Original Article

Is there a can of worms in your party wall?

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ABSTRACT This article investigates whether the Party Wall etc Act 1996 is the panacea that it was hoped to be. Past Acts have tended to concentrate on the London area and this has now been extended to include all of England and Wales. An extensive literature review has been undertaken, with the result that the Party Wall etc Act 1996 and its sections have been examined in close detail. There do appear to be quite a few areas where the 1996 Act is not comprehensive and recommendations are made where this is appropriate and applicable. Personal opinions from surveyors have been sought and their contribution, where relevant, has been utilised. Some members of the profession feel so strongly about the 1996 Act that they have deemed it necessary to lobby Parliament for improvements and amendments to it and this can only lead to general overall improvements for all concerned if carried out correctly and expert opinion is listened to and acted upon. The surveying industry is currently self-regulated and it would seem that as long as this self-regulation continues to work satisfactorily, the likelihood of further government intervention in the working life of a surveyor is lessened. Attention to and recommendations for improvement in all relevant laws relating to the building industry can only help raise the professional profile of surveyors to the mutual benefit of all concerned. Highlighting legal matters and points of law using well-reasoned arguments with the Government should contribute towards persuading them that the surveying profession is responsible for monitoring itself and any further regulation is unnecessary.

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INTRODUCTION

Anyone who has studied Latin may raise a wry smile to the following quote by Horace:

Nam tua res agitur paries cum proximus ardet.

Bickford-Smith and Sydenham (2004) translate this as:

For it is your business if your neighbour's party wall catches fire.

From the above it can be seen that disputes between neighbours over party walls have arisen since at least the time of Julius Caesar, himself a contemporary of Horace, dying in 44 BC (*Historic Figures*, 2005). Bickford-Smith and Sydenham (2004) go on to state that for the last 2000 years disputes over party walls have continued, especially after the Great Fire of London in 1666. A succession of London Building Acts culminated in that of 1939 and this owed a lot to its predecessor of 1894. The 1939 Act was extended to cover the whole of England and Wales by the Party Wall etc Act 1996 (henceforth referred to as the 1996 Act) and it is this Act that will be closely studied in this article. Before this, disputes outside London often had to be resolved by expensive litigation.

According to Hannaford and Stephens (2004), the 1996 Act applies to three types of structure: party walls, party fence walls and party structures and for those not fully conversant with the nuances of party walls, their description of the two types of party wall is apposite here:

- The first type is a wall that forms part of a building and stands on lands of different owners to a greater extent than the projection of any artificially formed support on which the wall rests.
- The second type of wall is defined as so much of a wall (not being the first type of wall) that separates buildings belonging to different owners.

Figures 1 and 2 are typical examples of party walls that can be easily found in most towns.

The Law Society opposed the Bill that preceded the 1996 Act on two grounds – those of cost and technicalities (Bickford-Smith and Sydenham, 2004) and it is this latter point of opposition by the Law Society that will be addressed in this article because it would appear to some that it has opened the proverbial can of worms and may not be the panacea that it was previously hoped to be.

Figure 1: Party wall, Leadmill Road, Sheffield (Author's own photograph).

Figure 2: Party wall, Leadmill Road, Sheffield (Author's own photograph).

LEARNING FROM HISTORY

The quote by Santayana that

Those who cannot learn from history are doomed to repeat it. (Lewis, 2009)

seems quite appropriate here when looking at the progress of English Law following the Great Fire of London in 1666. Bickford-Smith and Sydenham (2004) state that the 1667 Rebuilding Act, which was limited in application to the City of London, made no provision for the demolition or alteration of party walls. Interestingly, during the hundreds of years since the Great Fire of London, successive laws concentrated on problems that may arise in London. The 'London Building Act' of 1774 (as it was unofficially known) was succeeded by the Metropolitan Building Act 1855, the London Building Act 1894, the London Building Act 1930 and the London Building Acts (Amended) Act 1939, before the 1996 Act (Chynoweth, 2003). Having looked at various points of Law that have arisen from the above acts, it could be said that each succeeding Act seeks to 'fine-tune' the previous Act, ironing out anomalies and making it more equitable. As to how successful the 1996 Act has been is open to debate. Studying the available current literature often provides the words 'unclear', 'ambiguity' and 'omission', and these demonstrate to the reader that the 1996 Act is far from being the definitive work that it was hoped to be and it is not an unreasonable expectation that future Acts or Amendments will eliminate the problems that exist with it in its present form.

KEEPING NEPOTISM IN THE FAMILY

The London Building Act (Amended) Acts 1939 (according to Anstey, 2007) tells us that anyone can be a party wall surveyor. Members of the building profession may be surprised to discover that North (2005) informs the reader that the term 'surveyor' is not a protected one, unlike the term 'architect'. As a result of this anomaly, no one is precluded from being a party wall surveyor. Indeed, Anstey (2007) jokes that a grandson can be appointed to the post of party wall surveyor, if one is determined upon such gross nepotism. The 1996 Act did not seek to close this loophole completely, but what it did do though was to allow, by virtue of section 20 (1) the appointment of:

any person not being a party to the matter.

This still allowed any family member to act as surveyor, should they so wish (North, 2005). Anon (1997) points out that an architect may be appointed as a party wall surveyor, although it does admit that there may be a conflict of interest if the Architect is already providing a client with normal architectural services.

WHERE DOES IT GO WRONG?

Followers of Law in England and Wales will be experienced in how each successive, related law aims to improve on its predecessor. To a certain extent this has happened with the 1996 Act, but there are quite a few places where it could, in the Author's opinion, be improved on even more.

One perceived flaw in the 1996 Act is that the cost of producing an award in relation to the cost of the works can be disproportionate. An example given in North (2005) is when the owner of a small terraced house (the building owner) in a small provincial town wants to carry out an improvement to his property that affects both his neighbours (the adjoining owners). North goes on to tell us that, even with moderation being shown in the charges, the cost of paying three different surveyors could be ridiculously high. In this situation, the appointment of an agreed surveyor would reduce these costs significantly. North also says that several people are working on a method of imposing the 'Agreed Surveyor' system on small works and also that if anyone comes up with a good method, steps will be taken to try to bring it into force by legislation. Whether the average homeowner will take kindly to having a surveyor imposed upon him rather than using one of his own choosing will remain to be seen. Sometimes though, a sensible discussion with one's neighbour may be all that is needed to save the need for surveyors to be brought in, with all of their associated costs.

The matter of impartiality can raise its head when dealing with the 1996 Act and North (2005) warns that it is needed as a surveyor is acting as an arbitrator, not as an agent. This is perhaps a distinction that the client may not fully understand or appreciate; a full explanation to the building owner and the adjoining owner of exactly what duties the surveyor has at a very early stage of being commissioned may well prevent any misunderstanding and unpleasantness later on in the proceedings should a dispute arise. Although it may be a difficult task, to properly fulfil their function under the 1996 Act the surveyors involved must work together to settle matters (amicably or not).

A small, but easy to overlook part of the 1996 Act is, according to North (2005), where the name of the third surveyor has not been agreed *in writing*. While this may appear to be a minor point and to some, unnecessarily strict, if the name has not been agreed in writing, but merely verbally over the telephone, problems can arise at a later date where the third surveyor (if not in name, officially) may claim not to be able to deal with the matter. It could even be said that the other surveyor should acknowledge the selection of the third surveyor, if the 'belt and braces' approach is being utilised.

A SECOND OPINION

North (2005) is not alone in putting his feelings about the 1996 Act into print – Bickford-Smith and Sydenham (2004) even go so far as to say that the Act is:

... full of unnecessary infelicities, inconsistencies, misconceptions and plain errors ...

They go on to report that the Pyramus and Thisbe Club, a nationwide group of surveyors with an interest in party walls has formed a working party to cure perceived shortcomings in the 1996 Act and the proposals are being considered by the Office of the Deputy Prime

Minister. The advice from the Pyramus and Thisbe Club to the Government is also reported by Bizzey (2010). These, together with the suggestions that Bickford-Smith and Sydenham (2004) provide, may well be included in a revision of the 1996 Act or even its eventual successor. It can be reasonably claimed that recommendations for improvements to the 1996 Act by the surveying profession to the Government augments the professionalism of the profession itself while simultaneously helping negate the need for excessive government-led legislation. Until a suitable replacement for the 1996 Act is available, it may be up to the Courts to decide on points of law as they arise (Hannaford and Stephens, 2004). The example they give regards security from a building owner as they state that there is no limit on the circumstances in which security may be required from a building owner. They point out that the 1996 Act says that under section 12 (1) the security is to be given before the building owner begins any work. It does not spell out that the building owner may not start work without providing the agreed or determined security and an award requiring security should make this clear.

WHEN IS A WALL NOT A WALL?

According to Bickford-Smith and Sydenham (2004), [even] the use of the word ‘wall’ can cause confusion in the 1996 Act. They claim that although a number of expressions are employed that appear to be used in a technical way that does not command immediate comprehension, they are not defined and they have to be deduced from their context. This might come as somewhat of a surprise to the reader, especially as the word ‘wall’ appears in the title of the 1996 Act. Examples that Bickford-Smith and Sydenham use include among others:

- wall
- fence wall
- external wall
- boundary wall

With something as basic as a lack of definition of such an important word as ‘wall’, with reference to the 1996 Act, a casual (albeit somewhat experienced) observer may begin to wonder, with a certain level of justification, just how watertight the Act is and what other problems and their ramifications lay below the surface, only to be exposed under closer scrutiny. Bickford-Smith and Sydenham (2004) appear to excuse this lack of definition by explaining that the concept of a wall is so familiar but go on to ask if a fence can also be a wall, giving the Concise Oxford Dictionary definition. The four examples given above may, if only in a small way, lead to doubts as to the overall integrity of the 1996 Act and to questions regarding the completeness of the Act as a whole.

North (2005) points out that under the 1996 Act there is no stipulation to show the location of the adjoining owner’s property in relation to the site, saying that it would be a very good idea to do so. North hopes that such a stipulation might need a site plan showing both the adjoining owner’s and the building owner’s properties.

RETROSPECTIVE WORK AND PAYMENT OF EXPENSES

The statement by Jaram (2010, Chartered Building Surveyor, Mason Clark Associates, Hull. *Party Walls*. E-mail to the author, 8 March. Personal communication) that retrospective application and injunctions that follow when the adjoining owner has not followed the 1996 Act opens another can of worms and he feels quite strongly that this is another area where the 1996 Act is lacking and needs reform. Hannaford and Stephens (2004) point

out that the 1996 Act does not provide for what happens if either the building owner or the adjoining owner sell the property either after service of notice but before the award or after service of the award but before the works are completed. Uncertainty as to whether the new building owner or original building owner should make a claim for repayment of expenses under section 11 (11) is, according to Hannaford and Stephens (2004), another area of uncertainty resulting from the 1996 Act. Following on in this vein, they go on to also say that it is equally unclear as to whether it is the original or new adjoining owner who is liable to pay a contribution to the expenses of the original work.

These points, together with the other points made elsewhere contribute to the author's affirmation that the 1996 Act as it currently stands leaves a lot to be desired and a considerable amount of work needs to be done to make the Act more transparent and equitable.

CONCLUSION

It can be seen from the above that there is a lot of scope for the 1996 Act to be improved upon and not just regarding what could be seen as minor technicalities. Perceived major flaws as identified above are not currently contributing to the smooth running of home ownership and the intervening years since the introduction of the 1996 Act have demonstrated what a can of worms this Act is. It is largely up to the surveying and associated professions who have a vested interest in the matter to lobby for improvements, if not wholesale reform or amendment of the 1996 Act. It has been shown that the Office of the Deputy Prime Minister has been given details of some suggested improvements to the Act and it is hoped that successive Governments will listen carefully to well-reasoned arguments that can only be of benefit to the general public. Party wall issues can only increase in the United Kingdom as the population inexorably increases, if Government forecasts are proved to be accurate while the amount of land on which to build naturally remains a constant.

The duties of a surveyor in dealing with party wall matters should logically become more straightforward as successive laws become more refined and fine-tuned but the situation as it is at the moment appears to leave large gaps where disputes can arise, perhaps leading to expensive and prolonged litigation where the only winners may be the law firms dealing with the litigation process itself. As the surveying industry is self-regulated (a situation that is infinitely more effective than being regulated by a Government department, providing of course, that this self-regulation itself is carried out to the highest ethical and moral standards), the industry could be said to be duty-bound to continue to seek out loopholes, anomalies and omissions in the laws that are relevant to it. It is a continuing battle to stave off the threat of encroaching government intervention by regulation and further legislation on the surveying industry and to uphold the high level of esteem and respect that it rightly holds in the community and beyond.

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