you elected me to this significant post on 3rd October 2021. I read and re-read the announcement to be certain about the date; it is hard to believe that, by the end of this month, I will have sat for sixteen months.

"Sat" is certainly not the operative word, for this has been far from an armchair exercise and more that of a marathon runner, bringing with it the challenge and pleasure of serving such an honourable body of learned members.

I am always very conscious of the high calibre of persons I correspond with practically on a daily basis, persons better, more experienced and learned than me. These, in their gracious way have been a great encouragement for which I am grateful and by which I can continue to work and strive to honour your vote and confidence in me.

What follows is a series of highlights of the past year which have attracted my attention, but which are by no means exclusive:

Learned Society

Of course, the most significant highlight of 2022 was the transition from Club to Society, a realisation of the inspiration of a few of those fine persons, who against odds – and there were odds- persevered until the realisation of this fine body of learned members forming the Pyramus & Thisbe Society.

Given the relatively rapid way in which we have developed, it is difficult to imagine that we were once a club. To my thinking a club –which of course has its benefits- is an inward-looking organisation, while a learned society is an outward-looking one.

That, to all intents and purposes is the motivation to show the world 'how it is done', to educate internally and externally, and to encourage.

We are still the same champions promoting excellence in party wall matters as well as being learned in party wall, neighbourly and other associated matters. We have a large wealth of knowledge, experience and enviable skill in the matters we possess, profess and proclaim. This is indeed a Society worth belonging to, thanks to the efforts of all the Fellows and Members who support and devote to the vision.

The Concept of Fellowship

One of the more significant aspects of the Society is the new concept of Fellowship. Unlike other organisations, becoming a Fellow does not constitute a 'reward' for life, but, quite the opposite, it constitutes an invitation to continue to devote to the work required to build and maintain the Society, which is why the Fellowship is greatly appreciated both by fellow-Fellows and by the Society at large.

There is another side of the coin, which, again, makes the concept of Fellowship both valuable and meaningful: It is only accorded to persons who do, and continue to devote to the work required, and, if they stop, they must shed their mantle of Fellowship and revert to Members. More about this point in the Membership Officer's Report below.

We are not a Screen

A Society with a few devoted workers and many cheering (or sometimes critical) viewers, clicking on a few 'likes' from time to time will go nowhere to making the Society work as it should. Absolutely nowhere!

It is for this reason, that the Society calls upon every single member to play their part in building and maintaining an organisation we can all continue to be proud of, and which gains the respect of the world at large. We should not be hearing of one working group member doing all the work, or a Branch which appears to be fast asleep, neither participating, nor enthusing about the Society's vital work.

There is a real need to invest in the vision, and the drive for this can only begin here, with the Fellowship, by example by deed, and by encouragement. Therefore, please make best endeavours to keep the fire burning and to encourage others to 'be present' and to do the same.

Fellows are the real 'owners' of the Society. The Management Board is voted in by Fellows and forms their executive wing. At their last meeting (and at many previous meetings) it was just possible to spot a head or two which was not adorned with grey hair. If you are one of those exceptions, you are greatly encouraged to change this! Do please consider being in line for such positions or putting forward any candidates you feel are suitable.

Gratitude

As one of the fellow-Fellows, I am confident that I speak for all in saying that all of us appreciate deeply the contributions made by each one of us, and by those who participate in the



various working parties and activities of the Society. For this thanks are due and gladly given.

We also salute those who originally envisioned the transformation, and who, with others, pursued the vision up to the end. Thanks to them, we are now the Society we are.

Thanks are also gratefully given to Ada and her team, who with devotion and fidelity have managed to keep us all on track with all our administration affairs.

The National Conference

This year, for the first time, our bi-annual National Conference will be just that: A national and not a London conference. As such the conferences are open to be held in any part of the country. Fellows are invited to encourage their Branches (especially their chairpersons) to participate in this special aspect.

Individual Reports

The reports by the individual activity officers accompany this report. From these, one should be able to update oneself, and, of course, the forthcoming annual meeting will provide opportunity for questions.

We can be proud of what has been achieved so far thanks to the officers and their teams, who have worked on Finances, Membership Protocols, Publications, Education,

Diversity and Inclusion crowned by a superb Website which contains details of all the products of the working groups. There is much to come, for example the Law Library, an updated Green Book and more. As mentioned previously, the website is intended to be the central hub of the Society both for members and for the public at large.

The Long View

On stepping back and viewing the whole picture, one realises what a radical change and transformation has taken place! We have become the Pyramus & Thisbe Society and we are proud of it!

The Pyramus & Thisbe Club was founded in 1974. In 2024; in just a number of months away it will celebrate its 50th birthday, from a handful of members to the 1400 strong today forming the Pyramus & Thisbe Society –the best!

As ever, and counting it a great honour to serve the Society. 🇮🇪

**Fareed N Fetto FPTS CEng MStructE
CBuildE MCABE MFPWS AaPS**

National Chairperson

The Pyramus & Thisbe Society

February 2023



Secretary

ANDREW SCHOFIELD

Secretary's Report to the Fellowship Annual Meeting 28th February 2023

PLEASE REFER TO THE INDIVIDUAL REPORTS prepared by the Management Board Officers in respect of education, membership, finance and publications.

I am pleased to be able to report that the transition from the Pyramus & Thisbe Club to the Pyramus & Thisbe Society has been completed although, certain ancillary aspects of this remain to be completed such as the transfer of funds from the branches to a central account.

Notwithstanding the efforts of the transition team and the Management Board Officers there is still a lack of understanding of what the changes mean amongst the members. In an effort to address this Michael Kemp is touring the branches giving presentations describing the management, structure, etc. An objective for the year ahead is to make the membership familiar with the website as the platform from which the Society is run.

The Management Board decided that it would be inappropriate to impose upon the membership the regulations concerning the recording of continuing professional development (CPD) but this will apply for the year ahead. Those that have failed to fulfil the requirements will be sent reminders towards the end of the year, further reminders, if necessary, at the beginning of 2024 and then, if they have still not complied, invitations to membership will be withdrawn. It should be noted that one of the CPD requirements is physical attendance at a branch event. The Membership Officer will consider exemptions from this in exceptional circumstances but discussion between members is considered an essential part of an organisation dedicated to improvement through education.

Outside of the day to day running of the Society and in



my capacity as the Secretary, I have produced, in conjunction with Howard Smith Barrister and on behalf of the Society, an article to appear in the Magistrates Association magazine which is designed to assist their understanding of applications for costs featured in an award declared as debts. Experience has shown that understanding of this amongst the various Magistrates Courts across the country varies considerably.

The intimidation of surveyors, and particularly third surveyors, by solicitors has caused concern. Meetings have been held with the Property Litigators Association and the intention is to produce a

“Best Practice Guide”. The RICS may be involved and it will form part of the PLA education weekend to be held in November.

Procedure

For ease of reference Section 17 of the Constitution is as follows:

- 17.0 Election and Appointment of the Management Team
- 17.1 Each year the Fellowship shall meet and review the reports and proposed agenda of the Management Board and elect the Management Board.
- 17.2 It is expected that each member of the Management Board shall be in a position for a period of not less than two years (subject to resignation).
- 17.3 Nominations for Management Board positions shall be submitted to the Management Board a minimum 30 days before a meeting of the Fellowship. Election will be by simple majority as previously defined.
- 17.4 Nominations are to be proposed and seconded by Members or Fellows with the prior agreement of the nominee who is at liberty to accompany the nomination with a personal statement.
- 17.5 The maximum duration and membership of the Management Board by any individual in any one position is four years, subject to any extension which may be determined from time to time by the Fellowship.
- 12.4.3 At the (annual) meeting the Fellowship will vote on each element of the Management Board report. All decisions will be decided by a simple majority.
- 12.4.4 All members of the Fellowship have a right to vote, attendance and voting rights cannot be delegated.



You are cordially invited to submit nominations for officers of the Management Team. The current team comprises:

Chairman	Fareed Feto
Secretary	Andrew Schofield
Finance Officer	Graham North
Education Officer	Stuart Birrell
Membership Officer	David Moon
IT and website Officer	Hannah Boyd

You are also invited to submit to the Membership Officer nominations for Fellowship. In accordance with the Constitution the Membership Officer will review the current register of Fellows and will inform those who have ceased to make a contribution to the Society that they will revert to Membership status.

Objectives for the Year Ahead

1. Working with the PLA and RICS to produce the "Best Practice Guide" regarding intimidation of surveyors.
2. To increase awareness of the mediation service.
3. To increase awareness of the Society its aims and objectives amongst its membership and other organisations. 🙏

.....
Andrew Schofield FRICS FPTS
 Secretary
 The Pyramus & Thisbe Society
 December 2022



Finance Officer

GRAHAM NORTH

THE TRANSITION FROM THE PYRAMUS & Thisbe Club to the Pyramus & Thisbe Society has, in financial terms, been relatively smooth. Both the income and expenditure for all of the Branch's has now been centralised to enable the Branch's to spend less time on the administrative side of things and more time on providing education and knowledge/information for the Members of that particular Branch.

Shortly, the Branch's will be returning their surplus funds to the National account of the Society, and I am delighted to report that the Society is in a very strong position financially with a large uptake of invitations to renew the Membership to the Society for 2023 along with the profit made from the National Conference held in March.

You will have noticed that the subscriptions for the year 2023 have remained the same as previous years as the Society is keen to ensure that the subscriptions are kept at a modest level particularly taking into account the current cost of living issues, inflation etc. Whilst other costs have increased in the running of the Society, we have kept the subscription levels at the same amount for the last few years and hope to continue to do so for 2024. ■

Graham North FRICS MCI Arb FPTS
Finance Officer
The Pyramus & Thisbe Society
May 2023



Membership Officer

DEREK G BATE

Membership Officer's Report to the Fellowship Annual Meeting 28th February 2023

THERE WAS ALWAYS A POSSIBILITY THAT the transition from Club to Society would lead to some discontent within the membership, and it does indeed appear to be the case that an isolated few members of the Club are not entirely happy with all of the detail in which the Club decided to make "the move". However, make the move we have, the Club is dead, long live the Society!

Those Members of the Club at transition who did not practice as Surveyors i.e. Solicitors and Engineers, but had an interest in the Party Wall etc. Act, were granted status as Affiliate Member.

The Society granted grandperson rights to those Members of the Club who had been Members two years before the transition and those members were immediately made Members of the Society. Those who had joined the Club more recently than two years before the transition were made Associate Members. In round numbers approximately 1000 Members and 90 Associates.

It was decided at a fairly early date in discussion as to how the Society would function, especially given that most of the officers of the Society would give their time without financial recompense, that those Members who contributed toward the governance of the Society would be awarded status as Fellows.

At the time of transition those Branch Officers of the Club, those persons already within posts at National Council and those who were involved in working parties; were all awarded membership as Fellow of the Society.



The Membership Group consist of myself as Chair along with five other Fellows. We have formed three "teams" who each deal with:

- (i) New Members
- (ii) Members moving status (Associate to Member, Member to Fellow & Fellow to Member)
- (iii) Complaints and disciplinary

I am pleased to report that this last year the New Members team have been the busiest with approximately 30 new members making application to join the Society as Associate and Student Members. In the first weeks of 2023 there have been an encouraging number of applications for Associate Membership, a pleasing start to the year.

There have been four persons who have changed from Member to Fellow in recognition of the Members involvement in working groups and the like.

I am pleased to report that there have been no complaints registered for consideration and no disciplinaries.

Moving forward in 2023 we hope that applications for new membership and Members making application for change of status within the Society, will be streamlined by applications via the Societies internet site enabled to provide necessary supporting documents.

Continuing Professional Development (CPD), is considered an integral part of the Society and paramount if we are to continue to be leaders in excellence in neighbourly matters. In this our first year, the Membership Group are not expecting that every member to have logged their CPD via the web site, but for the coming year 2023, the Membership Group will review early 2024 and expect to see every Associate Member, Member and Fellow will have logged at least 5 hours CPD in the prescribed manner.

The upcoming National Conference is an opportunity to network, meet faces old and new and. Importantly to further our knowledge. Just because the event is in London, do not be tempted to think the event is only about London, it is not. It is important that the Society has representation from the Branches, please do your best to attend. 🙏

Derek G Bate MRICS FPTS
Membership Officer
The Pyramus & Thisbe Society
January 2023



Education Officer

STUART BIRRELL

Education Officer's Report to the Fellowship Annual Meeting
28th February 2023



OUR EFFORTS TO UPGRADE THE standard and quantity of education have had mixed results over the last few months since we morphed into the Society.

Foundations have been laid with regard to connections with universities and this is still fairly embryonic. This will be pursued more vigorously this year with a view to making Pyramus & Thisbe Society material and presence available within the education sector.

Regarding engagement with the professional and commercial world, education is a good conduit for this, we have good connections with the RICS less so with the ICE and RIBA which we would wish to improve. Also, it is the intention of the Society to engage with the commercial world, to which end we have given presentations to master

planners dealing with the redevelopment of Waterloo Station and some other commercial concerns. In order to promote the Society, we need to be looking more widely to promote our expertise in these matters. This is something that will require input from as many Fellows and Members as possible in order to spread the net widely and improve connections and status within the marketplace.

We have restarted our conversation with the RICS about accrediting party wall surveyors and the reorganisation of the RICS has made the outlook a little bit more promising than it was before. At some stage we will engage over the next year regarding the education requirements in this and ongoing monitoring.

Moving on to education of members there has been some good progress made on this but not enough.



The lockdowns during the pandemic caused obvious problems but the club adapted well in providing virtual presentations and even a virtual London conference in 2021. The reversion to a more normal pattern has caused a few hiccups in the amount of material available as we transfer from virtual to actual attendance. It is the Society's intention that in all reasonable cases presentations will be recorded and later put on the website however we don't want to discourage physical attendance. Part of being a member of the Society is the interaction between members and the opportunities for dissemination of information and collaborative working etc. We are working slowly towards the situation where this actually happens, but we have had teething problems with the equipment, and we are providing assistance to the branches to allow them to record presentations effectively.

In addition, London branch have completed 6 vodcasts so far which 3 are on the website and the other 3 are currently being edited and will be put on in due course. Although this is currently a London initiative other branches will be encouraged to do the same.

The Society will hold the first National Conference on the 23rd March. The organisation of these conferences takes quite a long time and London had already commenced with the organisation of their biennial conference before the Society was formed however the decision has been made to make this a national conference although it will be held in London, details are on the website. The venue can hold up to 600 people if necessary, so please try to encourage as many as possible to make the effort to come down.

It is intended that these conferences will continue on a biennial basis but there is no necessity for them to be in London if another branch wishes to pick up the baton. There will need to be a business case that it works both

logistically and commercially. Future committees dealing with conferences will be nationwide not formed from just London even if it is decided to carry on holding the conferences in London.

Smaller conferences have been held by East Midlands and West Midlands last year which were very successful and there is of course no reason why further regional conferences cannot be organised. If you wish to do this please contact me and I will put you in touch with the necessary people to advise on logistics, costs etc.

Objectives for the Year Ahead

- Run a successful first national conference.
- Set in motion the necessary organisation to run a national conference in 2025.
- Complete the necessary logistics to enable all presentations to be recorded and subsequently put on the website.
- To work with the branches to enable sufficient presentations to be provided to allow compliance with the requirements of the Society.
- Engage with other organisations to promote good relations and collaboration and raise the profile of the Society.
- Complete engagement with universities.
- Continue work to produce more professional vodcasts. 📺

Stuart Birrell FRICS FPTS
Education Officer
The Pyramus & Thisbe Society
February 2023



Publications Officer

DAVID MOON

Annual General Meeting of the Fellowship on 28th February 2023

THIS REPORT TO THE FELLOWSHIP OF THE Society sets out the current status of the Society's publications projects and proposed developments during the coming year. The Society's publications will comprise the following;

- Learned Society Journal,
- Newsletter,
- Guidance Notes,
- Law Library,
- Society Archive,
- The Green Book,
- The White Book,
- Other Publications Projects.

Whispers and the Learned Society Journal

Whispers continues to serve as the Society's newsletter. The Journal will present the public face of the Society as a record of the Society's proceedings and will be published annually. The editorial panel is chaired by Natasha Demirbag. Other members of the panel are; Shirley Waldron, Angela Gregson, Nick Brown, Irene Moore, Allan Ssesanga and Michael Clark. Issue 50 of Whispers is now complete and is available on the Society website. This edition is the first to appear as the Society's newsletter. The first edition of the Journal is scheduled for publication in March, following the Society's AGM and the National Conference. The editors aim to produce three issues of Whispers and a Journal annually.

Guidance Notes

The working party is chaired by Geoffrey Adams. Other members are;

Darren Frias-Robles, James Beat, Ashley Patience, Phillip Hurst and Trevor Hultquist. The working party is currently considering the following Guidance Notes;

- Security for expenses
- Access
- Notices
- Surveyors' fees
- Jurisdiction
- Advising engineer

The SFE and Access Guidance Notes are expected to be finalised in February. It is intended to complete review of the first tranche of GNs during the coming year.

Law Library

The working party are; Shirley Waldron, Aiden Cosgrave and Tony Fieldhouse as the surveying members with Victoria Woolf and Howard Smith serving as the legal commentators. The working party is producing a format for the library. A sample of case reports will be prepared for wider discussion.

Archive

Holly Harris has advised the Whispers editorial panel that due to other commitments, she will be unable to continue as the Whispers archivist. It seems likely to follow that Holly will withdraw from the similar role for the Society generally. A successor is to be appointed.

The Green Book

The Green Book working party is chaired by Fareed Fetto. Other members of the working party are; Martin O'Shea, Mike Clark, Rob French, James Beat, Stuart Cobbold, Michael Kemp and Irene Moore. Fareed Fetto is undertaking a review of the text with the objective of sharing a first edit with other members of the WP for discussion. The WP expects to complete its objectives during the coming year. The Board of Management is considering whether the Green Book should be offered in digital form as well as hard copy. The Board's recommendation will be made to the Fellowship.

The White Book (Register of Members)

It has been agreed to produce the White Book in digital format and hard copy for 2022/23. The rationale for this is that most members if not all, have access to documents in digital format. Members have been advised that the White Book will not be produced in hard copy in future years.

Other Projects: The Society of Chartered Surveyors Ireland

The P&T Society has been invited to assist with the preparation of a guidance note for surveyors practising in Ireland under the Land and Conveyancing Law Reform Act 2009. The working party met for the first time via video link on 3rd November 2022. An agenda will be set for future meetings. We currently await further developments. 📌

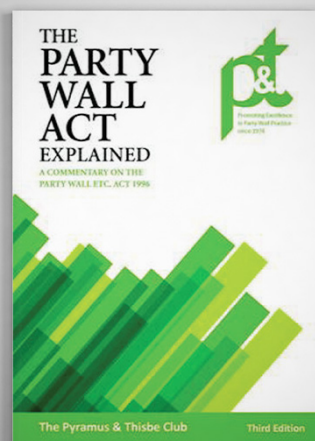
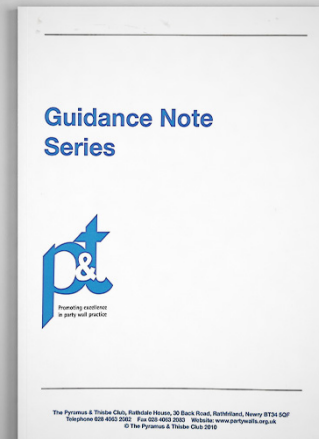
David Moon DipBS FRICS FPTS (Retd)

Publications Officer

The Pyramus & Thisbe Society

February 2023





IT/Website Officer

HANNAH BOYD

IT/Website Officer's Report to the Fellowship Annual Meeting 28th February 2023

AFTER THREE YEARS IN THE MAKING, I WAS delighted to finally be able to launch the new website in June 2022. The journey didn't end there of course, and anyone who has developed a website will know that there are inevitably some glitches to overcome after going live – and this has been no exception.

The website hosts a number of functions that most company websites do not have – a CPD recording facility, event booking with online payments, Find A Surveyor search, and a separate member area to name a few. Combining those requirements whilst developing the structure of the new Society has certainly been challenging.

Most of 2022 was about getting these features up and running to a standard where they were able to be used by members, and 2023 will be about refining and optimising those features, and developing new content.

The 'Find A Surveyor' search function is now working well after some initial glitches, and I will take this opportunity to remind you that the search will only work if members have completed their 'Public Profile' in the member 'Dashboard' area of the site. The reason behind this is a GDPR issue. Having taken advice, the most sensible way to proceed was to set the default as 'opt-out' of the search, and have members manually 'opt-in'.

The CPD recording facility is also up and running, and I would encourage members to familiarise themselves with this, and start recording their CPD.

The 'Knowledge Library' contains some useful content such as legal judgements, back issues of Whispers, Guidance

Notes and some podcasts, and we will be adding some pre-recorded webinars in the coming months.

There are a number of under-utilised areas including the Branch pages. This is an opportunity for individual branches to promote themselves and their events – a useful tool for potential new members. If any branches require assistance, or would like some further guidance on how to use these or any other facilities, please do get in touch, I will be happy to help.

Michael Kemp is assisting in working with the branches to promote the website, and also with updating some of the technical content, and improving website user experience.

I really do want to make the website the best it can be for all who use it, and am always happy to hear constructive feedback on how it could be improved.

The focus for 2023 is to streamline the content to improve the Search Engine Optimisation (SEO) rankings, so P&T appears higher up the up the results page from a Google search, and increase our social media presence.

Objectives for the Year Ahead

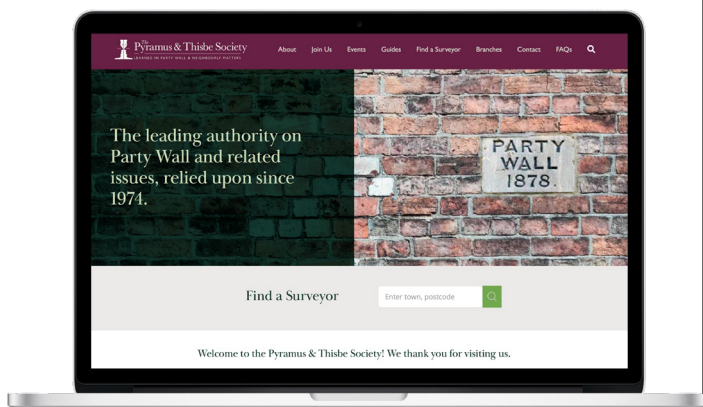
1. We are hoping to recruit a part-time website/marketing manager, who can help us build our social media presence, improve our SEO and increase website traffic.
2. In conjunction with the Membership Officer and working party, streamline application forms for Student and Associate members, and develop application forms within the member dashboard area to upgrade membership status from Associate to Member, and Member to Fellow.
3. Expand the Knowledge Library in conjunction with the Education and Publications Officers, to give members better access to a wider range of CPD content.
4. Support Michael Kemp to provide guidance to the Branches on how to get the most benefit from the new website.
5. Add new content to the website to promote the Mediation Scheme, and raise awareness of the Diversity and Inclusion initiatives. 🧑🏻‍🦰

Hannah Boyd MRICS FPTS

IT/Website Officer

The Pyramus & Thisbe Society

February 2023



National conference report

National Conference 23 March 2023

MICHAEL COOPER



TO THOSE WHO ATTENDED AND BASED on the feedback forms I'm delighted to say the event was a huge success. We have some very helpful suggestions on improvements which we will explore going forward with whoever volunteers to take on the challenge of the next one.

The success on the day was very much due to the help of Ada and her team and of course the excellent speakers covering a range of subjects.

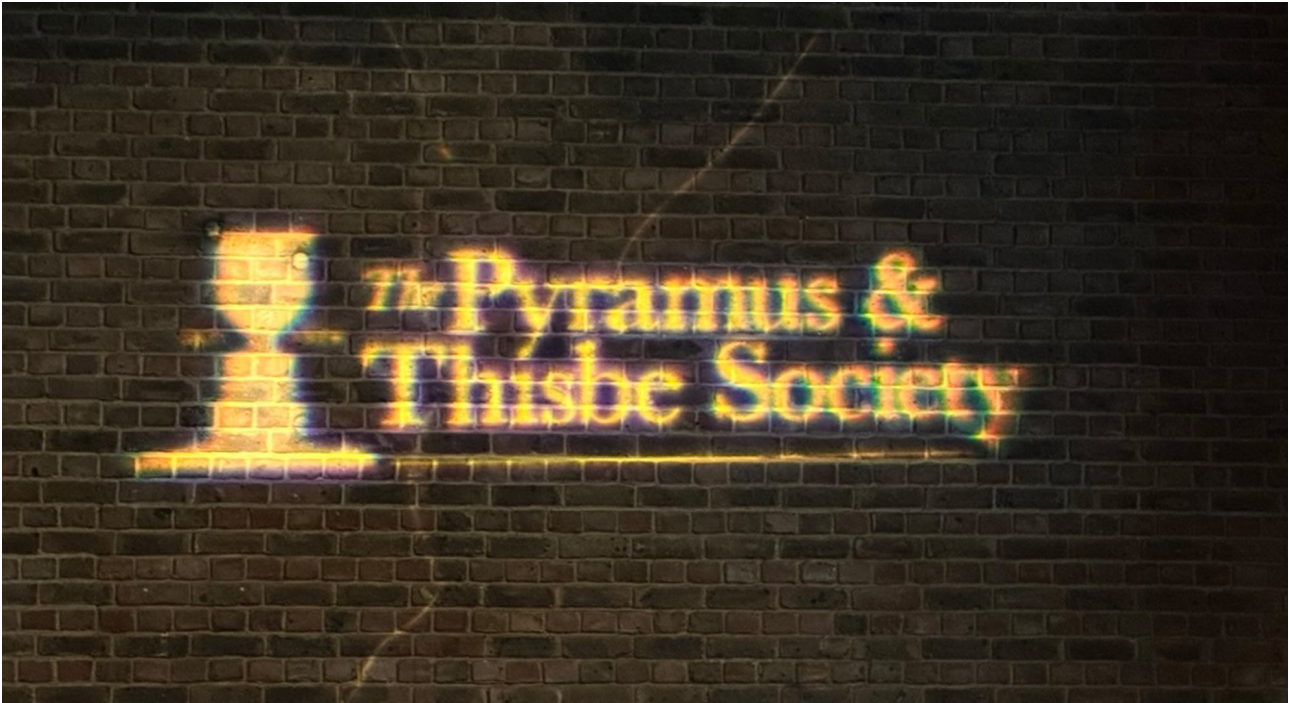
If you missed the event we have filmed it and a video copy will become available in due course, free to those who booked and paid to attend but, for whatever reason, couldn't

stay or attend and payable at a cost to others who would prefer to view it at leisure on their home pc's etc.

The National conference is once every two years and provides the full quota of CPD required to maintain membership of the new society. As we are now a national club I hope the next conference if not held outside of London will be supported more by the regions offering assistance in the planning or offering up speakers, as we all know the regions do have differing issues to those of central London so we may be able to add more focus on regional differences next time. Do let me know if you are interested In helping. >>

THE NATIONAL CONFERENCE 2023 PROGRAMME

9.30	WELCOME AND INTRODUCTION	Chairman	Michael Cooper Stuart Birrell
9.35	ARE YOU A LIABILITY? PI, Owners Insurance, Adjoining Owners Cover, Damages, Security of Expenses		Mark London, Sam Hiller
10.05	TO BE... IMPARTIAL... OR NOT TO BE... IMPARTIAL. THAT IS THE QUESTION The issue of impartiality and independence when acting as an appointed surveyor under the Act using examples of what to do and what not to do to satisfy that role		Graham North
10.35	LEGAL UPDATE		Howard Smith, Victoria Woolf
11.05	QUESTIONS		Stuart Birrell
11.15	COFFEE	Chairman	Michael Kemp
11.45	PART ONE: INTIMIDATION OF SURVEYORS An update on how P&T is addressing harassment of surveyors		Graham North Cecily Crampin
	PART TWO: BEST PRACTICE UPDATE The Practical effect of recent key legal decisions on best surveying practice. How to expend security for expenses by entering on the building owner's land to carry out works.		Edward Cox Michael Kemp
12.35	QUESTIONS		Michael Kemp
12.45	LUNCH	Chairman	Michael Cooper
14.00	BUILDING REGULATIONS & THE PARTY WALL ETC ACT 1996 Some common considerations		Paul Hannent
14.30	THE ROOT OF ALL EVIL Legal aspects of trees, roots, cutting back etc		Jon Heuch, Howard Smith
15:15	ON THE RIGHT TRACK Network Rail & The Party Wall etc Act 1996		Stephen King Tom Hopkins
15:45	QUESTIONS		Michael Cooper
15:55	TEA	Chairman	Fareed Fetto
16.25	SOCIETY NOTICES		Fareed Fetto
16.35	A SOCIETY FOR ALL Stats and feedback		Holly Harris
16:50	WHAT'S ON YOUR MIND? Unanswered questions explored		Hannah Boyd, Shirley Waldron Don Jessop, Simon Price, Mike Clark
17.20	FINAL QUESTIONS		Michael Cooper
17.30	CLOSE		



As London Chairman I was tasked to pull this one together, it was going to be the London conference as in previous years, but the birth of the new society changed it all and it became a national conference. I was told that normally the London chair had a theme that they ran through the conference. One year it was basements, another it was what goes wrong, and so after a bit of head scratching I wrote a list of subjects and areas that I thought I could learn something in myself, and that might cover areas of party wall across all regions.

A long list later and there still wasn't a theme to link any of it, but, on re-reading the list for about the seventh time it dawned on me that there was a common thread it was simply a long list of things that I didn't know or didn't remember I knew, (I'm not saying quite how long that list was for fear of embarrassing myself), so there it was the theme was 'what Michael doesn't know or forgot he knew'. Hopefully there was something in that for others as well but now my list is a lot shorter.

The new venue at the Mermaid was I think excellent this year and the view of the Thames breath-taking. I know we

jammed a lot into one day and that meant little time for Q&A but fear not the speakers collectively offered to take calls or further questions on their topics and if you have a question please send it to me or Ada and we will seek out answers or comment.

I think there are a lot of unanswered questions still out there and the views of the experts are always welcomed when there isn't a straightforward answer. I know I for one will be following up some of those talks for more in depth discussion. Until the courts hear and decide it we are very much dependant on our own opinions on many areas of party wall administration, and it's always great to hear the wisdom of our learned colleagues and friends. I hope you all look to support future events and I very much look forward to bumping into you all on a project or two.

Michael Cooper BSc (Hons) FRICS FPTS
Conference Organiser



Activities for 2023

Precis of activities involving the Society 2023

ANDREW SCHOFIELD

The Magistrate's Association in conjunction with Howard Smith of Radcliffe Chambers

The Society composed an article published in "The Magistrate" (the magazine of the Magistrate's Association). The purpose of this was to provide a reference document not only for Magistrates facing applications from owners and appointed surveyors for the declaration of debts but also as guidance for members and owners considering applications to the Magistrate's Court.

The article is available to members of the Society on the website.

Immunity from Prosecution

Members of the Society will be aware that there has been a recent tendency towards joining surveyors into the appeal of awards. The position of the Society is (and remains) that properly appointed surveyors administering the provisions of the Act do so in a quasi-judicial capacity. We are pleased to report that this has been confirmed in the recent case of *Gray -v- Crowley*. Although this is a decision at County Court and not a binding authority at paragraph 67 HHJ Parfitt stated:

It seems to me looking at the role of party wall surveyors that they are quasi-judicial in the sense that immunity should follow: The tribunal is one created by Parliament under the 1996 (and its predecessors for London only disputes); the surveyors decide issues very much akin to civil law issues (not least the extent to which the rights granted under the 1996 Act can be exercised without common law claims and remedies); and surveyors' decisions are binding on the building owners subject to appeal to the County Court.

It should be noted that this case was the outcome of an action brought against a Third Surveyor but nevertheless the Judge did not see fit to distinguish "selection" from "appointment".

Although not a reported case this is an important development and the Judge cites several authorities in

connection with it. It is to be hoped that this will give reassurance, particularly to third surveyors and discourage attempts to intimidate.

The Intimidation of Surveyors

Officers of the Society have noticed a steadily increasing trend towards trying to intimidate surveyors engaged in the administration of the Act, particularly third surveyors. This is particularly distressing when the threats are issued by solicitors. The Society has long felt that this behaviour is inappropriate, surveyors are acting in a quasi-judicial capacity and it is wrong to threaten them with proceedings and costs in an attempt to coerce them into either stepping down or making an award in favour of one or other of the parties. The Society has discussed its concerns with representatives of the Property Litigation Association who, I am pleased to be able to report, are in agreement. As a result there will be a presentation to members of the PLA at their next National Conference in November.

It should be noted this behaviour is not restricted to solicitors, others, including surveyors are guilty of it and where appropriate the Society will be raising concerns with other professional bodies.

The Society has also made it clear that such behaviour will not be tolerated and any member found to have behaved in such a matter will have their invitation to membership withdrawn.

Activities for the year ahead

The Society intends to develop its ties with universities and other centres of learning with a view to exporting its expertise and making it available to students engaged in studies relating to the built environment.

The Society's publications are being reviewed by working parties, these include guidance notes, the Law Library and of course a new edition of the Green Book. "Standard documents" such as a template award will shortly be available to members through the website.



REVIEW OF THE 2022/2023 SESSION

Achieving First National Conference

We are delighted and quite proud to have held the first National Conference in March. These take a huge amount of organisation and work had started prior to the Society being formed and was originally intended to be the biannual London Conference. A decision was made to make it National and was a great success. We had an attendance of roughly 270 which was good although we were hoping for more bearing in mind, we have all been locked up indoors for quite some time!

The next National Conference will be arranged for 2025, emails have gone out to Chairman of all branches to get an indication of interest in hosting the Conference. A decision will be made on location following expressions of interest. Wherever the next Conference is held the organising committee will be drawn from the entire Membership.

There were a number of regional Conferences last year most notably West Midlands and East Midlands which I understand were a great local success. Branches with sufficient resources and demand will be encouraged to hold such regional Conferences although we will try to make sure that the calendar is adhered to, to avoid impinging on demand for the next National Conference which is after all our show piece.

Presentations, Recordings etc.

The number of presentations is getting back to normal slowly after the obvious problems during the lockdown. These are reasonably attended across the country but we would like to encourage more members to make the effort to meet physically, there is a huge value in the Society in personal contact, sharing experiences with ones peers and discussing matters in a convivial environment.

The Society has made efforts to record these meetings with mixed success. The equipment is not terribly intuitive to use (that's probably an age/generational thing!) but we are working on alternatives and trying to provide sufficient equipment and expertise to enable this. Whilst we don't want the recordings

to discourage people from going to the meetings themselves it will give members who can't attend for whatever reason the opportunity to see them. Professional recordings were made of the last London meeting at which we

had nearly 100 people present, the results have not been received yet but we are hoping to put this on the website shortly.

It is hoped that all branches will be up to speed shortly and where problems exist in logistics, numbers etc we will try to assist.

We have continued making vodcasts in London, there are some on the website already, some are still being edited and two more are planned. London are happy and indeed keen to pass on the expertise they have gained in producing these so that other branches can if they wish hold their own. They are quite a cost effective way of disseminating information. The ones we have held so far have been in the nature of a discussion between various members on specific topics we are still working on getting the format correct and try to make them as interesting as possible (given the subject matter!).

Engagement with Government Regarding Problems with HS2 Legislation

Following an article by P&T Members Michael Cooper and Andrew Thompson, Lord (John) Lytton (another P&T member) requested assistance in lobbying the Government to try and get some change in the legislation which is badly flawed in terms of neighbourly matters. A Group was set up which included John Lytton, Lord Northcroft, Michael Cooper, Shirley Waldron, Howard Smith, Edward Bailey and Stuart Birrell to engage with the Department of Transport, which we managed to do virtually. We put forward 7 suggested amendments to make the Act fairer and more workable and we got 6 through. Unfortunately, the one we didn't get through would have made the biggest difference but many thanks for all those involved for giving up their time to try and correct what is frankly extremely unfair legislation. The Government do not seem inclined >>

to consult with anybody, they didn't consult with the RICS, they mention the ICE in the legislation without bothering to consult with them and unfortunately, they didn't consult with us. It is important we don't look like we are just trying to drum up work for ourselves and our suggestions were not to that end, but it is important that neighbour's rights are taken into account in these big infrastructure projects.

Engagement with the SCSi

We were approached via Michael Cooper by the Society of Chartered Surveyors Ireland to sense check some guidance notes on party wall / neighbourly matters and also give advice regarding a possible Irish Party Wall etc. Act.

Michael Coopers, Stuart Birrell and David Moon have engaged, and this is ongoing and will result in a new guidance note being issued and dialogue continuing regarding the possibilities of an Irish Act.

This is not the first time we have been approached by a foreign country, some years ago during a gap in sanctions Iran contacted us to discuss the same and more recently the Channel Islands, Guernsey in particular.

Engaging with Master Planners, Waterloo Station

Michael Cooper and Stuart Birrell were approached by the Master Planners dealing with the redevelopment around Waterloo Station. They gave an entry level presentation on how the Act works and what they need to take into account in their development plans to approximately 30 of the staff. They were made aware of the Pyramus & Thisbe Society and how it works and hopefully as the planning progresses (this is an extremely large site) will come back to the Society for further guidance.

RICS Accreditation

Some of you may remember the Club tried to engage with the RICS to obtain a mechanism for accreditation through the RICS. This foundered due to the internal problems that the RICS had at the time. Now that the RICS has reorganised and appears more interested in Surveying we have reopened this.

Contact with Universities

The last year has been a little disappointing in this respect, but the group tasked with making and maintaining contacts with Universities has been reformed with hopefully more energy. We want all that complete their Building Surveying degree to be fully aware of the Society and have at least the basic grasp of party wall legislation and neighbourly matters.

Diversity and Inclusion Initiatives

This started as a London initiative and has been quite successful mainly due to the efforts of the core group, Holly Harris supported by Victoria Woolf, Hannah Boyd, Anne Lorenzato and Louis Maycock. Speaking sessions have been arranged and more recently a breakfast meeting with a talk ably given by Richard Webber. The purpose of these initiatives is to make everybody feel welcome at Society events, it can be very daunting if you are a young surveyor in particular and also some of the minority groups, to walk into a room of experienced and rather elderly practitioners, we want to make sure that we are accessible and welcoming to all.

It will be necessary to roll this out through the branches, Holly has made contact with Susanne Leo in Northwest and we will be looking to make contact with the larger branches in particular but all in due course. 🇮🇪

Andrew Schofield FRICS FPTS

Secretary
The Pyramus & Thisbe Society



Articles

Two heads may be better than one in a party wall dispute, but should the developer always pay for both?

AIDAN COSGRAVE



THE PARTY WALL ETC ACT 1996 OFFERS parties to a party wall dispute two options for settling their differences: concur in the appointment of a single agreed surveyor or each appoint their own surveyor. The surveyor or surveyors then settle the disputed matter in an award, the reasonable costs of which are normally borne by the building owner.

Whilst a building owner, particularly a homeowner undertaking a domestic project, may prefer the agreed surveyor route as it is likely to be less costly than if two surveyors are involved, conventional thinking is that an adjoining owner should be free to opt for either route

without being penalised on costs. The unreported case of *Amir-Siddique v Kowaliw & Anor* (18 May 2018), heard by His Honour Judge Bailey in the Central London County Court, reminds the unwary that is not always the case.

In the aforementioned case, the building owner (Ms Amir-Siddique) appealed against the costs element of a party wall award, which authorised her proposed works. She claimed that the adjoining owners (Mr & Mrs Kowaliw) had acted unreasonably by declining to let her concur in the appointment of the adjoining owners' preferred surveyor as the agreed surveyor and, in doing so, caused her to incur unnecessary cost. She sought an order that the adjoining owners pay all the fees she incurred, including fees charged

by the appointed surveyors for making the award (£1,500 inc VAT charged by their surveyor and £595 charged by her surveyor), plus her earlier surveyor's fee for serving notice (£180).

His Honour Judge Bailey stated:

“The standard practice of requiring the building owner to pay the fees both of his and of the adjoining owner's party wall surveyor must be subject to two provisos. First the fees in question must be reasonable (see s 10(13))... Secondly, the building owner will not be required to pay the adjoining owner's surveyor's costs when these have resulted from unreasonable conduct either on the part of the adjoining owner or the surveyor. The adjoining owner must act reasonably...”

“There can be no comprehensive definition of unreasonable conduct for these purposes. The reasonableness or otherwise of any person's conduct is to be determined against the background of the relevant facts. There must however always be an objective element in the determination. The conduct of any individual has to be set against the standards to be expected generally throughout society.”

The judge held that:

1. The adjoining owners had not acted unreasonably by not reciprocating the courtesy and consideration afforded to them eight years earlier by the building owner (then the adjoining owner), when they (then the building owners) undertook similar work, and by declining to enter into an agreement outside the 1996 Act that would avoid the statutory party wall procedure and associated cost.
2. The adjoining owners had not acted unreasonably within the context of the Act by requiring satisfaction on a matter that they would not be entitled to in a party wall context as a condition of their agreement outside the Act. (The matter related to the precise siting of a dormer window that was proposed to be erected wholly on the building owner's property.)
3. The adjoining owners had acted unreasonably by not permitting their preferred surveyor to act as agreed surveyor, apparently for no reason, when the surveyor himself was willing to do so and they were aware the

building owner wished to keep costs to a minimum. The judge remarked:

“The Respondents felt entitled to insist on the “two-surveyor route” but not, in my judgment, on the basis that the Appellant had to pay all the additional costs.”

4. The building owner was liable to pay the fee of the adjoining owners' surveyor (£1,500), as she would have had to pay that even if the surveyor had acted as agreed surveyor. However, the adjoining owners were liable to reimburse the building owner the £595 fee charged by her appointed surveyor, in light of the fact that the adjoining owners' unreasonable behaviour had caused the building owner to incur that “wholly unnecessary cost”.

Analysis and commentary

It may seem surprising, on the face of it, that an adjoining owner who opts for the two-surveyor route could be found liable for some of the costs of the award. However, on closer examination of the facts, the judgment is logical.

One purpose of the 1996 Act is to provide an expeditious and cost-effective method of settling any disputes that might arise. Wherever possible, parties should reach agreement themselves, particularly if the proposed works are minor and/or not intrusive. However, in reality, adjoining owners are often concerned that their interests will not be properly protected unless they dissent and appoint a surveyor to settle matters.

The Government's Explanatory Booklet on the 1996 Act advises building owners who are unable to reach agreement with their neighbour that “the next best thing is to agree with them on appointing ... an “Agreed Surveyor”... Alternatively, each owner can appoint a surveyor to draw up the award together.” It advises adjoining owners who are in a similar position, “in these circumstances, and particularly in residential circumstances where surveyor's fees would significantly increase the project costs, the appointment of an agreed surveyor to resolve the dispute is preferable, especially if the proposed surveyor is not involved in your neighbour's project.”

Often the building owner will indicate, at the time of serving notice, which surveyor they would intend to appoint in the event of a dispute arising and invite the >>

FACTORS TENDING TOWARDS THE AGREED SURVEYOR ROUTE INCLUDE:

The works are fairly simple (e.g. cutting into a party wall to insert a flashing)

The works are uncontentious (e.g. cutting into a party wall to insert a beam on a padstone or building a wall wholly on the land building owner's land at the line of junction)

The works pose limited risk to the adjoining owner

The works necessitate minimal access onto the adjoining owner's land or are not overly intrusive

It is a modest domestic project where surveyors' fees would significantly increase the project costs

The adjoining owner is not planning to carry out work of their own

The surveyor is evidently competent and experienced in party wall matters involving work of a similar nature and scale to that proposed, understands the need to be impartial and is willing to act as agreed surveyor

The surveyor has no other involvement in the project or other relationship with either party, which might create a conflict of interest

FACTORS TENDING TOWARDS THE TWO-SURVEYOR ROUTE INCLUDE:

The works are more complex (e.g. excavation, underpinning and/or temporary propping of the adjoining owner's property)

The works are potentially contentious (e.g. involve placing 'special foundations' on the adjoining owner's land, building a new party wall or raising an existing party wall in an unconventional manner)

The works pose significant risk to the adjoining owner and security for expenses may need to be determined by the surveyors

The works necessitate access onto the adjoining owner's land that is likely to be very intrusive

It is a sizeable project where surveyors' fees would not disproportionately increase the project costs

The adjoining owner is planning work of its own and may need to serve a counter notice

One party is unable to satisfy itself that the surveyor proposed by their neighbour has sufficient experience in party wall matters involving work of a similar nature and scale or that they understand the role of agreed surveyor or the surveyor is unwilling to act as agreed surveyor

A surveyor is engaged by one of the parties in another capacity (e.g. project architect, engineer or builder), which might create a conflict of interest

adjoining owner, should they wish to dissent, to consider concurring in the appointment of the said surveyor as agreed surveyor or otherwise state the name of the surveyor they prefer to appoint. At that point, it would not be unreasonable for the adjoining owner to appoint their preferred surveyor and to expect the reasonable costs to be met by the building owner, in most normal circumstances. However, if the building owner wishes to concur in the appointment of the adjoining owner's preferred surveyor as agreed surveyor, and if the surveyor is happy to be appointed in that capacity, then refusal by the adjoining owner is likely to amount to unreasonable conduct, unless there is good reason.

So what might a good reason be for an adjoining owner preferring the two-surveyor route to an agreed surveyor? The table above sets out some of the factors that might influence the decision.

Another consideration, as the Government's Explanatory Booklet puts it, is "if you have chosen to have just the one surveyor ... then there is no Third Surveyor to call upon [if you do not agree with what the surveyor is doing]. This is why you should take care in selecting a surveyor and more particularly as to whether you just need the one 'Agreed Surveyor'."

Whichever route is chosen, while costs (fees) may be a consideration, it should not be the prime motivation for the selection of any surveyor. Competence and experience are key, as once the appointment is made it cannot be rescinded! 🚫

Aidan Cosgrave BSc(Hons) MRICS MPTS

First Published *Whispers* issue 42

Raising of party walls

KEITH DOUGLAS AND STUART FRAME



IN THE AFTERMATH OF THE GREAT FIRE OF London in 1666 the Authorities legislated to prevent a re-occurrence of the catastrophic damage by requiring future construction to be built in masonry. Until the repeal of the Constructional By-laws made under the London Building Acts an owner wishing to raise a party wall was obliged to do so in brickwork or stonework and furthermore to do so above the roofline as a parapet. Apart from the fire-resisting qualities parapets provide a harmonious architectural addition to terraced properties.

Some building professionals interpret the London Building Act requirements as a precedent for party walls to be raised in masonry; however, others take the view that modern materials enable the wall to be raised in clad timber framing.

When applied to loft extensions Planning Authorities have differing interpretations of Permitted Development rights. Section 38 of the Law of Property Act 1925, defines a party wall as a wall being jointly owned, severed vertically at the centre line but with the benefit of mutual easements of support. The Planning Acts neither define party walls, boundaries nor curtilage, thus when considering whether raising the full width of a party wall as part of a loft extension is Permitted Development, the law is unclear. In 2000 the London Borough of Enfield refused an application to certify Lawful Development for a loft conversion, the dormer cheeks of which were raised the full width of the party wall. The refusal was on the grounds that the development was beyond the curtilage of the subject house and therefore not Permitted Development. On Appeal the Inspector disagreed with the Council on the grounds that the curtilage had to include the full width of the party wall, without which the house would be incomplete. A similar

decision was reached in 2009 against the London Borough of Barnet. In 2010 the Court of Appeal, quoting the Oxford English Dictionary, held against the London Borough of Waltham Forest that the curtilage of a dwelling house included the full width of the party wall. Planning Decisions are not binding; however there appears to be a consistency in the decisions from which it is reasonable to suggest that a party wall falls within the curtilage of a building, at least for the purpose of planning law. Regrettably many Local Planning Authorities still disagree, leading to curious construction techniques and differences in the interpretation of Section 2(2) (a) of the Party Wall etc Act.

The Building Regulations permit the construction of timber framed party walls. Additionally, brick/stone party walls are more often 'thickened' using timber battening (ie dry lining, soundproofing) and not the same material as used in the original wall. Accordingly, is there any reason why a brick/stone party wall cannot, where appropriate, be raised in timber?

The raising of a party wall in brickwork is arguably the best way of achieving a satisfactory aesthetic appearance and fire-resistance, but it has to be acknowledged that a 112.5mm or 225 mm thick brick wall is neither waterproof nor sufficient to comply with today's requirement for energy conservation. Siting of efficient damp proof courses can also be challenging.

There are few, if any, grounds to challenge notices to raise a party wall in masonry and access to carry out that work. Importantly the raising in masonry of a party wall facilitates the ability of both owners to subsequently raise the wall. Thermal insulation can be provided internally and if properly detailed the wall can be raised as a parapet thereby enabling a waterproof junction between flat or pitched >>

roofs and the parapet. The Adjoining Owner can subsequently enclose upon the raised party wall and pay half the costs at the current price.

With the need to increase living space owners are resorting to adding loft rooms, the cost being significantly less than moving house and the process is made easier by relatively relaxed planning policies. To fulfil significant demand loft building companies are starting up everywhere, some employing designers with inadequate knowledge of sound construction techniques and the provisions of the Party Wall etc Act 1996. Loft Companies prefer working in timber and the “modern” way to raise a party wall is often in timber-framing. A dormer cheek not built off a party wall will almost always be built in timber off a double (or even triple) rafter. The loft conversion is exactly that - a conversion of the loft, which is part of the roof, and inevitably built in timber. Accordingly, if one is converting a loft made from a timber roof, then the obvious, and often only material that can be practically used, is timber. The raising of a party wall in timber to create the cheek of a dormer is merely an extension of the existing use of timber elsewhere in the loft conversion. To raise one side where the party wall is in brickwork is an additional expense, not only in material costs, but also in labour, involving the need for additional tradesmen, namely a bricklayer, and an extra day's work.

If properly executed it is possible to design the raising of a party wall in compliance with the Building Regulations. It is therefore difficult to argue against raising a party wall in timber unless it is reasonably foreseeable that an Adjoining Owner would subsequently be deprived of their right to do so, or incur additional costs in the exercise of that right. An Adjoining Owner could also serve a counter notice under section 4(1)(a) insisting that the wall is raised in brick, but that right is of course subject to a contribution to any additional expenses of work, pursuant to section 10(9) of the 1996 Act.

To avoid serving notice under the Act some building

designers opt to double up the rafters spanning parallel and adjacent to the party wall and support the dormer cheeks on timber framing, the external cladding projecting over half the width of the party wall. Since the cladding does not bear on the party wall it cannot be described as the raising of the structure thus there is no requirement to serve a notice under Section 2 of the Act. However, the disadvantages are that there is no legal right of entry onto the Adjoining Owner's roof for the purposes of construction and also there is a risk that roofing battens, when cut for the works, may be left short with inadequate broken joints. On the other side of the coin the developer does not have to pay for expensive surveying services and the Adjoining Owner can, at a later day, raise the full width of the party wall in masonry or timber studwork.

An alternative to framing the dormer cheek is to raise the full width of the party wall as a double leaf of timber-framing incorporating the required sound, fire and thermal insulation, but this involves the Adjoining Owner accepting the cladding being on their side of the party wall, albeit the removal of the cladding to facilitate enclosure would be a simple process. Whether specific consent for the cladding to be on the adjoining owner's land is required is a moot point; the tile hanging is merely a form of weather-proofing of the timber stud wall, in the same way that render may be for a block wall. It is possible to argue that such tile hanging is an integral part of the wall, namely it's weatherproofing. In Section 2 of the 1996 Act there are clear provisions designed to facilitate works of weatherproofing, thus the Act is drafted to enable works for such purposes.

The “third” method involves serving a notice to raise the party wall in timber but in such a manner as to facilitate the Adjoining Owner replicating the work without incurring additional costs. The advantage to the Building Owner of serving a notice to raise in this manner is the right of access under Section 8 of the Act. Furthermore, it becomes possible to determine a long-term solution to detail the junction of dormers if and when the current Adjoining



the head of the dormer cheek should ideally be constructed with an upstand above roof level.

Owner carries out reciprocal development.

It is submitted that an acceptable method of construction, that is to say in compliance with Building Regulations and advantageous to the Adjoining Owner, is (viewed from the Building Owner's side of the party wall), as follows: -

- An insulated plasterboard system cladding the existing party wall as well as the internal face of the timber-framed dormer cheek providing the necessary fire resistance, thermal and sound insulation and incorporating an integral vapour control layer all in the form of: -
- Kiln-dried and regularised timber studwork of minimum finished section size 100mm x 50mm, ideally @ 400mm centres, but sized to suit the dormer construction, by a structural engineer or other suitably qualified designer.
- Non-combustible insulation, such as Rockwool, to fill the gap between the studs.
- Structural grade plywood sheathing with a weather-resistant glue line of thickness to be determined by that necessary for the loadbearing parts of the dormer construction.
- 15mm thick calcium silicate board to achieve the required fire resistance for the overall system, as confirmed by appropriate available fire test data sheets.
- Breathable membrane.
- Vertical counterbattens fixed through the boarding/sheathing in line with the vertical studs behind to provide the necessary drainage and ventilation path behind the horizontal battens.
- Horizontal tile-battens and tile/slate weathering.

It is, however, the Designer's responsibility to check with Building Control that the above specification is acceptable in their area. The ultimate aim where both owners develop is to provide a timber framed party wall in compliance with the Building Regulations and initially without disadvantaging the Adjoining Owner.

To provide the opportunity to form a long-term working detail where both owners have developed their dormers at the boundary, the head of the dormer cheek should ideally be constructed with an upstand above roof level, in the order of 150mm high, which can be flashed over to form a weathering joint. Where owners wish to join their dormer flat roofs the omission of this, or a similar, detail can and does lead to disputes. It is appreciated, however, that to incorporate this detail in the dormer design may depend on the relationship between the height of the dormer and the ridge line. (normally 150mm)

This Article describes some of the common approaches to building dormers; however, many old terraced buildings were built without party walls in the roof attics, or the party walls are only half brick thick. In these circumstances some local authorities take the view that the raising of the party wall shall not be carried out to a lesser standard than used in the original wall construction which, if steps are not taken to improve insulation, implies the potential for serious inconvenience to the Adjoining Owner.

In conclusion, provided an Adjoining Owner is not disadvantaged by the actions of the Building Owner, the raising of a party wall in timber framing in compliance with Building Regulations is acceptable. 

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We record with great sadness the untimely death of Stuart Frame since this article was first published in Whispers Magazine

How to be a “proper” Party Wall Surveyor

ALISTAIR REDLER



WHEN I WAS ASKED TO GIVE THIS John Anstey memorial talk it was because I had announced my intention to stand down as National Secretary of the Club and I therefore thought it appropriate to use the opportunity to address concerns that I have over the way that some surveyors are undertaking the role of party wall surveyors, and I am concerned that an increase in this will ultimately undermine the ethos of this part of the profession, which has been set and maintained primarily by this Club.

After fourteen years on the London & National Committee, having been Chairman and then Secretary,

and having passed the age of 50, I believe that I have the right to start developing just a bit of a persona as a grumpy old man. The comments I would like to make in this talk are based upon my own observations over those fourteen years and the many conversations that I have had with other party wall surveyors over that time, as well as my own experiences in dealing with many disputes as Third Surveyor.

During the course of this talk I will give examples of practices that I consider to be inappropriate and some that I consider to be dishonest. If you believe you know about whom I may be talking, or if you believe that it applies to you, then you may well be right.

Some people here have heard my bell curve theory of Third Surveyor popularity. A surveyor will start becoming named as a potential Third Surveyor when they start being noticed at some point in their career, often as a result of being selected for the London Committee or when they come to prominence handling complex building owner matters with competence. As their name appears on more selection forms they get chosen more often and inevitably they start having disputes referred to them. However, as they start to make Third Surveyor Awards they carry a risk that the losing surveyor in each case is sufficiently upset that they decide not to agree to their selection again. This is of course not inevitable, and any good Third Surveyor should aim to make an Award that persuades the losing party of their error rather than end up in conflict over the matter. Eventually, however, the number of disgruntled surveyors not accepting one particular individual, together with the Third Surveyor becoming slow to respond due to the volume of workload or complexity of matters referred, together possibly with a developing grumpiness with the same issues appearing again and again, means that the name fades from favour and other younger and less tainted surveyors are chosen in their stead. If you think back on the Third Surveyors that many of you have selected over the years you can see this pattern. Therefore, whilst I hope I am still somewhere near the peak of the bell curve, and I am aware of an increasing number of surveyors who refuse to accept me now as Third Surveyor, I hope I can use this position to get my point across.

One of the key things that John Anstey did in the early days of the Club in the 1970s was to develop the concept that surveyors act for the wall and not for the owners, and then to express that concept in his talks, including those to the Colleges where I first heard him speak on the subject. Whilst we do not tend to use the phrase in the same way anymore, most of us do still express that concept to our instructing owners and to those surveyors that we believe are not following that principle. However, I have a concern that this essential principle is being eroded by those who see the role of party wall surveyor as a partisan one, and a road to enrichment; and also by those who treat their role as unduly selfimportant and therefore become pompous, pedantic and obstructive. There is a middle line that we need to walk that allows us to serve

the public properly whilst allowing us to run effective businesses while doing so.

Part of the problem is a result of the success of John Anstey's approach which has led to practices, such as mine, that specialise in party wall matters and are known for doing so, and have also managed to do so as successful businesses. Imitation is indeed a form of flattery, but not if based on a misunderstanding of how those firms go about their business. After all, it is the Partners of those firms who will have been most heavily involved over the years in educating the profession, writing RICS Guidance Notes, sitting on Disciplinary Panels, giving up days at a time to talk for the RICS and indeed running this Club.

Therefore, I want to explore some issues that are currently prevalent that cause concern to me and others, and to give my opinion on how these be addressed.

One thing that we are hearing is that there are surveyors, primarily those outside London, who are refusing to accept as Third Surveyors those names that are usually on the London list. Part of that is due to a misguided impression that there is form of Central London cartel that needs to be broken but, notwithstanding that, I suggest that they are not necessarily wrong. After all, some of the most frequently selected Third Surveyors are partners of Central London practices and have hourly rates to match. It is therefore not necessarily appropriate for them to be selected as Third Surveyor for a simple domestic extension project. Choosing an expensive Third Surveyor carries a risk of imposing a higher cost on the owners, in the event of dispute, than may be necessary, and it is one of the duties of the surveyors to seek to make the cost of the Award proportionate and I suggest that in those cases you could consider agreeing a more local surveyor. Of course, the key principle must still apply, which is that the surveyor chosen needs to be one that both surveyors can respect both for their construction knowledge and for their knowledge of the Party Wall Act.

On the subject of Third Surveyors and proportionate costs, when you are referring a matter to the Third Surveyor, please take the time to consider how to make that referral as effective as possible. In the last few years I have had cases where surveyors have had their secretary simply photocopy their entire file, including the multiple un-edited email threads of endlessly repeated >>

insignificant comments, backed up with large signature blocks and disclaimer text on every single one. I have received referrals from surveyors who seem unable to ever write less than three pages at a time, often seeming as though they doubt my ability to understand simple construction details or procedures. When dealing with a referral I only want to know the points in dispute so that I can make a decision to resolve those and allow matters to proceed. I do not need to know the full history of the correspondence between the surveyors, unless it is relevant to the point in dispute and so do not need to be party to the ongoing spat between the parties. If you are going to send an expensive Third Surveyor hours of work to do, then don't complain about the cost of the Award.

The key issue, of course, is to avoid any need to refer to a Third Surveyor and that can usually be achieved by a proper approach to the Act and to our discussions with our counterpart in each case. I believe that the key problems at the moment are down to two things, and that is over zealousness on the part of some surveyors and greed on the part of others. So let us start with the issue of greed. In the first place, there is nothing wrong with undertaking party wall work with a view to that being a contribution towards a successful and profitable business. After all, most of us work in the commercial world and either own firms that need to make a profit or are employed by people who expect us to be profitable. However, there is a right way and a wrong way of going about this. For example, I see no difficulty with setting out to make good money by acting primarily as a building owner's surveyor. Most building owners' surveyors are competing for that business in a commercial market and if they charge high fees for that service then they will only be paid those fees if the building owner, who is usually a repeat client, considers that the fee is justified.

I suggest, however, that if somebody goes into this business with the intention of making a fortune out of being an adjoining owner's surveyor, then that intention must be suspect. To do so should require a high number of instructions and long working hours to service them.

There are some clearly greedy practices that many of you will have seen and indeed some are partaking of. These include not notifying the building owner's surveyor

of your fee after prolonging the discussions until the building owner is keen to proceed and advising a high fee knowing that the building owner does not have time to dispute it. There are a number of surveyors, thankfully still quite a small number, for whom this appears to be a standard practice. Indeed I have even been told to my face by a surveyor who should know better that matters will go very smoothly if the fee is right.

An even worse form of this is those surveyors who ensure that their terms of business, signed by the adjoining owners who appoint them, state that those adjoining owners will pay whatever fees they submit regardless of whether those fees are awarded in full or not. I consider this to be the behaviour of a charlatan. It is, unfortunately, currently the case that lawyers have established that adjoining owners' surveyors cannot claim their fees directly from the building owner despite these being awarded, something I still think is very wrong. It does mean that we need to make adjoining owners aware that they may be responsible for our awarded fees if the building owner does not pay them. That is a different matter from insisting that an adjoining owner should pay any fee claimed regardless of whether it is awarded. I personally have sufficient faith in the members of this profession that I do state that I will only claim fees that have been awarded. This is on the basis that I expect to be able to agree my fees with a

building owner's surveyor, which includes being prepared to reduce them if necessary, or trusting myself to the decision of a Third Surveyor who, after all, I have agreed in the selection of. If I spend more time than I can recover from the building owner under the Award, then that is either my problem or, if caused by a difficult adjoining owner, I need to have agreement from that adjoining owner that they will pay that additional time on the basis that they are incurring it for their purposes.

On the question of a valid amount of time, it is not the case that an adjoining owner's surveyor is entitled to be paid for every minute that they have spent on a matter simply on the basis of their own timesheet. Just because you may be a surveyor who likes to write at great length, repeating points you have made in previous emails, or you hold the view that you are so much more intelligent

than any other surveyor that you must write at great length to educate them, does not necessarily mean that the time you have spent is justified.

More on the point of greed, there is a trend for hourly rates to be increasing. This in itself is not a bad thing as we may as well make our profession attractive to intelligent and competent people. I do think there is a key rule, however, which is the cost of an Award, in adjoining owners' surveyors' fees, should be much the same regardless of the hourly rate of the surveyor acting as adjoining owner's surveyor. That will not always be the case, but I suggest if you are charging high rates then you should be capable of reading a draft Award and drawings effectively and efficiently. As Third Surveyor I see submissions on fees where a surveyor has allocated 3 hours to reviewing an Award and drawings on fairly conventional projects. For a junior surveyor that may be an appropriate time allocation to properly understand the Party Wall Act implications, but for an experienced surveyor charging a high hourly rate I simply do not believe they need to spend that much time, or if they do, their competence does not match their charging rate. If an Award is based on the standard RICS draft version then any changes to the standard wording should be readily apparent. Of course, if you are a surveyor who produces a very different form of Award then you must expect other surveyors to spend longer reviewing it.

Another example of greed, but on the part of a building owner's surveyor, are those surveyors who simply act as a post box for the project team; passing on drawings and documents to an adjoining owner's surveyor without having reviewed and checked them themselves. This is more prevalent from those working on fixed fees. It is incumbent on a building owner's surveyor to ensure that only relevant information is passed to an adjoining owner's surveyor so that that adjoining owner's surveyor is able to spend the optimum amount of time dealing with it. It is particularly poor form to send a website link to 50 drawings and then complain when the adjoining owner's surveyor claims the appropriate fees for having done the building owner's surveyor's job. May I suggest that when, as adjoining owner's surveyor, you are subjected to this that you simply write back to the building

owner's surveyor advising the number of hours and appropriate fee it will take to sift through these documents and ask them whether they want you to spend that time on their behalf.

An approach being taken in our office, particularly by Andrew Schofield, is to assist the building owner's surveyor in obtaining an Award promptly and with minimum expenditure of our time. That is done by explaining clearly at the outset what documents we will need to agree the Award, ensuring that these are appropriate for the matter in hand and suggesting that the visit to site to agree the Schedule of Condition only takes place once all those documents are to hand and the draft Award properly reflects those and any conditions which will be imposed on the work. That way it should be possible for the Award to be effectively agreed by sitting down together immediately after taking the Schedule of Condition and thereby minimising the time incurred at the relatively high hourly rate. The fact that the meeting then takes place in a local pub is simply a happy coincidence.

There are times when incomplete or inadequate information does need to be passed on. I have done so recently where I served notice for a double basement excavation project where only planning drawings are currently available and not construction drawings suitable for an Award. In that case I have asked the appointed surveyors to simply familiarise themselves with those drawings and not spend any significant time on them until I have better drawings to pass to them. In that case it was necessary to start the notice period running and ensure the appointment of surveyors at an early stage and I suggest there is no harm in that if that intent is explained.

The other main problem that I see is over-zealousness from adjoining owners' surveyors, or responding by rote without considering the detail of the particular project. Sometimes, but not always, this also results in excessive fees but for a different reason. In my view the key thing to remember is that the role of an adjoining owner's surveyor is a simple one. It is to be satisfied that the proposed works are lawful under the Party Wall Act and that they are of a design and method of execution >>



One of the more difficult roles of an adjoining owner's surveyor is managing their appointing owner's expectations.

that would not cause harm to the adjoining owner or their property. It is not the role of a party wall surveyor to vet every aspect of a proposed design or to insist on proof that every element of that design will not cause harm. In the first place, a party wall surveyor is a surveyor or other construction professional, and if you are not then you should not be undertaking this work. Any surveyor should be capable of reviewing drawings and answering for themselves the first question which is "Is there any part of this design that causes me concern?" It is only those items of concern that should be raised with the building owner's surveyor.

To give an example, a couple of years ago I had an experienced surveyor insist on a method statement covering every item of work proposed to the party wall in order to prove that it would not cause any inconvenience to the adjoining occupiers. As those works involved fixing waler beams to the wall for temporary support, some repair of parapets and replacement of flashings, it seemed evident to me that any surveyor would be able to form their own judgement on the impact of power drills to form bolt holes. There is nothing wrong with an adjoining owner's surveyor reviewing drawings and a draft Award and simply agreeing them if they are appropriate. There is no obligation on us to justify our existence further.

The same goes for the appointment of a structural engineer to advise an adjoining owner's surveyor. This is not something that we are obliged to do in every case; there is no PI liability if you do not and it is frequently unnecessary. Even for the ubiquitous basement excavation projects, if the building owner's engineer is a reputable firm, and more so if one known to you, do you really need to check their work if you can obtain appropriate answers from them direct? All too often engineers are engaged to disguise shortcomings in the appointed surveyor's knowledge of construction and the mistaken belief that the most important thing is to avoid risk.

If there is a dispute between the surveyors, it is not

necessarily your job to win that dispute. You should consider asking your appointing owner whether they want to concede the point, even if you think they should not. The owners can override the surveyors by agreeing with each other. There is no reason why they should not be given that opportunity, whether over access, special foundations or the repair of damage, to give just a few key issues.

It is inevitable that building work will cause disturbance to adjoining owners. Indeed the law reflects this as there is no claim for nuisance or even loss of income in common law as a result of building works if carried out in a reasonable manner. I consider the same applies to the Party Wall Act, notwithstanding the relatively wide wording of Section 7(2). The job of an adjoining owner's surveyor is not to ensure that the adjoining owner experiences no disturbance at all but, in conjunction with the building owner's surveyor, agree a method of working that is appropriate for the needs of both building owner and adjoining owner. I suggest that an adjoining owner's surveyor should be as aware of the method of operation and cost of a piling rig, and therefore the need to optimise its use, as they are of the disturbance that will be caused to an adjoining owner. Their duty is to agree the appropriate method and then to be prepared to stand by that. Incidentally, the first Third Surveyor referral that I ever lost was when I was building owner's surveyor for the Grosvenor Estate and the adjoining owner's surveyor insisted that work had to stop on any afternoon where the adjoining owner, who happened to be Sean Connery, wanted a nap. Somewhat to my surprise an eminent Third Surveyor awarded that Sean Connery could make the work stop when he wanted a nap.

I have recently heard arguments that tenants of an adjoining owner cannot be expected to accept disturbance. I have also heard arguments that any vibration or indeed noise that causes the staff of the adjoining owner to become unnerved in some way cannot

be permitted. I suggest in those cases it is incumbent on the adjoining owner's surveyor to explain to their appointing owner and their staff why this may be an annoyance, but not dangerous, rather than simply not accept the method of working.

On that point, one of the more difficult roles of an adjoining owner's surveyor is managing their appointing owner's expectations. All adjoining owners' surveyors should seek to have the knowledge and confidence to stand up to their appointing owner when it is appropriate to do so. That could be resisting an owner's insistence on restricting hours of work, pressure to delay an Award which could be achieved by repeatedly delaying access for a Schedule of Condition, or in insisting on more comprehensive repairs than are reasonably necessary as a result of damage being caused. It is not usually pleasant having to take that stance but that is what a professional surveyor must do when appropriate, and indeed it is one of the key things that will have a positive impact on a surveyor's reputation.

This talk has, I hope, not come across as an unduly negative. I am a great believer in the way that party wall surveying has developed over the last 40 years, substantially promoted by this Club and by the wider membership, not just the Committees. I also believe that it has been instrumental in contributing to the continuing professionalism of surveying as a whole, particularly building surveying. Let us all work on keeping it that way. For those surveyors that are greedy, and disrespectful of their colleagues when being so, perhaps there is nothing that can be done except make a timely referral to a Third Surveyor to get that fee determined. Most Third Surveyors will, I think, also agree to sign an Award where the only outstanding matter is the adjoining owner's surveyor's fees, in order that the building owner is not unduly delayed.

In relation to the over-zealous surveyors, I would ask all of you to consider how you do undertake this work and

whether you are properly considering the interests of both owners and actually working to get Awards in place effectively.

If the wider profession increasingly develops the view, which is already out there, that the party wall process is a pointless rip off then that will be detrimental not only to us but also to the wider profession and general public. I do believe that this unique piece of legislation is a valuable one and I am also an advocate of using the Section 10 procedures in other legislation, something that Committee members have been trying to do over recent years. Let us not undermine that through greed, ignorance, over-caution or the belief that you have to win every argument rather than working as part of a practical tribunal to make an appropriate Award in each case. 🙏

Alistair Redler BSc FRICS

First Published *Whispers* issue 28

From

the

Vaults

Gyle-Thompson and others v Wall Street (Properties) Limited

DONALD ENSOM

THIS TIME, 'FROM THE VAULTS' FEATURES the well known case of Gyle-Thompson v Wall Street (Properties) Ltd case which most, if not all, of us are familiar with. This case covers the fundamental aspect of ensuring our appointments are correct and protocols set out by the Act are followed to ensure validity.

This case is in relation to demolition works which required the reduction in height of a party wall. In this particular case, Notice was served on the Adjoining Owner's Surveyor and not sent to the Adjoining Owner. This raised questions regarding firstly, the surveyor's authority to receive such Notices in his role as an 'agent' but also the validity of the Notice and subsequent Award.

This is of course still relevant to our procedures today in terms of the protocol to be followed from beginning to end, validity of Awards from Notices that are not valid, the service of documentation and appealing an Award.

However, there is one aspect of the case that is no longer relevant under the Party Wall etc. Act 1996. The reduction in height of a party wall was not permitted under the London Building Acts (Amendment) Act 1939 so the surveyors have no jurisdiction to agree an Award for these works. However, under the 1996 Act, there is a right to undertake such works under section 2(2)(m).

There are some important lessons in this case which frame our role as party wall surveyor and are essential for us today as experienced professionals that our clients and appointing owners rely on for not only knowledge and expertise but procedural accuracy.

A summary of this case is as follows:-

Defendants, owner of warehouse, one wall of which formed the rear boundary of houses erected by Plaintiffs. Warehouse being demolished for redevelopment of site for housing. The wall was approximately 38ft high and the Building Owners wished to reduce the height to a much lower level. Notice served under Section 47 on the 22nd February 1972; works described as "the partial demolition and rebuilding of the present warehouse wall in connecting it with the new premises to be erected behind it on out side". This particular Notice was served on eleven house owners but matters between Building Owners and

Adjoining Owners in all but three of the cases were settled by negotiation and can be ignored.

Adjoining Owner's Surveyor maintained that the Act did not authorise demolition and rebuilding to a lower height.

The warehouse having been virtually demolished, the stability of the wall caused anxiety and the Building Owner's Surveyor served Notice that the Building Owner would require to enter on the gardens and shore up the wall.

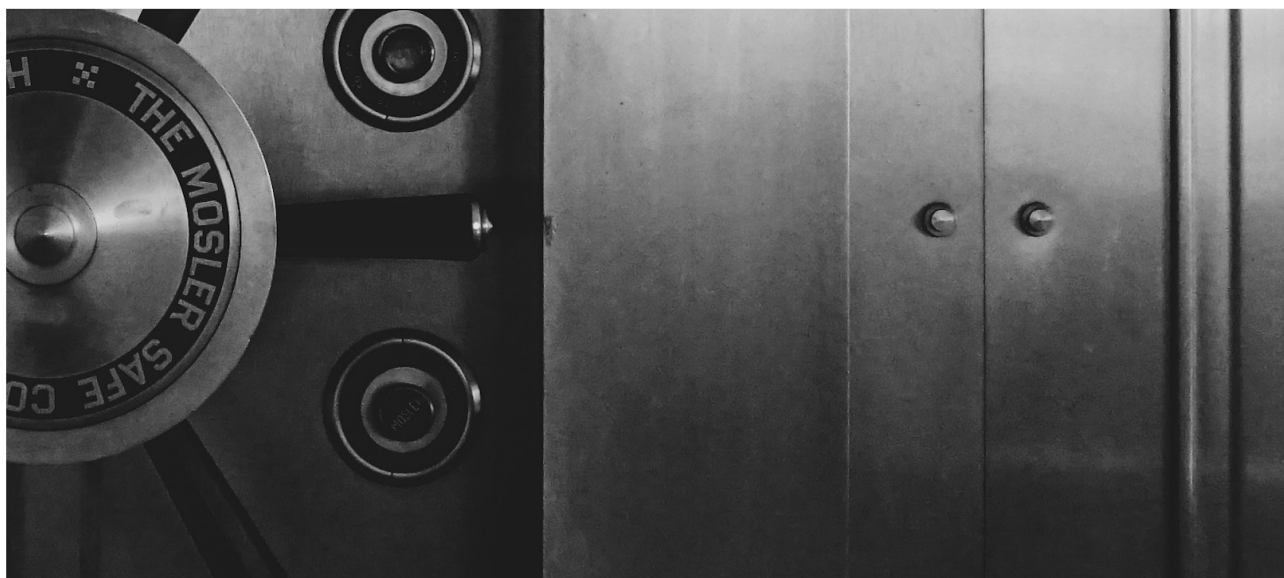
Further attempts were made by negotiation to resolve the problem of the reduction in height of the wall. An Award was signed relating to the shoring.

Negotiations having come to naught the Third Surveyor was called in and the three Surveyors met on the 18th December 1972. The Third Surveyor determined that the three Surveyors had no power to act as the Notice of the 22nd February was more than 6 months old (Section 47(3))

On the 20th December new Notices were served under Section 47(1) which relied on the provisions of 46(1)(k) and the works stated were "the demolition of the existing party fence wall and its replacement with a party fence wall 19ft. high in accordance with the Architect's drawing shown to you previously". The Notices were addressed to the individual house owners.

The two Surveyors again could not agree and referred the matter to the Third Surveyor. A meeting took place on the 18th January 1973 and on the 2nd March 1973 the Building Owner's Surveyor and the Third Surveyor under the powers of Section 55(1) issued an Award, the substance of which was that the Building Owner was permitted to take down the wall and rebuild it to a height of 19ft.

Demolition commenced on the 17th March, which was one day after the 14 days allowed for an appeal in the County Court and a 14 days restriction which was set out in the Award. Demolition was stopped initially by the intervention of the police and subsequently by an injunction. >>



The Adjoining Owner then took the case to Court and claimed that the Award was null and void. During the case it was agreed that the only Section 46 rights which were relevant were:

- A A right to make good underpin thicken or repair or demolish and rebuild a party structure or party fence wall in any case where such work is necessary on account of defect or want of repair of the party structure or party fence wall; and
- B A right to raise a party fence wall to raise and use as a party wall and a party fence wall or to demolish a party fence wall and rebuild it as a party fence wall or as a party wall.

Adjoining Owners' Counsel argued that 46(1) did not confer any specific right to reduce the height of a party fence wall and that had it been intended that this right exist the Act would have said so. Counsel for the Building Owner submitted that by implication of 46(1)(k) did confer the right and that if this right did not exist there was no purpose in conferring a right to demolish and rebuild if the former wall could not be changed because there was already a power in 46(1) to demolish and rebuild where the structure was defective and that no-one would want to take down and rebuild to the same height unless the wall were defective.

The Judge did not accept this argument, but suggested that someone might want to rebuild a party fence wall in more durable or appropriate materials or to renew it before it started to develop defects!

Whatever the Judge's reasoning he nevertheless held that there was no right to demolish and rebuild to a lesser height.

The judgement then went into a second major point, as to whether the Appeal was in the right Court, i.e. should it have been in the County Court. The arguments here are in my view strictly legal and of no real relevance to party wall practice and, therefore, I have not gone into detail.

Having found that the Appeal was correctly in the High Court, the Judge stated that on those two points alone the Adjoining Owner succeeded but then went on to deal with some procedural objections. These were:

1. That the December 1972 Notices were not served on the Plaintiffs but on the Adjoining Owner's Surveyor who had not been given authority to accept service. You will see above that the Notices were addressed to the individual owners.
2. That the Adjoining Owners' Surveyor was not appointed by them to be their Surveyor. It is believed that the Judge did not see the Notice of Appointment dated 3rd September 1972 which stated "I hereby appoint Mr. V. F. Johnson, FRICS, FI Arb., as my Surveyor in connection with the above matter, the Notice being headed with the title of the Act and the words "Party Wall between 51 Paulton Square and the premises known as 57 & 63 Old Church Street, S. W. 3.".
3. That the Award was not delivered until 20th March 1973, when a copy was handed to the Plaintiff's Solicitors i.e. after demolition had commenced (see above that the Award was signed on the 2nd March 1973). He did, however, state that the Adjoining Owners on the 26th January fully reporting on the proposed Award and advising them of their right to Appeal. 

Donald Ensom

Mass concrete strip foundations in basement construction

MICHAEL CLARK



IN HIS JUDGEMENT ON CHATURACHANDA v Fairholme [2015] HHJ Bailey stated that the inclusion of a mass concrete rail beneath a basement party wall does not comprise a special foundation. Since then there has been a proliferation of basement schemes incorporating mass concrete strips below the edges of reinforced concrete basement boxes as a means of circumventing the provisions of Section 7(4) of the Party Wall etc. Act 1996.

The mass concrete strips have appeared in basement schemes in various shapes and sizes. Some are significant foundations, properly proportioned and located. Other proposals comprise thin layers of blinding concrete with no obvious structural capacity or function.

Section 7(4) prevents a building owner from placing special foundations on the land of an adjoining owner without their consent. It is not proposed to discuss the provenance of the provision here except to point out that it was originally intended to prevent large steel beam grillage foundations from being placed on the land of adjoining owners and not to prevent the use of the modern, slender reinforced concrete underpinning in modern basement developments.

Judge Bailey did provide some useful definitions of the relevant structural components:-

- i The mass concrete strip is an element of the construction separate and distinct from the reinforced concrete

underpin (wall) which sits upon it. It is the construction element, artificially formed, which rests on the solid ground beneath. It is 'the foundation' and it does not comprise an assemblage of beams or rods. Accordingly, it is not a special foundation. The reinforced concrete underpin (wall) comprises an assemblage of beams or rods, but it is not a foundation. It follows that it cannot be a special foundation.

- ii The reinforced concrete box constitutes a foundation because it distributes load not only to the mass concrete strip immediately beneath the party wall, but also to the solid ground on the Building Owners' side of that wall.
- iii The particular strip foundation in the case of Chaturachanda v Fairholme [2015] is described as a foundation able to provide a not inconsiderable level of support. In other words, an obvious foundation capable of supporting the load from the party wall.

We have also been provided with a description of the sequence of work which must have been important to Judge Bailey.

1. On exposing a metre section to the required depth, mass concrete is poured to make the 'foundation' strip (the 'concrete rail') on which the box will sit.
2. Once the section of mass concrete strip has cured a wall is constructed off the strip up to the base of the exposed basement underpin wall.
3. The base slab is constructed later, after the completion of the vertical wall.



Figure 1
Excavate and Cast
Reinforced
Concrete Base

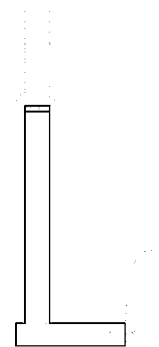


Figure 2
Cast Reinforced
Concrete Wall Stem
and Dry-pack

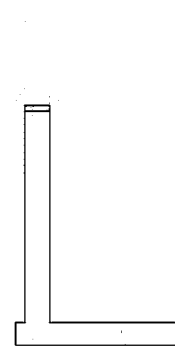
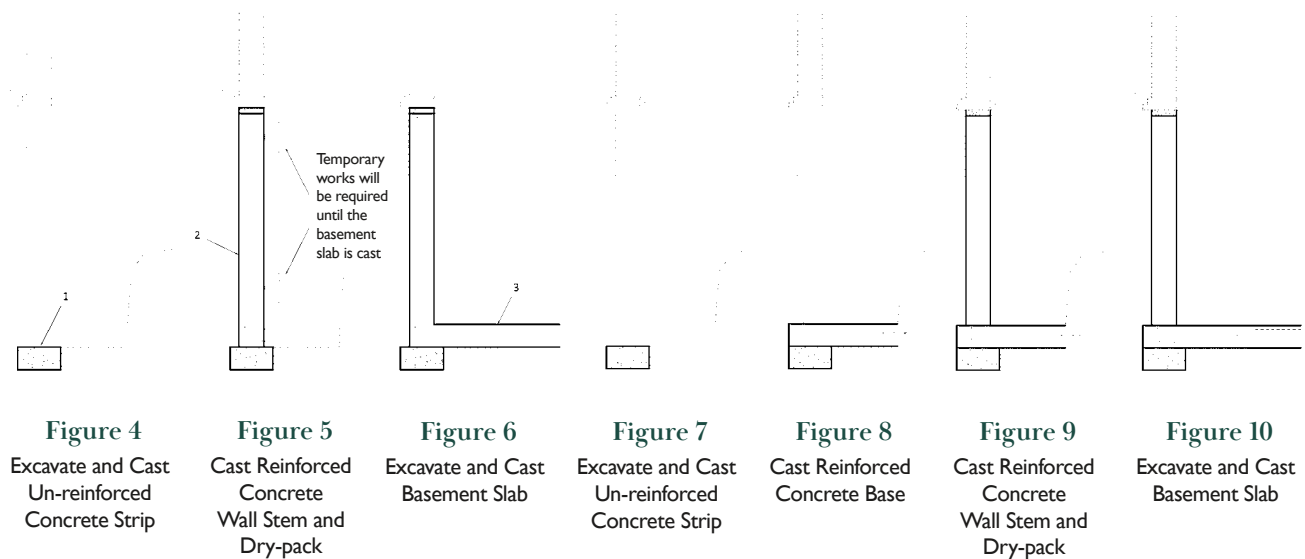


Figure 3
Excavate and Cast
Basement Slab



The following figures illustrate the differences in construction sequence between basements with and without mass concrete foundation strips. Figure 1 shows the first stage in the construction of a 'traditional special foundation' without a mass concrete strip. An underpin excavation is made beneath the party wall and the base section cast with continuity reinforcement. Figure 2 shows the reinforced concrete wall stem cast and dry-packed up to the underside of the party wall. The final stage shown in Figure 3 is the completed basement 'box' after the bulk excavation has taken place and the basement slab cast. Full width temporary propping may be required during this stage, depending on the design of the underpins.

Figure 4 shows the first stage of the 'non-special foundation'. The excavation has been carried out and the extra work undertaken to excavate for and cast the un-reinforced concrete strip. Figure 5 shows the casting of the reinforced concrete wall section. At this stage the mass concrete strip is acting as the foundation to the party wall and should be designed as such. Full width temporary propping will be required at this stage because the wall is not yet combined with the base to provide lateral stability. Figure 6 shows the final arrangement following bulk excavation and casting of the basement slab.

At this stage the mass concrete strip is entirely superfluous and is effectively replacement soil below the basement box and it could be argued that this sequence of construction is in contravention of the CDM Regulations [2015] under which a designer's main duty is to eliminate,

reduce or control foreseeable risks that may arise during construction work. The incorporation of the mass concrete rail requires additional work to be carried out in a hazardous environment, confined space and within a deep excavation which is unnecessary and introduces foreseeable and avoidable risks.

In reality, the sequences illustrated in Figures 4 to 6 to avoid the requirement for consent for special foundations is rarely followed. It is far simpler and safer to adopt the traditional sequence of construction but with the addition of the mass concrete rail. See Figures 7 to 10 below. Figure 7 shows the construction of the mass concrete rail. This is followed by Figure 8 and the casting of the base section with continuity reinforcement. The reinforced concrete wall is then cast in Figure 9 followed by bulk excavation and casting of the basement slab in Figure 10.

This sequence makes complete sense for the construction of a modern reinforced concrete basement box, except that the mass concrete strips does not have a structural function and can be eliminated. As the omission of the strip would save time, money and be safer to build, it is worthy of consideration. The only obstacle is the interpretation of what is, or is not, a special foundation. 🚧

Michael Clark BSc CEng MICE MStructE

First Published *Whispers* issue 48

Special foundations: the origin

DAVID BOWDEN

Abstract

THIS ARTICLE EXPLORES THE ORIGINS of the restriction preventing the placing of special foundations on adjoining land without consent, which was introduced in Part VI of the London Building Acts (Amendment) Act 1939. It establishes why it was introduced, and concludes that under the Party Wall etc Act 1996 that superseded it, the restriction is redundant but commonly misapplied.

In the Beginning

The industrial revolution, and in particular the improving technology associated with the railways, led to the use of steel structural skeleton frames in large buildings in the late nineteenth and early twentieth centuries.

Owens College in Manchester was built in 1869 and is believed to have a steel frame, as are the National Liberal Club in London built in 1887, the Midland Hotel in Manchester in 1903, and the Guinness Market Street Store in Dublin in 1904. However, the Ritz in Piccadilly, built in 1906, is generally considered to be the first substantial steel framed building in London. Selfridges, built in 1909, was probably the first to have no continuous external masonry¹.

The loads in a framed building, as opposed to being distributed along footings and foundations for the full length of load bearing walls, are concentrated and transferred to the ground through columns.

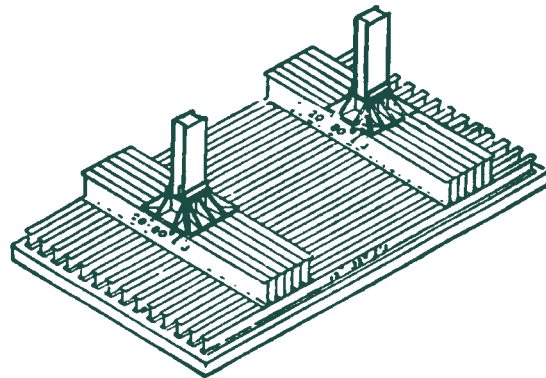
Originally, the columns had to be founded on pads of sufficiently large area to distribute the load, so as to not exceed the safe bearing capacity of the ground, thus

avoiding settlement. They had to project equally on all sides of the column they supported. Due to the loads involved, these pads were typically grillage foundations made of an assemblage of beams or rods, encased in concrete, later to be defined in the London Building Acts (Amendment) Act, 1939 (the 1939 Act) as special foundations.

If an external wall of a framed building were to be built close to the boundary or as a party wall, the pad foundations for its columns would need to project onto the adjacent land². If the wall were to be built on the line

of junction, there would be a statutory right to project the pads onto the adjacent land. The areas taken up by these foundations came to be of concern when development of adjacent land was found to be hindered by them.

GRILLAGE. A grating or structure of timbers laid horizontally side by side and crossed by others, and so on for several thicknesses, the whole being intended to carry a foundation on



GRILLAGE OF STEEL I BEAMS, WITH TWO IRON BOX-COLUMNS AND THEIR SHOES.

piling or on soil not otherwise fit to receive it. By immediate transference to new material, a similar structure made of bars of iron or steel, such as rolled rails.

A typical grillage foundation³.

The Advisory Committee on the Amendment of the London Building Act

The London Building Acts were local acts proposed and administered by the Metropolitan Board of Works (the MBW) until 1889, by the London County Council (the LCC) until 1965, and finally by the Greater London Council (the GLC) until its demise.

The 1930 Act, as previous legislation, assumed foundations and walls to be continuous, restricting heights and requiring footings accordingly. The increasingly popular steel framed buildings had to be granted dispensations from the restrictions and requirements of the legislation on a case by case basis.

In 1931 the LCC “decided that an advisory committee should be appointed to consider and report to the Council as to any necessary amendments of the London Building Act, 1930”.⁴ The

Advisory Committee on the Amendment of the London Building Act was duly set up and made its final report with recommendations in 1935. This was followed by a consultation process and the recommendations then formed the basis of the amendments introduced by the 1939 Act.

The Committee found, amongst other things, that *“problems ... have arisen as to the concentration of loads on columns and grillages as compared with loading distributed along the area of foundations of a party wall”*⁵.

The rules for the design of iron and steel framed buildings in the 1909 Act were repeated in the 1930 Act and hence were even more archaic by that time having been not even up to date in 1909. Waivers were available to permit the use of more up-to-date methods of design for framed buildings and these were formalised in the Bye-laws that were permitted by the 1935 Amendment Act (one of the first results of recommendations made by the Advisory Committee) the Bye-laws eventually coming into force in May 1938. The 1935 Amendment Act also formalised the procedure for obtaining waivers.

The Committee's Proposals

The Committee's proposals included that *“As regards grillage foundations, we recommend the inclusion among the rights of building owners of a power to place on the land of the adjoining owner, below the level of the lowest floor of his building, grillage foundations to support the columns of the building owner's building, but we consider that the power should not be exercisable without the previous consent in writing of the adjoining owner and that compensation for any damage occasioned should be paid.”*

The Committee considered that whilst grillage foundations placed beneath the lowest part of adjoining owners' buildings in order to support staunchions (sic) were a good thing, they should be subject to consent so as to avoid causing damage to the adjoining owner's redevelopment interests.

Under s113 of the 1930 Act, when erecting a new wall on the line of junction, the building owner had the right *“to place on the land of the adjoining owner below the level of the lowest floor the projecting footings of the external wall with concrete or other solid substructure thereunder”*.

The committee proposed⁶ that grillage foundations be restricted under that section to prevent them being placed on the land of the adjoining owner without his

written consent (s113 is now s1 of the Party Wall etc Act, 1996 (the 1996 Act)).

The committee also proposed that, under s114, grillage foundations be permitted under a party wall for columns of the building owner. If the foundations were to project further than the footings or foundation concrete of an ordinary wall, they would be restricted as under s113 (s114 is now s2 of the 1996 Act). It is reasonable to conclude that, consistent with the enabling philosophy of the Act, the Committee only wanted to restrict the work so as not to interfere with an adjoining owner's right to develop.

Under s115, the adjoining owner was then to be given the right to require those foundations to be placed at a greater depth or made sufficiently strong to bear the weight to be carried by the columns of any building which he himself might intend to erect. s116 would require sufficient detail to be given with the notice to enable the adjoining owner to consider the effect of the grillage foundations and whether to require their modification.

The Consultation

With regard to the proposal to permit grillage foundations for the building owner's columns under a party wall projecting no more than would an ordinary footing and foundation, the comments received during consultation on the final report and minuted as recommendations and observations on 19 July 1938⁷, included,

“We do not recommend the adoption of the recommendations of the Advisory Committee. We are advised that to permit a ‘building owner’ to project steel grillages on to an adjoining site might have the result of seriously interfering with the redevelopment of that site at a later date. We, therefore, consider that an adjoining owner should have the power to veto such projections on to his site. We consider, therefore, that the section should be amended to provide that grillage foundations for columns of the building of the building owner should not, without the consent of the adjoining owner, be constructed under a party wall, on the land of the adjoining owner.”

Grillage and Special Foundations

In the 1939 Act, the term ‘grillage foundations’, used in both the Committee's report and the consultation paper, was replaced by the more general term ‘special foundations’.

The proposal that special foundations be >>

permitted under a party wall as a specific right at s114 of the 1930 Act (now s2 of the 1996 Act) was not included in the 1939 Act. However, somewhat anomalously, the restrictions consequential to that proposed right were included at s115 and s116, and are now s3(1)(b) and s4(i)(b)(ii) of the 1996 Act.

The 1939 Act

The 1939 Act, at s45(2), restricted the placing of special foundations on adjoining owners' land by removing the right to project such foundations without consent.

The right to project foundations and footings onto adjoining land under s45 followed the long-standing requirement that walls be constructed with equally projecting footings either side with foundations under, except where the line of junction was already built upon.⁸ That requirement continued essentially unaffected by the 1939 Act, although it no longer applies due to changes in construction methods.

S56(5) gave the adjoining owner the right to have any increased costs of his erection of any building or structure repaid by the building owner, following his having given consent to special foundations.

The introduction of the 1996 Act

Until the 1996 Act, works notifiable under party wall legislation had developed in three distinct areas, referred to in the 1996 Act as 'new building on the line of junction' (s1), 'repair etc of a party wall' (s2), and 'adjacent excavation and construction' (s6).

Each area had its own set of requirements as to the giving of notice, the consequential rights and obligations, and whether written consent or an award was necessary.

Building a new wall on the line of junction but wholly on the land of the building owner brought the right to place footings and foundations on the land of the adjoining owner. This was due to the requirement mentioned above to project footings. It was only here that the right to place projecting footings and foundations, and hence the restriction on not placing special foundations without consent, on land of an adjoining owner occurred.

Excavation work on the land of the building owner but to a specified greater depth than, and within specified distances of, foundations of an adjoining owner's building or structure brought the right to underpin or otherwise safeguard those foundations, again on the land of the

adjoining owner. This was in order to protect existing buildings regardless of whether they had acquired any right of support from the building owner's land.

Carrying out any work that would fundamentally affect the rights of the adjoining owner, such as erecting a new party wall, or placing special foundations on his land, required his written consent.

Carrying out work to a party structure, a shared resource, was subject to consent or award.

The right to do work on adjoining land was subject to payment of compensation, whereas the rights to do work to a party structure were subject only to making good.

In the 1996 Act, when the provisions of Part VI of the 1939 Act were extended to cover England and Wales, there was an attempt at rationalisation. The specific compensation requirements were extracted from their separate areas and applied to the three areas of notifiable works mentioned above. The restriction on special foundations on the land of the adjoining owner was extended similarly.

The conditions relating to party structures were applied to excavation works, thereby making excavation and construction on one's own land within specified distances etc subject to consent or award, whereas previously it had only been the consequent right of underpinning or safeguarding foundations on adjoining land that had been subject to control, and then only in the event of actual dispute.

The Present Difficulty

The present difficulty with the special foundations restrictions of the 1996 Act is not the restriction of grillage foundations adversely affecting the redevelopment of adjoining land but the perception that that can be extended to the underpinning of party walls in basement construction.

The generalisation of the restriction on the placing of special foundations on the land of the adjoining owner has led to the belief that the restriction will also apply to underpinning a party wall in reinforced concrete. I have explained elsewhere how underpinning a party wall does not in itself constitute a foundation, but the perception often remains that underpinning will always constitute a foundation, which if reinforced will be a special foundation.

The consequence of the application of the restriction on special foundations on the land of the adjoining owner

to underpinning work is unnecessary cost and delay to the building owner at no benefit to the adjoining owner.

Surveyors appointed for both parties, engineers, and often also lawyers, spend additional time discussing and negotiating the design, construction method of, and consent for, reinforced concrete underpinning of party walls. This is almost always at the sole cost of the building owner.

The adjoining owner has nothing to gain from this. It is in his interest for the underpinning to be reinforced so it will be better able to support his land and building. It is also in his interest that the underpinning takes up as little space as practicable should he later want to make use of the underpinning for his own basement. The compensation available if he were to grant consent to special foundations on his land under the Act is no greater than would flow from any work carried out under the Act. Also, there is always the risk that he may not recover all his costs from the building owner, and he may even end up having to pay some of the building owner's costs.

Conclusion

Since the 1939 Act, the use of special foundations as originally envisaged has ceased. Since the middle of the twentieth century, all large framed structures for high rise buildings are founded on systems of piles and ground beams, which although special foundations in themselves, can always be contained within the footprint of the building. Low rise buildings are typically founded on mass concrete trench fill foundations which, due to their depth, can usually be constructed eccentrically. In neither case is there any necessity to project onto the land of the adjoining owner.

It is clear that the special foundation restrictions were included in the 1939 Act to restrict the placing of enormous grillage pad foundations on adjoining land. They were then simply continued into the 1996 Act.

Special foundations did not become an issue again until nearly twenty years later with the advent of basement construction, now so popular in central London.

The modification of the right in the 1996 Act, s1(6), "*to place below the level of the land of the adjoining owner such projecting footings and foundations as are necessary for the construction of the wall*" effectively prevented any foundations, special or otherwise, ever being placed on adjoining land as the necessity could not be justified.

The original concern that the adjoining owner's future redevelopment rights be protected when a building owner exercised his right to place foundations on the adjoining land, contrary to its initial purpose, has often been misappropriated so as to hinder development even where the proposals would have no adverse effect on the adjoining land. 

David Bowden BSc FRICS MSL ACI Arb

Published *Whispers* issue 31⁹

¹ These buildings preceded the LCC General Powers Act 1909 which for the first time included rules for the design of framed buildings in iron and steel and the power to make regulations for reinforced concrete. Those outside London were of course not subject to the London Acts.

² This problem was originally often avoided by the use of external load bearing masonry with internal frames, or, as in the case of the Ritz by cantilevering.

³ A dictionary of architecture and building : biographical, historical, and descriptive, Sturgis, Russell, 1902, Macmillan, New York

⁴ Report of the Advisory Committee on the Amendment of the London Building Act, 1930, London County Council, London, 1935, Introduction

⁵ Report of the Advisory Committee, page 13

⁶ Report of the Advisory Committee, page 33

⁷ Recommendations & Observations on Advisory Committee recommendations by the Planning & Building Regulations Committee in July 1938

⁸ 1894 Act, Schedule 1, 9

Unless with the consent of the Council every wall other than a wall carried on a bressummer shall have footings:

The projection of the bottom of the footing of every wall on each side of the wall shall be at least equal to one-half of the thickness of the wall at its base, unless an adjoining wall interferes, in which case the projection may be omitted where that wall adjoins, and the diminution of the footing of every wall shall be formed in regular offsets, and the height from the bottom of such footing to the base of the wall shall be at the least equal to two-thirds of the thickness of the wall at its base.

⁹ (First published in the Solicitors Journal 7 July 2015 and amended 14 July 2015 following comments by Lawrence Hurst)

Special foundations: what foundations, walls, and underpinning really are

DAVID BOWDEN

Abstract

IN THIS PAPER DAVID BOWDEN CONSIDERS what foundations, walls, and underpinning really are. He establishes that underpinning is not a foundation and that reinforced concrete underpinning of a party wall as part of a basement extension produces in itself neither a foundation nor a special foundation.

He concludes that special foundations have had their day and all reference to them should be repealed along with the right to place any footings and foundations on the land of an adjoining owner.

Mole's new extension

Once upon a time, Mole had his friends round for tea. He was showing off his new basement extension to Ratty.

Toad, (pointing at the reinforced concrete underpinning):

"You ought not to have done that."

Badger, (agreeing with his friend and trying his best to appear clever):

"Now, I do not believe you wanted to do that, did you? it's a special foundation." Mole:

"The hell it is Badger, that's a wall! The foundation's underneath it." Ratty, (agreeing with Mole):

"Yes, I know a wall when I see one. Look, there are pictures hanging on it and everything."

Then came the Weasels from the Wild Wood and they said underpinning was always a foundation, never a wall, and as Mole had used reinforced concrete his was a special foundation. Mole should have got his adjoining owner's written consent first, and as he had not done so the Weasels advised that his new underpinning be dug up and his earth worm larders emptied¹.

Mole, (disconsolately):

"Oh my, oh my. What to do?"

Special foundations introduction

Special foundations have become an issue recently, mainly due to the increased construction of residential basements in Central London boroughs within a few miles of the river bank.

House owners often want more space and, being restricted above ground, extend downwards, frequently to the displeasure of their neighbours. Such basement extensions usually involve underpinning party walls.

People dislike basements being constructed next door for many reasons, including disturbance and fear of damage. Their concerns are increased by knowing that there might be burrowing underneath their houses, the extent of which is unknown and hidden from view.

It may be that the debate about special foundations simply flows from such anxieties.

Pyramus & Thisbe Club Guidance Note and alternative approaches

The Pyramus & Thisbe Guidance Note 12 says there are two views on special foundations, the first being that underpinning a party wall in reinforced concrete constitutes a special foundation, the second that underpinning a wall is raising it downwards and so not a foundation in itself.

In a recent Pyramus & Thisbe Club debate, ("Special Foundations: what they are and are not", 20 January 2015) the two main opposing views were expressed, essentially as in P&T Guidance Note 12:

The first approach was that underpinning a wall created a foundation, which if reinforced, would be a special foundation, and should part of it cross the boundary, the consent of the adjoining owner would be necessary. It was suggested that the underpinning could be done in two planes either side of the boundary, one reinforced and one not, thereby avoiding the necessity for consent otherwise required by the 1939² and 1996³ Acts.

The second was that special foundations had a meaning in engineering terms, that raising downwards was a valid idea, and that underpinning of a party wall would be a wall if it were intended to be used as such. Within this approach, the advantage of using reinforced concrete for underpinning a wall was also mentioned, that is, it would be thinner to the advantage of both parties.

It was also suggested that it would be better to simply advise an adjoining owner to consent to special foundations because he would then have a claim against the building owner under the 1996 Act, s11(10) for any increased cost they might cause him in the erection of any building or structure in the future.

Raising downwards

The legal fiction of raising downwards was introduced in *Standard Bank of British South America v Stokes* [1878] 9 ChD 68.

Under the 1855 Act⁴ there was no right to underpin a party wall, although there was a right to raise one, and also a right to take down and rebuild one. It would not have made sense if the wall were to have had to be taken down and rebuilt simply to make its bottom lower. This led to the law being stretched to permit underpinning of a party structure.

According to the late John Anstey, *“The judge asked himself: ‘Is it absolutely necessary to limit this (the right to raise a structure) to raising above ground?’ And answered himself: ‘I do not see the necessity’. He went on to say, somewhat obscurely as it seems to me, that if all the party structure was above ground, it must be raised above ground, but if some of it was below the surface, it could be raised downwards.”*

By the introduction of the right to underpin a party structure in the 1894 Act⁵ as *“a right to raise and underpin any party structure”* which continues in the 1996 Act as the right *“to underpin, thicken or raise a party structure”*, the necessity for the concept of raising downwards was removed.

However, it is kept on life support by those charmed by the belief that underpinning will always constitute a foundation. This may be because underpinning is more commonly associated with insurance paid subsidence remedial activity.

Walls, footings, foundations, and special foundations

There is no definition of “wall” in the 1996 Act nor in the previous acts. In the older ones a definition can be inferred from the context as they also included regulations regarding building works generally, as the Building Regulations do today. A wall has been defined as an enclosing element more than 70° from the horizontal.

From those older Acts we find that a wall was expected to be constructed of brick, to have footings projecting equally either side of specified widths, depths, and heights, and to be sitting on a foundation of either solid ground or artificially formed support resting on solid ground. Thicknesses of brickwork to walls and footings were specified dependent on height.

The 1844 Act,⁶ Schedule D, Part I, required that *“Every Footing must be built either of sound Bricks or of Stone, or of such Bricks and Stone together, laid in and with Mortar or Cement in such Manner as to produce solid Work.”*⁷

It follows that a footing is part of a wall, and that a foundation is whatever provides support to a wall, with its

footing, from the ground, either the ground itself or concrete, or other material laid onto the ground to take the load of the wall.

It is also clear from the old legislation where footings were a requirement, that a footing is the progressive widening of a wall to spread its load onto a foundation, and so not a foundation itself (cf 1844 Act, Schedule D, Part I).

As the 1996 Act concerns itself only with party wall matters and not general building regulations, there is no definition of underpinning in the Act, and nor is there of footing. However, the omission of statutory definition does not alter the meaning of the words.

The definition of “foundation” in the 1996 Act, s20, as in the 1939 Act, s44, is *“‘foundation’, in relation to a wall, means the solid ground or artificially formed support resting on solid ground on which the wall rests”*. Under the 1930 Act, this definition only applied to a wall having footings.

“Special foundations” are defined in the same acts as *“foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load”*.

Before 1939 there was no particular control of special foundations and the 1930 and 1894 Acts defined “foundation” as including a bressummer, but otherwise foundation has always been defined by reference to the solid ground on which the wall rests.

The origin of the special foundation restrictions and the report of the LCC Advisory Committee on the Amendment of the London Building Act 1930 is discussed in the addendum to this paper.

Underpinning

Underpinning is a process whereby a structure is provided with new lower level support from underneath, not necessarily a foundation. Whilst often undertaken to lower the level of a foundation to firmer ground, it is a process and not an entity in its own right: a verb not a noun.⁸

The right to underpin adjacent buildings, as opposed to party walls, is found in the 1996 Act, s6, and has existed from at least the 1844 Act, but only as a consequence of, and necessitated by, excavation of the land of the building owner. Since 1894 this right has been expressed in terms of underpinning or otherwise safeguarding the foundations of the adjoining building.⁹ Underpinning¹⁰ a foundation is to extend the foundation to a lower level and so would >>

constitute a foundation.

Underpinning a wall was to be done similarly to the construction of the wall itself in terms of dimensions and materials, to have proper footings, and to rest on a foundation. It was to be thicker than the original wall only if the additional height of wall so created required it. It was, therefore, clearly considered to be part of a wall and not a foundation.

Underpinning of a party wall can be done in brickwork, concrete, reinforced concrete, or any other suitable material. Nowadays, underpinning is almost always done in concrete, by excavating, casting, and dry-packing in a sequence of pins.

Underpinning of foundations often includes dowel rods to link the various pins, and underpinning of walls in basement construction is more commonly undertaken in reinforced concrete, often integral to the box forming the monocoque structure of the building owner's new basement. It is because of the necessity for retaining adjoining land that reinforced concrete is usually chosen for deep underpinning of a party wall. It is not to distribute load that the reinforcement is included in the concrete.

Underpinning a wall in concrete, instead of in the more traditional materials, does not make it a foundation any more than raising a wall in concrete would, since the only variable is the material.

The 1996 Act, s2, gives various rights including underpinning a party structure, a party fence wall, or an external wall which belongs to the building owner and is built against a party structure or party fence wall, and s6 gives the right to underpin the foundations of a building or structure of the adjoining owner. Neither expressly gives the right to place projecting foundations on the land of the adjoining owner.

There is a difference between a wall and a foundation.

Foundation is defined in the 1996 Act and, as before mentioned, is a supporting element enabling the load of the building or structure to be distributed over a sufficiently large area of ground to not exceed the load-bearing capacity of the ground and so avoid subsidence. A party wall is an enclosing or separating element in the vertical plane.

It follows that to extend a party wall downwards to enclose a basement, the right to underpin a party wall

would be invoked and the wall would be underpinned. The structure thus formed would be part of the party wall. It would probably act as a retaining wall to the adjacent ground, but it would not in itself be a foundation, it would have a foundation beneath it. This would not be a new foundation placed partly on the land of the adjoining owner, but simply a foundation replacing the existing at a lower level. So, even if it were a special foundation, consent would not be needed.

As the structure thus formed is a wall, both by execution of right under s2¹¹ and also by fact of its purpose, it cannot be a foundation and so cannot be a special foundation. The consent of the adjoining owner would therefore not be required to underpin a party wall in reinforced concrete (unless perhaps the underpinning were to be part of a box basement).

Concentration of load

Even if the reinforced concrete used for underpinning were somehow considered to be a foundation, the reinforcing bars could not make that foundation a special foundation because they are not employed "*for the purpose of distributing any load*". Instead, they are employed for the purpose of concentrating¹² the loads imposed horizontally by the retained ground of the adjoining land.

The reinforced concrete underpinning, as a retaining wall, concentrates the horizontal loads from adjoining land into a propping system, usually the floor slabs. The mechanism is much the same as above ground but acting horizontally rather than vertically.

Floors and beams in a framed building concentrate the vertical loads into columns. These loads are then transferred down through those columns to foundations for distribution to the ground. The distribution is done either through pad foundations spread over a large area or through piled foundation systems which take the loads to a great depth.

The loads from the building itself are neither concentrated nor distributed by the reinforced concrete of the underpinning but simply transferred through it. The reinforcement in reinforced concrete underpinning of a wall does not distribute any load.

Consent and repayment of additional costs

Underpinning a party wall in reinforced concrete will cause

less harm to an adjoining owner than underpinning in mass concrete. The wall will be less thick, whilst maintaining the duty of support of the adjoining land, and so, there will be less inconvenience, loss and damage.

Should the adjoining owner come to develop later, he will not be inconvenienced by the reinforcing element as it is under the party wall, not projecting onto his land. The reinforcement may become redundant if the adjoining earth is removed, but the reduced thickness of the work can only minimise the possibility of any increased cost to the adjoining owner.

Further, as it is not an overriding interest under the Land Registration Act 2002, the adjoining owner would lose any cost protection on first transfer of either property because the building owner's liability under the 1996 Act, s11(10), will not run with the land unless registered (an unlikely eventuality).

Thus any perceived advantage in consent to special foundations would be lost.

The 1996 Act, s1(6), gives the right *"to place below the level of the land of the adjoining owner such projecting footings and foundations as are necessary for the construction of the wall"* on the line of junction. However, special foundations can never be placed on the land of the adjoining owner without his consent in writing.

If he does not give his consent there is no right to place the special foundations on his land.¹³

If an adjoining owner does give his consent, then he gains the right to be repaid any additional costs of erecting a building or structure caused to him by the special foundations¹⁴. This is in addition to the compensation for any damage caused to his property in the placing of the foundations under s1(6)¹⁵ and the compensation for any loss or damage resulting to him by reason of any work executed in pursuance of the Act under s7(2)¹⁶, although in practice these heads of damage will overlap. The 1939 Act contained almost identical provisions.¹⁷

Notices and counternotices

Special foundations are controlled by the 1996 Act even when wholly on the land of the building owner, who is required, under s3(1)(b), when serving a party structure notice, to give *"plans, sections and details of construction of the special foundations together with reasonable particulars of the loads to be carried thereby"*.

The statutory definition of special foundations means that most reinforced concrete foundations, including piled foundation systems, constitute special foundations which, even if not to extend onto adjoining land must be included in any party structure notice. Many party structure notices for works including special foundations do not include such details, and are thus invalid.

If the special foundations are to be placed partly on the land of the adjoining owner and he consents to them, he can also serve a counter notice under s4(1)(b) requiring them to *"be placed at a specified greater depth than that proposed by the building owner; or be constructed of sufficient strength to bear the load to be carried by columns of any intended building of the adjoining owner or both"*.

Special foundations were originally reinforced pad foundations for columns of a framed structure. They were seriously large pieces of engineered structure, capable of relatively simple modification to support columns of an adjacent building, and their spread onto adjoining land needed to be controlled. With the advent of piled foundation systems in the nineteen sixties, the using of special foundations needing to project onto adjoining land has effectively ceased.

The requirement to give plans etc with the notice stems from the expectation that special foundations would likely be shared by adjacent buildings (see addendum on the origins of the special foundation restrictions).

Conclusion

The term "special foundations" is sometimes misconstrued to include projections from the face of a party wall, and as discussed above, the underpinning of a party wall.

The concept of special foundations has become outdated. Now an annoyance and hindrance rather than the simple safeguard originally intended, it should be laid to rest.

Walls are no longer required, and do not need, to have equally projecting footings and foundations. The right under the 1996 Act, s1(6), *"to place below the level of the land of the adjoining owner such projecting footings and foundations as are necessary for the construction of the wall"* is, therefore, no longer necessary and should be repealed. Without this right, there would be no need for the restriction on placing special foundations on adjoining land, and so all references to them in the 1996 Act¹⁸ should also be removed. >>



Summary

The salient points are:

- 1 raising downwards is a legal fiction outdated for over a century,
- 2 underpinning is the action of carrying out work to transfer support to a lower level, not a foundation in itself,
- 3 underpinning a wall in brick would not be considered a foundation, and using concrete (reinforced or otherwise) rather than brick will not make it one,
- 4 as a party wall can be constructed of reinforced concrete, so can underpinning or raising it be, above or below the ground,
- 5 even if underpinning were to be considered a foundation, any reinforcement could not make it a special foundation, it not being for the purpose of distributing any load but concentrating it,
- 6 the foundation to the underpinned party wall, being simply a replacement of the existing but at a lower level because of the underpinning, cannot be dependent on the adjoining owner's consent, even if it were a special foundation,
- 7 there is no realistic possibility of the costs of any new building or structure of the adjoining owner being increased by the existence of the reinforced underpinning of a party wall,

- 8 there is no genuine benefit to the adjoining owner in pretending that underpinning a party wall in reinforced concrete constitutes a special foundation so that consent can be given and a right to additional costs obtained, because that right will self-extinguish on first transfer and is in any event no better than his rights under s1(6) and s7(2),
- 9 most party structure notices for works involving reinforced concrete foundations on the land of the building owner, if they satisfy the definition of "special foundation" are invalid as they do not include the requisite details of those foundations, and
- 10 special foundations have had their day and should be done away with by simple repeal of the right to place below the level of the land of the adjoining owner such projecting footings and foundations as are necessary for the construction of the wall and all associated verbiage.

"Phew" said Mole, "That was a long read for a small furry."
 "I am so pleased I don't get to lose my extension
 and I can keep my earth worms after all." 🐹

David Bowden BSc FRICS MSL ACI Arb

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- ¹ Moles excavate larders off their living quarters in which to store earth worms for winter
- ² London Building Acts (Amendment) Act 1939
- ³ Party Wall etc Act 1996
- ⁴ Metropolitan Building Act 1855
- ⁵ London Building Act 1894
- ⁶ Metropolitan Building Act 1844
- ⁷ 1844 Act, Schedule D, Part 1
– RULES concerning WALLS of whatever kind. Foundations
With regard to the Foundations of Walls :–
Every external Wall, and every Party-Wall, and every Party-Fence-Wall, must be built upon a constructed Footing, based upon solid Ground, or upon other sufficient Foundation.
Footings
With regard to Footings of Walls, in reference to the Materials thereof, to the Width thereof, to the Height thereof above the Foundation, and to the Depth below the Surface :–
Materials
1. In reference to the Materials thereof :–
Every Footing must be built either of sound Bricks or of Stone, or of such Bricks and Stone together, laid in and with Mortar or Cement in such Manner as to produce solid Work.
- ⁸ Definitions from The American Heritage® Dictionary of the English Language, 4th Edition
transitive v. To support from below, as with props, girders, or masonry.
transitive v. To give support or substance to: “the public awareness that must underpin a sustained and concerted development effort for Africa and its youth” (Barber B. Conable).
from Wiktionary, Creative Commons Attribution/Share-Alike License v. To support from below with props or masonry.
v. To give support to; to corroborate.
from the GNU version of the Collaborative International Dictionary of English
transitive v. To lay stones, masonry, etc., under, as the sills of a building, on which it is to rest. transitive v. To support by some solid foundation; to place something underneath for support.
from The Century Dictionary and Cyclopedia
To pin or support underneath; place something under for support or foundation when a previous support is removed; underset; hence, figuratively, to support; prop.
from WordNet 3.0 Copyright 2006 by Princeton University. All rights reserved.
v. support with evidence or authority or make more certain or confirm
v. support from beneath
- ⁹ 1844 Act, sXXVIII,
THAT if it be necessary to excavate or dig out the Ground against the Wall of any adjoining Building for the Purpose of erecting a Wall thereon, or for any other Purpose, then it shall be lawful for the BuildingOwner and he is hereby entitled so to do, but upon condition that the said Building-Owner do at his own Costs shore up and underpin such Wall, or such Part thereof, to its full Thickness and to the full Depth of such Excavation, with good sound Stock Bricks and Tiles or Slates bedded in Cement, or with proper and sufficient Materials, such Underpinning to be done in a workmanlike and substantial Manner;
- ¹⁰ 1894 Act, Schedule 1, para 10,
The underpinning of walls and chimneys shall be built with brick or stone bedded in cement to the full thickness of the old wall or work, and with proper footings, or to an additional thickness if the

increased height of the wall so requires, and shall rest on the solid ground or on concrete, or on other solid substructure as a foundation, and the whole shall be executed to the satisfaction of the district surveyor.

- ¹¹ 1996 Act, s2(2)(a)
- ¹² Thanks to Lawrance Hurst and Andrew Schofield for suggesting this point.
- ¹³ 1996 Act, s7, (4)
Nothing in this Act shall authorise the building owner to place special foundations on land of an adjoining owner without his previous consent in writing.
- ¹⁴ 1996 Act, s11,(10)
Where-
A. consent in writing has been given to the construction of special foundations on land of an adjoining owner; and
B. the adjoining owner erects any building or structure and its cost is found to be increased by reason of the existence of the said foundations,
the owner of the building to which the said foundations belong shall, on receiving an account with any necessary invoices and other supporting documents within the period of two months beginning with the day of the completion of the work by the adjoining owner, repay to the adjoining owner so much of the cost as is due to the existence of the said foundations.
- ¹⁵ 1996 Act, s1, (7)
Where the building owner builds a wall wholly on his own land in accordance with subsection (4) or (5) he shall do so at his own expense and shall compensate any adjoining owner and any adjoining occupier for any damage to his property occasioned by-
A. the building of the wall;
B. the placing of any footings or foundations placed in accordance with subsection (6).
- ¹⁶ 1996 Act, s7, (2)
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.
- ¹⁷ 1939 Act, s1, (c)
Where in either of the cases described in paragraphs (a) and (b) of this subsection the building owner builds a wall on his own land he shall have a right at his own expense at any time after the expiration of one month but not exceeding six months from the service of the notice to place on land of the adjoining owner below the level of such land any projecting footings and foundation making compensation to the adjoining owner or the adjoining occupier or both of them for any damage occasioned thereby the amount of the compensation in the event of difference to be determined in the manner provided in this Part of this act.
1939 Act, s56, (5)
Where in pursuance of section 45 (Rights of owners of adjoining lands where junction line not built on) or the said section 46 of this consent in writing has been given to the construction of special foundations on ‘land of an adjoining owner, then if the adjoining owner erects any building or structure and its cost is found to be increased by reason of the existence of the said foundations the owner of the building to which the said foundations belong shall on receiving an account with any necessary vouchers within two months after the completion of the work by the adjoining owner repay to the adjoining owner so much of the cost as due to the existence of the said foundations.
- ¹⁸ s3(1)(b), s4(1)(b), s7(4), s11(10), and s20

The loneliness of the adjoining occupier

DAVID MOON

IS THE ADJOINING OCCUPIER AS LONELY and friendless as the title of this article suggests? I will follow the adjoining occupier through the Party Wall etc. Act 1996 looking out for the rights and remedies offered. For my present purposes and for clarity, I distinguish here an adjoining owner who also occupies the adjoining property from a person who occupies an adjoining property owned by another, whose only standing is as an occupier. This is our creature. Certainly the party wall practitioner is seldom acquainted with the adjoining occupier outside the context of making appointments to take schedules. On the face of it, the role of the adjoining occupier is very limited. He or she does not figure in the multiple provisions in the Act for the giving of notice of a building owner's intended works (but see below). For the most part there is a sense of inferiority about the position of an adjoining occupier compared to that of an adjoining owner. Conventional wisdom has it that he falls into a class of person not entitled to representation by appointing a surveyor. An adjoining occupier must (following the premise of this article) necessarily be a person excluded from 'ownership' as defined but does at least have a definition to cling to in section 20; "*adjoining owner*" and "*adjoining occupier*" respectively mean any owner and any occupier of land, buildings, storeys or rooms adjoining those of the building owner and for the purposes only of section 6 within the distances specified in that section.

Where does the adjoining occupier figure in the Act? We find him first in section 1(7) where he is entitled to be compensated for any damage the building of a wall on the line of junction or placement of any associated necessary foundation below the level of the land of an adjoining owner may cause to him. In section 1(8); a surprising entrance to centre stage, he is a potential party to a dispute where section 10 is invoked to determine matters arising under section 1. Here, a dispute must be actual, there being no provision for a deemed dispute in relation to work undertaken under section 1. Plainly an adjoining occupier can rely on section 10 if we take section 1(8) seriously. Wait on though; where in section 10 does he appear? Nowhere. Section 10(1) starts promisingly enough with; "*Where a dispute arises.....*" but then disappoints the adjoining occupier by continuing "*between a building owner and an adjoining owner....*" Left out in the cold. But section 1(8) must surely stand. It cannot be disregarded. Does this

mean that every adjoining occupier must have an adjoining owner as his proxy when a dispute arises?

The adjoining occupier does not reappear yet awhile but I make a brief diversion to mention the obligation on a building owner to make good damage occasioned by the work.

In sections 2(3)(a), 2(4)(a) and 2(5) the building owner's rights are exercised subject to "*making good all damage occasioned to the adjoining premises or to their internal furnishings and decorations.*" The adjoining occupier does not figure here expressly but internal furnishings are likely to be the province of an adjoining occupier and quite possibly decorations as well. His ghostly presence is felt but without active participation. Is the adjoining owner once again his proxy?

There seems little point in dwelling on section 3. We know that an adjoining occupier is not entitled to notice of a building owner's intention to exercise rights under section 2. This was mentioned in my opening paragraph. The real scholars of the Act will now be on their feet shouting in unison, "What about section 3(3)(a)?" It is just one of those provisions most of us do not register in our daily application of the Act; "*Nothing in this section shall(a) prevent a building owner from exercising with the consent in writing of the adjoining owners and of the adjoining occupiers any right conferred on him by section 2.*" Who knew? Here is real power over his destiny. What happens if the adjoining occupier does not consent in writing where the adjoining owner does? In the absence of universal consent, it seems there must be a dispute, deemed or otherwise, obliging the owners to proceed to the appointment of surveyors. This is not wholly in sympathy with section 5 however, where it is only the adjoining owner who is called upon to consent within 14 days if a deemed dispute is to be avoided. His moment in the sun over, our adjoining occupier now retires into the shadows once more. He is no doubt as confused as the rest of us and wondering about the effect of his failure to return a written consent to the building owner.

Our adjoining occupier almost takes a breather in section 6 but he pops up at the very end in section 6(10) where he is safeguarded jointly with the adjoining owner from any injury by reason of work (of adjacent excavation) executed by the building owner.

Section 7 of the Act represents the high point for the adjoining occupier. By virtue of section 7(1) he must ➤➤



not be unnecessarily inconvenienced. Under section 7(2) he is entitled to be compensated for any loss or damage resulting to him “....by reason of any work executed in pursuance of this Act.” Section 7(3) requires a building owner where he lays open any part of the adjoining land or building, to install temporary works for the security of the adjoining occupier.

And so to section 8. Our adjoining occupier does not swim into focus sharply until section 8(3) although section 8(1) permits the removal of furniture and fittings which are probably the property of the adjoining occupier. Section 8(2) authorises forced entry in the company of a constable. If there is an adjoining occupier these measures affect him.

Section 8(3) brings some relief with the requirement for notice of a request for entry by a building owner, his servants and workmen to be served on an occupier as well as an owner. The same stipulation is made in section 8(5) where an appointed surveyor requires access. I will jump ahead at this point because it is convenient to address the adjoining occupier’s potential criminality under section 16, associated with the rights of access conferred under section 8. A refusal by an occupier to allow access is an offence liable on summary conviction to a fine (section 16(3)). The refusal must be in light of knowledge or reasonable belief that the person seeking to exercise a right under section 8 is entitled to do so. The penalties imposed by section 16 are broadened to “occupier” which would include an owner in occupation and even further by section 16(2) to a “person” hindering or obstructing the process. The term “occupier” is not defined in section 20. I suggest it is broader than “adjoining occupier” and means anyone in occupation which would include (rather obviously) an “owner” in occupation or (less obviously) a builder in possession of a building site under a building contract. Would a squatter count as an occupier in this context and be thus entitled to notice? Section 8(3) refers to “occupier” not “adjoining occupier”, assuming as I have that subtle differences apply. With this in mind, I believe a squatter qualifies. For an offence to be committed, it must be in the knowledge or reasonable belief of a person’s entitlement to access which at least implies that a notice was given.

Section 10 is altogether a disappointment for the adjoining occupier. In spite of the various entitlements to be compensated and the many impositions endured thus far, the right to independent representation for the purpose of settling any dispute arising, does not exist. We have seen that while in section 1(8) there appears to be the promise of an adjoining occupier having a dispute determined in accordance with section 10, the dispute

resolution procedures outlined in that section are confined to disputes between a building owner and an adjoining owner. We cannot read into section 10 more than is written on the page. Just to rub it in, at section 10(10)(b) the duty of the surveyors to make an award is confined to disputes between the building owner and the adjoining owner. As we have seen, the promise in section 1(8) is not fulfilled in section 10. I believe the proper conclusion to be drawn is that an adjoining occupier does need an adjoining owner as his proxy to deal with any dispute arising for determination in accordance with section 10.

The adjoining occupier takes his last bow in section 11(6). This deals with the consequences of a building owner exercising the right in section 2(2)(e) to rebuild a party wall and where adjoining premises are laid open and “.....a fair allowance in respect of disturbance and inconvenience shall be paid by the building owner to the adjoining owner or occupier.” The fair allowance is distinguished from compensation and is understood to be a matter agreed before rather than after, the event.

Although section 11(6) is the last substantive reference to an occupier, there is one further point of interest to the adjoining occupier watcher. Section 15 deals with the service of notices and in section 15(2)(a), permits service on an owner of premises by addressing the notice to “the owner” and delivering it to a person on the premises or if nobody is there to accept it, fixing it to a conspicuous part of the premises. This method does not extend to a notice to be served on an adjoining occupier. This might be important when dealing with a request for access under sections 8(1) or 8(5).

My review of the adjoining occupier’s journey through the Act is complete. Out of curiosity I looked at the preceding legislation, the London Building Acts (Amendment) Act 1939. I wondered whether the adjoining occupier’s lot had improved over the intervening 57 years. It has not. There has even been a modest reduction in an adjoining occupier’s entitlement. The current Act offers compensation under section 7(2) for “loss or damage” whereas the 1939 Act under section 50(2)(d) also offered compensation for “inconvenience”.

Answering the question posed at the very beginning of this article; yes, the adjoining occupier is a lonely figure. Is he friendless? Perhaps not but he needs an adjoining owner to assist him if ever he finds himself in a dispute .

David Moon Dip BS FRICS FPTS (Retd)

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What duties do party wall surveyors owe and to whom?

ANGELA GREGSON



THE ROLE OF A PARTY WALL SURVEYOR IS a unique one. During the course of a surveyor's retainer the duties placed on him change.

When a surveyor is first appointed, his appointment is a straightforward one. It is based on the contract between the surveyor and his appointing owner and on the common law duty of care that arises between the surveyor and his appointing owner. He must act with the reasonable skill and care which could be reasonably be expected of a competent party wall surveyor. Therefore, if he, for example, fails to ensure that a notice has been served on the correct party, he may be liable to his client in damages.

Matters become more complicated once a party wall surveyor is appointed or selected pursuant to Section 10 of the Act. Once appointed under the Act, in addition to his duties to his client, the surveyor also has a statutory duty to resolve any actual or deemed dispute pursuant to Section 10. Those duties must also be exercised with reasonable care and skill.

There is some guidance in case law on the duties of party wall surveyors. In *Longmire -v- Maldura* (unreported 29 January 2015) HHJ Bailey at the Central London County Court held that surveyors appointed under the Act hold a quasi-judicial function and as such they cannot delegate that function to others, even to other surveyors in their own practices. It is the appointed surveyor who must sign the award. This emphasises the fact that the appointment of a party wall surveyor under the Act is personal to him and is not an appointment of his company.

Further helpful guidance on this point was given by HHJ Bailey in *Barberini v Stancati* (unreported 2016) where he stated, "... the decision making involved in an award cannot be delegated ... However, any work that is necessary to enable the decision can be delegated. I refer to the condition survey, engineering calculations, drawings and matters of that sort ..." Therefore, in this regard, the duties of party wall surveyors are quite clear; they may delegate the fact-finding part of their role, but they must not delegate any of their quasi-judicial functions.

It is generally accepted that in their role as party wall surveyors, the surveyors perform a quasi – judicial function. In *Mills -v- Savage* (unreported 2016), HHJ Bailey stated:

"...party wall surveyors are exercising a quasi-arbitral function. They are bound by the rules of natural justice. It is axiomatic that in considering and making an award a party wall surveyor, and this must include the third surveyor, must enable the parties to make submissions if they wish and must give due considerations to any submissions made".

What are the rules of natural justice?

The rules of natural justice are rules of fair play, originally developed by the courts of equity to control the decisions of inferior courts and then gradually extended (particularly in the 20th century) to apply equally to the decisions of administrative and domestic tribunals and of any authority exercising an administrative power that affects a person's status, rights, or liabilities. Any decision reached in contravention of natural justice is void as *ultra vires* (beyond powers). There are two principal rules:

1 *nemo iudex in causa sua* (or *in propria causa*)

The rule against bias, i.e. against departure from the standard of even-handed justice required of those who occupy judicial office. No man may be a judge in his own cause. This means that any decision, however fair it may seem, is invalid if made by a person with any financial or other interest in the outcome or any known bias that might have affected his impartiality

(*R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No 2) [1999] 2 WLR 272 (HL); *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357; *Davidson v Scottish Ministers* [2004] UKHL 34, [2005] SC 7).

2 *audi alteram partem*

hear the other side. A decision cannot stand unless the person directly affected by it was given a fair opportunity both to state his case and to know and answer to the other side's case

(*R v Chief Constable of North Wales Police, ex p Evans* [1982] 1 WLR 1155 (HL); *R v Army Board of the Defence Council, ex p Anderson* [1992] QB 169; *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 (HL)).

The rules of natural justice provide a minimum standard of procedural fairness. In the context of the appointment of party wall surveyors, the rule of natural justice that surveyors will encounter most regularly is that of bias. It is my understanding that it is not unusual to appoint a family member or employee as one's party wall surveyor, or for party wall surveyors to appoint close friends as the third surveyor. In order to avoid the potential of an award being deemed void and unenforceable due to a breach of the rules of natural justice, all such appointments should be avoided if at all possible. Appointing owners should appoint independent surveyors where possible.

There are clear parallels between the duties owed by surveyors to their client and the duties owed by other professionals to their clients. In the case of *Barker -v- Baxendale Walker* [2017] EWCA Civ 2056, which was a case



in the Court of Appeal about a solicitor's negligence in relation to advice given on a tax avoidance scheme, *Asplin LJ* stated that the relevant test is whether a reasonably competent solicitor in the position of the Defendant firm would have given a specific warning given the "significant risk" that the interpretation of the law was wrong and that the structure adopted could be successfully challenged. The Court of Appeal held that, even where a solicitor's interpretation was likely to be correct, there could still be an obligation to draw to the client's attention the risk of an alternative interpretation, and that it could be negligent to fail to do so. She stated "the lawyer ... must evaluate the legal position and determine whether in all of the circumstances he should advise his client that there is a significant risk that the view that he has taken about the substantive matter in

question may be wrong". This case has particular relevance in the field of party wall law as there are many instances where more than one interpretation might legitimately be taken about the law. In cases where there may be a "significant risk" that the interpretation the party wall surveyor is giving to the law may be wrong, he is under a duty to provide a warning to the client about this. If he fails to do so, then he may be acting negligently.

The role of a party wall surveyor is a complicated one. Party wall surveyors should be careful to avoid the potential pitfalls. 

.....
Angela Gregson

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