Editorial

Philip Beck  FFPWS  BSc(Hons)  MRICS  RMaPS

A suggested theme for this editorial was ‘Managing people’s expectations’. Well, if you substitute ‘clients’ for ‘people’s’, this might make a suitable definition for business activity in general. Certainly, many of you will be familiar with that feeling of excitement / anticipation / dread (depending upon your mood) that builds as you field that first telephone call from a potential new client – questions such as ‘What’s involved?’, ‘How long will it take?’, ‘Is this enquiry within my field of expertise?’ or ‘How much is it worth?’ inevitably racing through your mind as the conversation unfolds. From that very first call, whether you are conscious of it or not, you are identifying the client’s expectations and endeavouring to ensure the service you deliver meets these – it’s what being a professional is all about.

Sometimes (most of the time?!), client’s expectations are unrealistic and cannot be achieved, at which point you must exercise tact and diplomacy – I am sure we have all been contacted by one side or the other in a ‘neighbours at war’ scenario, mistakenly believing they can use the Party Wall etc. Act 1996 as a means of frustrating their neighbour’s hideous development, when their objection at the planning stage has failed to bring about the desired result. Pause, deep breath, followed by a patient explanation of the purpose of the Act and the role of surveyors therein……etc…..etc.

As we live in an increasingly litigious society, with individuals being prepared in some extreme cases to shell out a small fortune in legal and professional costs just to prove a point or uphold a principle, the need for tact and diplomacy in managing clients’ expectations has never been greater. We attempt to forestall potential conflict by painstakingly setting out the scope and limitations of our services, backed up by terms and conditions of engagement packed with caveats and cover-alls drafted in suitably legalistic language. No doubt the recent judgment of the Supreme Court in Jones v Kaney, which sounded the death knell for immunity from prosecution of expert witnesses, has caused some to review the effectiveness with which they are ‘managing people’s expectations’ when they stand up in court.

But wait, you say, here you are basking on about terms and conditions of engagement, but there is no ‘contract’ between appointing owner and party wall surveyor. The ramifications of Justice Ramsey’s comments in Kaye v Lawrence, like the proverbial ripples on a pond, have spread throughout our industry and have been the cause of some debate amongst the Faculty’s Directors and at forum meetings up and down the land.

Central to the debate has been the question as to whether there is an implied duty on the part of the surveyor to inform the client of all the rights they have under the Act (such as the right to serve notice on the other party requiring security of expense). The implied duty arising from s.10(11) on surveyors to inform their appointing owners who has been selected as third surveyor is, hopefully, now generally appreciated and acted upon. But where do you stop? Can we rest on our laurels, secure in our statutory appointment, or should we genuinely be guarding against an aggrieved party taking a side action against us for negligence if we have failed to inform owners what their rights are under the Act from the outset? Do we have a duty to walk appointing owners through every section of the Act, or is it enough to distribute copies of the government’s red book and ask them to come back with any queries? Isn’t this another case of managing people’s expectations? Is there a case for ‘standard’ terms and conditions of engagement relating to party wall advice, with the owners’ respective rights under the Act put in simple layman’s terms? Perhaps.

I, for one, feel the pendulum has swung too far towards ‘backside covering’ and away from simply exercising professional judgment. That said, I expect that I shall too, in light of recent events, fall into line and review the information I impart to clients in my initial correspondence. For a more learned opinion on this issue, please refer to Stuart Frame’s article elsewhere within this newsletter.

Website

The Faculty’s website has recently been revamped and given a fresh look. Take a look at www.fpws.org.uk

New Forum Representative

We are pleased to announce that Graham Moran, MFPWS of GKS Building Consultants, Harpenden, Herts, has taken on the role of Forum Representative for the Northern Home Counties Region. Anybody wishing to attend Forum meetings in this area can contact Graham on 01593 346 940 or gmoran@gksbc.co.uk

The opinions expressed by writers of articles (even with pseudonyms) and letters appearing in this publication are those of the respective authors and do not necessarily represent those of The Faculty of Party Wall Surveyors.

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Regional Forum Dates

EAST ANGLIA & LONDON (East)
DATE: TBC
TIME: TBC
VENUE: TBC
CONTACT: Philip Antino 01245 492495 phil@apaproperty.com

EAST & WEST MIDLANDS
DATE: LATE MAY
TIME: TBC
VENUE: The Red Lion, Warstone Lane, Jewellery Quarter, Hockley, Birmingham, B18 6NG
CONTACT: James Jackson 0121 233 3380
r.windsorandcosurveyors@btconnect.com

LONDON (North)
DATE: THURSDAY 14th JULY 2011
TIME: TBC
VENUE: Kings Head Pub, Winchmore Hill, N21 1BB
CONTACT: Richard Garry 020 8886 0400 r@garry.uk.net

LONDON (South)
DATE: WEDNESDAY 12th OCTOBER 2011
TIME: TBC
VENUE: TBC
CONTACT: Simon Price 0207 736 7311
post@pricepartnership.co.uk

NORTH EAST
DATE: LATE JUNE/JULY 2011
TIME: TBC
VENUE: Leeds TBC
CONTACT: Neil Cunningham 0191 3891057
ndcassociates@btconnect.com

NORTHERN HOME COUNTIES
DATE: TBC
TIME: TBC
VENUE: TBC
CONTACT: Graham Moran 01582 346 940
gmoran@gksbc.co.uk

NORTH WEST
DATE: JULY 2011
TIME: TBC
VENUE: TBC
CONTACT: Graham Shone 0151 489 5440 graham@hspack.co.uk

SOUTH EAST
DATE: SEPTEMBER 2011
TIME: TBC
VENUE: Guildford TBC
CONTACT: Malcolm Lelliott 01483 416411
malcolm@mvl-architects.co.uk

SOUTH WEST
DATE: TUESDAY 12th JULY 2011
TIME: 6.30pm
VENUE: The University & Literary Club, 20 Berkeley Square, Clifton, Bristol, BS8 1HP
GUEST SPEAKER: TBC
CONTACT: Andrew McAllister 0117 944 4419
info@mcallisterassociates.co.uk

WALES
DATE: WEDNESDAY 22nd JUNE 2011
TIME: Noon—2pm
VENUE: RICS 7 St Andrew’s Place, Cardiff, CF10 3BE
GUEST SPEAKER: Stuart Frame, Barrister at Law, HonFFPWS
CONTACT: Philip Beck 01874 713133 admin@htbconsult.co.uk

Training Events

TWO-DAY COURSES
These courses are suitable for Surveyors, Engineers, Estate Managers, Property Developers, Architects and Architectural Technologists, Building Control Officers and all those with a responsibility for dealing with commercial or residential properties. They are for those that have little experience in party wall matters but would like to become proficient with the workings of the Party Wall etc. Act 1996.

On successful completion of the 2-day course delegates will be eligible to apply for full membership of the Faculty, subject to interview and completion of two party wall awards (one as an agreed surveyor and one as BO's Surveyor or AO's Surveyor) from a set of instructions and plans supplied with seminar paperwork.

NEXT COURSE:
London 28th & 29th June 2011
at CIAT Offices, City Road, London.

We are also looking to hold a two-day course in the North, probably in Leeds, and we invite anyone with an interest in attending to contact the Administration office.

Cost is £390. Please contact: Nicky Castell on 01424 883300 or by e-mail nicky@fpws.org.uk for further information.

A two-day ‘Certificate in Party Wall Studies’ course is run by the Association of Building Engineers (ABE) in conjunction with the Faculty at the following locations:

Northampton (ABE HQ) 3rd & 4th May 2011
Liverpool 7th & 8th Sept 2011
Brighton 9th & 10th Nov 2011

Please contact: Laura Sack or Sarah Dennison direct at the ABE for booking details, including their costs, on 01604 404121.

ONE-DAY COURSES

THIRD SURVEYOR COURSE
London 15th June 2011
at CIAT Offices, City Road, London.

Any member that has good experience can attend the course and if members are considering upgrading to fellow status, they should be aware that you have to attend this course to be considered. Cost is £225.

REFRESHER COURSE
London 11th May 2011
at CIAT Offices, City Road, London.

Half-day talking through common misunderstandings and taking questions from the floor and other half of the day discussing recent case law and its impact on the Act.

Cost is £180. Please contact: Nicky Castell on 01424 883300 or by e-mail nicky@fpws.org.uk for further information.

BOUNDARY DISPUTES
CPD Seminars
Following positive feedback from Members, the Faculty’s working party on boundaries has been working hard to develop a CPD seminar on the subject, similar in format to the successful party wall seminars and including PowerPoint presentation etc.

We hope to begin in the summer of 2011 and will announce dates soon.

CPD Certification will be available.
I recently had to serve my first ‘ex parte’ award. Fully expecting it to be appealed, I went the extra mile to ensure I did all that was humanly possible to demonstrate that my actions in going ex parte were fully justified. Despite ruffling the feathers of my recalcitrant counterpart, the award was thankfully not appealed, and so the works specified within it were allowed to continue unencumbered by the shortcomings of my opposite number. This was a result, but could so easily have had a very different outcome.

Many of us complain about the actions or inactions of our co-appointees, particularly where their fastidiousness or plain laziness is holding up the process, but rarely do we utilise the Act to press ahead on our own and get the job done swiftly and effectually. Sections 10(6) and 10(7) of the Act allow us to take this very action, of course, where the criteria is met. Section 10(6) of the Act states: “If a surveyor […] neglects to act effectively, the surveyor of the other party may proceed to act ex parte and anything so done by him shall be as effectual as if he had been an agreed surveyor”.

Section 10(7) states: “If a surveyor […] neglects to act effectively for a period of ten days beginning with the day on which either party or the surveyor of the other party serves a request on him, the surveyor of the other party may proceed to act ex parte in respect of the subject matter of the request and anything so done by him shall be as effectual as if he had been an agreed surveyor”.

Note the word ‘may’ in both sub-sections, suggesting it is not necessarily a fait accompli, but, equally, it is an available option, so why ignore it? The Act, after all, is an enabling Act, and the rights of the Building Owner to proceed with his intended works in pursuance of the Act should not be impeded by the procrastination, deliberation or obstinacy of either appointed surveyor.

This gives the lone ‘active’ surveyor a glorious opportunity to press ahead and continue as if he had been appointed in the capacity of Agreed Surveyor, possibly halving the fee burden to the liable party in the process. This could invariably delight the Building Owner on two counts: 1) progress finally being made; 2) he may no longer be liable for the fees of the defaulting surveyor, regardless of whether or not those fees were deemed ‘reasonable’. Of course, it should be borne in mind that the need to proceed ex parte might not apply to all matters being the subject of the award. Section 10(7) is clear on this: “the surveyor of the other party may proceed to [...]”. Thus it may only be one particular aspect of the draft award leading to one surveyor digging in the heels and thus falling foul of section 10(6)/(7). Therefore, a separate award on the other matters already agreed may well be produced in the meantime adopting the standard statutory triumvirate. This is, however, unlikely; if one surveyor is risking the other proceeding ex parte under section 10(6)/(7) the chances are it will be on all matters following a behavioural impasse rather than a technical dispute, or else the parties would be turning to the provisions of section 10(11).

In my recent experience, my reasons for acting ex parte were quite simply the natural outcome of my inability to engage the adjoining owner’s surveyor to join with me in making an award. Whilst he was initially in regular correspondence, once it came to drafting and signing the award, the communication faltered. I politely alerted my counterpart to sections 10(6) and 10(7) and the action I would take if he satisfied the conditions of either. I immediately received requests for irrelevant information that was not in any way pertinent to the works detailed in the notice (nor covered by the Act), so well outside the jurisdiction of our respective appointments. Accordingly, I sent a further draft award asking him to review and amend as necessary, whilst formally alerting him to section 10(6) and 10(7) and the potential ramifications for non-observance. We weren’t in dispute on any issue (other than the relevance of his information requests regarding an unrelated part of the project) and as such, there was no reason to refer the matter to the Third Surveyor under section 10(11). Electing to play it safe, I awaited the effluxion of the 10 days and then set about drafting my ex parte award. Mindful of the fact this would be met with some animosity (largely due to the issue of his fees being omitted from the award) I dutifully recorded the date of every email and letter requesting action, particularly the dates a formal request was made, along with the dates draft awards were submitted for review and/or amendment. This information was then carefully inserted in to the front of the award giving a detailed and potted history as to how we got to where we are now and why I had taken the action to proceed in this way.

It is imperative that reference is made to whether the decision was taken under either section 10(6) or section 10(7) and that this marries up with the actions of the other surveyor. One of the grounds upon which the ex parte award in Frances Holland School v Wassef [2001] was set aside was that the surveyor, who subsequently proceeded ex parte, wrote to the other surveyor requesting him to enter in to an award within the next 10 days, and failure to do so would mean he would act ex parte. Yet when it came to producing the ex parte award, the ex parte surveyor cited the reason for doing so on the basis the other surveyor’s refusal to act. Whilst this case concerned the provisions of the 1939 Act, this glaring inconsistency led to Judge Crawford Lindsay QC providing a salutary reminder to us all, which remains relevant under the 1996 Act:

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“I conclude that any surveyor who wishes to avail himself of the provisions of section 55 [now Sections 10(6) and 10(7) under the 1996 Act] must comply strictly with the provisions of the Act. This means that the surveyor can rely upon a refusal, or upon a notice that complies with the provisions of the Act, or, where appropriate, upon both grounds. The relevant grounds must be expressed accurately in the ex parte award.”

In this case, the legitimacy of the ex parte award was also compromised by the fact that there was no evidence of either a refusal or a failure to act. This underlines the importance of collating and subsequently reciting the necessary evidence to illustrate either a refusal to act effectively or a failure to act effectively within 10 days of the request being made.

Under the 1996 Act we now have the terms ‘refuses’ [S.10(6)] and ‘neglects’ [s.10(7)], but common to both sub-sections is the word ‘effectively’. Whilst it is evidently important to distinguish between a refusal to act and neglecting to act (for a period of 10 days from request) it is equally important to establish whether what little action that may have taken place has been effective. Clearly, a letter from the other surveyor conveying that he can’t be bothered to act any further (but without reference to section 10(5)) would satisfy grounds to act ex parte under section 10(6), but what if the response was less polarised? This is where problems may arise, and perhaps the reason why most ex parte awards are actioned under section 10(7), being the more clear-cut route. It is mooted that simply sending out holding correspondence or one-liners to buy more time, without actually progressing the matter, may amount to ineffective behaviour which could satisfy both section 10(6) and 10(7), albeit in the latter it would need to continue in this way for the requisite timeframe. In my experience, the late request by the adjoining owner’s surveyor for engineer’s details on a part of the building owner’s works unrelated to the notice (and indeed the Act) was irrelevant, aside from being perhaps ineffective behaviour, but was it a refusal to act effectively? I played it safe and served the 10 day notice under section 10(7), thereby crystallising the issue and avoiding unnecessary delay. If the ‘unreasonable’ surveyor continues to shirk his obligations to make the award purely on the basis his exaggerated fees have not been agreed, the system is in place for the other to proceed alone. This is an effective and fair way of dealing with the problem, although in this illustration, the ‘unreasonable’ surveyor did still obtain his fees, albeit negotiated down substantially from the starting position. Taking matters further, it could be submitted that the fees of the surveyor refusing or neglecting to act need not even be entertained by the ex parte surveyor since their services (and naturally their appointment) will have been summarily discharged with the service of the ex parte award; this example, of course, assumes the ex parte award covers all the points the surveyors were appointed to settle. Accordingly, the non-participating surveyor will no longer exist as a statutory member of the tribunal and fees need not, therefore, be awarded. If the supplanted surveyor wishes to pursue his fees with the appointing party directly, then that is their prerogative, but this could only be enforced contractually, if indeed a contract exists.

The judge, HH Hazel Marshall QC, delivered an important point worthy of future consideration if ever adopting a ‘firm’ position on the validity of notices: “Although the bare refusal contained in the letter might, in a different context, have amounted to no more than a statement of position, given the combined facts that it was raised so late in the day, more as part of a negotiating strategy than for genuinely good reasons and against the background of taking a succession of pediatric and difficult points, I find that, in this situation it did not do so...I therefore hold that Mr Lai’s letter of 12 January 2006 was, in all the circumstances, a refusal to act effectively.”

Fees (or should that be costs) are, sadly, the biggest motivator in either awakening the dilatory surveyor to the implications of section 10(6) & (7) in order to prompt action, or in catalysing their appointing owner’s appeal of an ex parte award once served. Either way, the prospect of having to fight to recover fees, which would otherwise be afforded the luxury of inclusion within the award, will usually be enough to elicit the desired response.

In his recent article entitled ‘Dealing with unreasonable costs’, Philip Antonio has alluded to the provisions of sections 10(6) and 10(7) as a useful mechanism for overcoming the ever-present issue of disagreement on ‘reasonable’ fees. The method being to do nothing more than acknowledge the other surveyor’s unreasonable fees at the outset, but pressing ahead with service of the award, sans fees, by accompanying it with a 10 day notice under section 10(7), thereby crystallising the issue and avoiding unnecessary delay. If the ‘unreasonable’ surveyor continues to shirk his obligations to make the award purely on the basis his exaggerated fees have not been agreed, the system is in place for the other to proceed alone. This is an effective and fair way of dealing with the problem, although in this illustration, the ‘unreasonable’ surveyor did still obtain his fees, albeit negotiated down substantially from the starting position. Taking matters further, it could be submitted that the fees of the surveyor refusing or neglecting to act need not even be entertained by the ex parte surveyor since their services (and naturally their appointment) will have been summarily discharged with the service of the ex parte award; this example, of course, assumes the ex parte award covers all the points the surveyors were appointed to settle. Accordingly, the non-participating surveyor will no longer exist as a statutory member of the tribunal and fees need not, therefore, be awarded. If the supplanted surveyor wishes to pursue his fees with the appointing party directly, then that is their prerogative, but this could only be enforced contractually, if indeed a contract exists.

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President’s Pen

Charles Dawson
PPFWS FFPWS MRICS FCIOB

Some years ago, I was privileged to be a guest in the members’ enclosure at Lords, where Dickie Bird, the very famous international cricket umpire was to stand for his final test.

It was England v India and the two teams formed an avenue of honour as Dickie came out onto the pitch.

As one would expect the full house rose to acknowledge the appearance of a legend.

There was a big screen TV at the reporters’ end and as the cameras focussed in it was clear to see tears in his eyes as he waved, almost solemnly, to the crowd.

England batted first and Atherton, then captain, opened.

On or about the third over a shout of “Howzat” went up for an LBW and Dickie raised his finger to send Atherton back to the dressing room.

Quite a sensation for the first wicket of his last test dismissing the captain so early.

A wag next to me said: “That weren’t out, Dickie’s still got tears in his eyes and can’t see straight”.

Last week I was proud once again to represent the Faculty at the House of Lords at a lunch hosted by Lord Howie of Troon and the guest of Douglas Smith for lunch with a host of legendary cricketers.

Dickie Bird, OBE was there and I had the pleasure of sitting talking with him after lunch for twenty minutes or so.

At one point I said that I was at the last test he umpired at Lords and noticed on the big screen as he walked out through the two teams that it was an emotional time for him. I said tactfully “I thought I saw a tear in your eye”. This wonderful, respectful, honest, old man said in a broad Yorkshire accent “and I still had them when I dismissed Athers, couldn’t see a bloody thing”.

I thought that my little tale was unique to me and the others immediately around us when that wag said it all those years ago.

But in reality this fair minded gentleman must have had it said to him hundreds of times before. Yet with grace and humour he treated it like it was the first time.

I don’t know what the point of this talk is really about other than to prove to me that honesty, tempered with humility, are two virtues that seem to have been lost in this world.

Let’s ensure they are preservers of the Faculty at least, as this is, in a small way, something we can all influence.

“To give a satisfactory decision as to the truth it is necessary to be rather an arbitrator than a party to the dispute.”

Aristotle (384 BC - 322 BC)

Norfolk Seminar Success

David Taylor of David Taylor Associates reports on a recent seminar held in Kings Lynn, Norfolk.

Over the past months I have been approached by a number of colleagues to arrange a seminar on the Party Wall etc. Act. Ours is primarily an architectural practice and I usually try to hold a seminar at least once a month to maintain a mandatory standard of CPD Hours.

In discussion with Philip Antino we settled on a lunch time seminar in late March and I began to notify various colleagues & associates of the event. To my absolute amazement and in very little time I became inundated with names who wished to attend, so much in fact I could have filled my conference room several times over. I restricted the seminar to the first 25 interested people but it was disappointing to inform others they could not attend.

The audience consisted of Architects, Building Control Approved Inspectors, Structural Engineers, Surveyors and Housing Association representatives.

My main worry was whether Philip Antino would arrive on time. It took him 3 and half hours to find us in Norfolk from Chelmsford; he must have taken the very long scenic route (if there is one!) but he finally arrived and eased my nerves.

Listening to Philip was an absolute delight, his knowledge and lucid answers to questions were precise, and provided a thorough seminar on the Act. This as support with a PowerPoint presentation and hand drawings of party wall cases during a question and answer session that seemed to go on for eternity, but with each attendee fully engaged! It wasn’t all serious; little bits of banter broke through, the anecdotal and funny comments provided a nice easy atmosphere.

I have to say the seminar was a resounding success with members of the audience confirming their intent to seek membership of the Faculty; one in particular, is a well known and prominent Norfolk surveyor and author of books on surveying. This goes to show the impact that Philip had on the audience.

As they say, success breads success and I am now being pestered to hold another event. A large number of enquiries are from solicitors, and more particularly the local Building Control teams.

There will be a further seminar later in the year for those who I had to turn away but, due to the response, I may move to book larger premises. Let’s hope Philip leaves the night before next time and we hope to attract other guest speakers in due course.

David Taylor MFPWS MCIAT FBEng

Seminar at Anglia Ruskin University

On the 13th April the Faculty hosted a seminar organised by Philip Antino and held at Anglia Ruskin University. The guest speaker was Mr Richard Cooke of Birketts LLP, a top 100 law firm, with offices in Chelmsford and surrounding counties. The seminar topic was the Bribery Act 2010. A broad spectrum of people attended ranging from students of the University, barristers and practising chartered surveyors.
Some surveyors acting ex parte may be a little more sympathetic to the plight of their counterpart and agree to a separate award covering fees, but caution ought to be exercised to ensure there is legal authority to do so; if one of the appointed surveyors has failed to perform their statutory function under the Act by eschewing their obligations by virtue of sections 10(6) and 10(7), would the subsequent collusion with the other surveyor to guarantee their fees by way of a separate award fall within their jurisdiction, or amount to complicit abuse of their powers?

Taking a slightly different stance, there is proven scope to proceed ex parte on the issue of fees alone, but again, the precept to this presumes meeting the criteria. The case of Bansal v Myers [2007], again an unreported county court decision (and again featuring our omnipresent fellow faculty member, Mr Antino) demonstrates that where the surveyors are in agreement on all matters up to the point of award publication, even on the inclusion of their respective fees, but where one surveyor cannot accept the ‘reasonableness’ of the other’s fees, then grounds for proceeding ex parte could be the answer for the ‘jilted’ surveyor. This would again need to follow the requisite application of sections 10(6)/10(7) to the letter, but underlines the notion that, if properly administered, there is no reason why the more diligent surveyor should not be properly remunerated once he has fulfilled his role. This obviously contrasts with the anecdotal examples cited above where the presumption is that the two surveyors could not even get to the signing of an Award owing to the apathy of one or other. Interestingly, once the appeal of the ex parte award in Bansal was dismissed, and the ex parte award deemed valid, HH Judge Platt clarified that the appellant (the building owner) had missed the opportunity to have the issue of ‘reasonable fees’ determined by the Third Surveyor: “Since I have determined that the award was valid the Appellant has lost his right to have the issue referred to the Third Surveyor for determination as a dispute.”

This case also illustrates the injustice of one surveyor proclaiming that the other’s fees are unacceptable, but then doing nothing to progress agreement on the issue, particularly where the award is ready to serve, if not already served; obviously, quite a different scenario to that where one surveyor refuses to sign an Award until fees and payment terms have been agreed, or worse still, funds have been received.

Moving on to the practical aspects of ensuring we avoid the ex parte award being invalid or appealed, it is good practice to notify the parties in advance of your proposal to proceed ex parte together with a brief explanation of what this entails. Whilst this is not mandatory as far as the Act is concerned, it is professionally courteous, particularly where this may have cost implications for the party whose surveyor has defaulted. The other surveyor obviously needs to be aware a request has been made of him, and it would seem best practice to also refer him to the requisite part of the Act rather than infer a breach from one’s own interpretation. Often the threat of going ex parte, and a timely reminder of what the Act says, will be enough to engage the other surveyor to take heed and avoid his protestations that he has been usurped by sharp practice.

In the drafting of my ex parte award I renamed myself as the ‘appointed surveyor’, as I was uncomfortable using the terms ‘building owner’s surveyor’ or ‘adjoining owner’s surveyor’ when the tripartite practical tribunal had, in this situation, been dissolved. Moreover, I was certainly not appointed as ‘agreed surveyor’ by the parties in the letter of appointment. However, sections 10(6) and 10(7) state that, in acting ex parte, “[...] anything so done by him shall be as effectual as if he had been an agreed surveyor”. So the principle is there if not the formal appointment.

It is important not to confuse a refusal to act with an impasse where the surveyors are in dispute themselves and cannot agree on what is to be awarded, or how. In such a situation, the Third Surveyor ought to be approached to make an award in accordance with section 10(11). Often, the supplanted surveyor will claim that the ex parte is invalid because there was no reason why the matter could not have been referred to the Third Surveyor; the circumstances for going down this route are quite different, as we have seen.

Finally, it almost goes without saying that the circumstances leading to action under sections 10(6) and 10(7) are quite different to where one party refuses to initially appoint a surveyor [s.10(4)(a)], or neglects to appoint a surveyor for a period of 10 days from the date of request [s.10(4)(b)], or indeed where one of the appointed surveyors dies, becomes or deems himself incapable of acting [s.10(5)]. Obviously, any surveyor seeking to go ex parte whilst his counterpart is still in the process of being appointed or replaced will catch the inevitable cold...

James McAllister FFPWS

4 P Antino, Dealing with Unreasonable Costs (Faculty of Party Wall Surveyors Newsletter: ‘Party Wall Surveyor’ Jan ’11).
5 Bansal v Myers [2007] unreported, Romford County Court, 26th October 2007. Case No. RM01607. 6 Ibid. 7 Bansal (n 6).
What Should We Tell Them?

Stuart Frame of Staple Inn Chambers looks at the duties owed by the appointed surveyors, the scope of section 12(1) of the Act, and the practical difficulties that can arise.

Surveyors’ duties

In the 2009 Court of Appeal case of Reeves v Blake,9 Lord Justice Etherton reiterated that the procedures of the Act were “intended to constitute a means of dispute resolution which avoids recourse to the courts” and that “the purpose of the 1996 Act is to provide a means for avoiding litigation...” S.10 of the Act is itself headed up ‘Resolution of Disputes’. An appointed surveyor’s overriding duty is therefore his duty to resolve the statutory dispute, and he does this by the making of an award. Additionally, he will have to act effectively in producing that award, since his costs have to be ‘reasonable’.

As with most matters where professionals are engaged, there is a duty on party wall surveyors to proceed both with care and with diligence. However, the definition of a ‘surveyor’ in s.20 of the Act also implies that there is a duty of impartiality: “Surveyor” means any person not being a party to the matter appointed or selected under section 10 to determine disputes in accordance with the procedures set out in this Act.” [emphasis added].

The fact that a surveyor must not be ‘a party to the matter’ means that some degree of impartiality is envisaged from the appointed surveyors. This notion is further reinforced by s.10 (8)(b) of the Act which curtails a local authority’s appointing officer’s power to select a third surveyor in circumstances where he or his employer is a party to the dispute. The appointed surveyor is therefore certainly not just an advocate for his appointing owner.

In Gyle Thompson v Wall Street (Properties) Ltd5 it was said that the “...surveyors are in a quasi-judicial position with statutory powers and responsibilities”. Indeed, in Chartered Society of Physiotherapy v Simmonds Church Smiles2 it was also said that “...decisions...are consistent with a judicial or quasi-judicial process...if three surveyors are to be appointed, a party-appointed surveyor, while no doubt retaining his professional independence, is not obliged to act without regards to the interests of the party who appointed him.”

It would appear then that appointed surveyors have a dual duty, both by acting impartially, but by also having regard to the interests of the appointing owner.

A duty to inform?

The question arises as to whether an appointed surveyor has a duty to inform the owner(s) of their rights and obligations under the Act. This question has gained prominence since the 2010 case of Kaye v Lawrence [2010] EWHC 2678 (TCC) which confirmed that claims for security for expenses can be made by an adjoining owner for all works under the Act, including section 6 excavation works.9 Should the adjoining owner be informed of his right to claim security, and more to the point, does the appointed surveyor have a duty to so inform?

Given the nature of some neighbourly disputes, some surveyors will feel, perhaps with considerable justification, that to inform the appointing owners of the rights they have under the Act, and in particular the right to claim security, is a recipe for disaster. Dispute escalation is more likely to occur than dispute resolution. For example, the obstructive adjoining owner, who has objected to the development right from the planning application stage, is not going to use his right objectively or constructively. The owners sometimes simply cannot be trusted to behave themselves reasonably when provided with such information! Surely it would be better to allow the surveyors to be the sole arbiters of whether or not security should be claimed?

S.12(1) of the Act states: “(1) An adjoining owner may serve a notice requiring the building owner before he begins any work in the exercise of the rights conferred by this Act to give such security as may be agreed between the owners or in the event of dispute determined in accordance with section 10.”

The Act therefore contemplates service of a notice by the adjoining owner, and ‘agreement between the parties’ as to the quantum of the security. The implication is therefore that the surveyors do not have sole control over whether security for expenses matters, and that in fact it is a matter, at first instance, to be dealt with by the parties themselves.

Similar considerations apply under s.10(11) of the Act, where the parties themselves have a right to ‘call upon the third surveyor selected...to determine the disputed matters...’. Referrals to the third surveyor are also not matters which fall solely within the appointed surveyors’ jurisdiction; not, as some have argued, to be used only in circumstances where the two appointed surveyors deem it appropriate. However, if the parties are not aware of the rights they have under the Act, how are they going to engage those rights?

Practical Difficulties

It is common practice when serving an award that the surveyors inform the parties by covering letter of their right to appeal the award to the county court within 14 days of service.10 It can therefore be a relatively straightforward matter to inform a party that they have a particular right.

Continued on page 8
Continued from page 7

However, some surveyors consider that informing parties of their right to claim security will lead to an increase in scenarios whereby they are awarding security in circumstances where none is actually required, such as when minor works are being conducted. Unsurprisingly, they regard this as an impediment on the effective resolution of the dispute that the surveyors are charged with resolving.

The answer to this potential problem lies in the actual wording of s.12(1). The section in fact only gives the adjoining owner the right to claim security for expenses, it does not give him or her the right to actually have it. It defines the circumstances and time within which an adjoining owner may serve a notice claiming such security. However, the amount of security is to be subsequently agreed, between the surveyors if it is not agreed between the parties first. Accordingly, there appears to be nothing in the wording of the section preventing the two surveyors from determining that the amount of security to be provided should be nil. As an aside, I would suggest that where there is a real doubt as to whether or not security should be awarded, that doubt should be exercised in favour of the adjoining owner’s request.

Nevertheless, frivolous, vexatious or unreasonable requests for security can still be dismissed by the two surveyors in the manner suggested. The adjoining owner, who pursues such a request, and presumably acts against the advice of his surveyor, may find himself paying the costs of the subsequent award produced. He may also find himself exposed to a counter request under the ‘tit for tat’ provisions in s.12(2)(b). Similarly the party who unreasonably, unnecessarily or erroneously uses his right under s.10(11) to refer matters to the third surveyor may also face paying for the costs of the third surveyor’s award. Parties should therefore be informed of their rights and obligations under the Act by their appointed surveyor. The Act’s mechanisms do provide relevant deterrents and safeguards against the obstructive owner who unreasonably insists on the exercise of those rights.

Other considerations

Finally, informing the parties of their rights and obligations may also protect the surveyor from exposure to claims brought against him or her for professional negligence. By way of example, what is a surveyor going to say to the adjoining owner who subsequently discovers that he could have claimed security for expenses from the offshore limited liability corporate building owner who now refuses to pay expenses in lieu in accordance with s.11(8)?

Some believe that the s.10 process of dispute resolution is a statutory arbitration which falls under the Arbitration Act 1996. This would give party wall surveyors immunity from professional negligence actions. However, whilst the matter has not been tested in the courts, it is considered more likely than not that party wall surveyors are not given immunity against such actions. The House of Lords case of Arenson v Casson Beckman Rutley & Co supports this view, and the very recent 2011 Supreme Court case of Jones v Kaney, which has removed the immunity from professional negligence claims previously enjoyed by expert witnesses, further demonstrates the courts’ current mood with respect to claims for such immunity.

Stuart Frame HonFFPWS LLB MA Barrister

1 [2009] EWCA Civ 611; 2 Paragraph 14 of the judgment; 3 Paragraph 24 of the judgment; 4 Section 10(13) 5 [1974] 1 All ER 295; 6 Brightman J., at 303a of the judgment; 7 [1995] 1 EGLR 155; 8 HHJ Lloyd QC at p.159 of the judgment.; 9 See the Case Commentary on this on the FPWS website.; 10 Section 10(17) of the Act; 11 Particularly in light of sections 94 to 97 therein; 12 [1975] 3 All ER 901, HL, 13 [2011] UKSC 13
Publications

THE THIRD SURVEYOR - A GUIDE

This is Alex Frame’s latest work, which explains the process whereby one arrives correctly at the appointment of a Third Surveyor in an easily digestible and comprehensive manner and then proceeds to explain in clear and concise terms the need for extensive and wide ranging abilities and knowledge necessary for a Third Surveyor to be able to provide advice, guidance and assistance to party wall surveyors, including a section at the end of the book providing an example of a Third Surveyor model award.

MISUNDERSTANDINGS AND GUIDANCE
(Second Edition)

This book has recently been updated to include material related to changes in some parts of CPR, the effects of recent case laws, together with further clarification of misunderstandings throughout the book.

Misunderstandings and Guidance and The Third Surveyor are available at a cost of £29.50 each and please note that if both books are purchased, a £5.00 discount will be given.

Both books are a ‘must have’ for all practising party wall surveyors. Please contact Nicky or Sally in the Administration office on 01424 883300 or by email enq@fpws.org.uk for details on how to purchase these books.

New Members

We are very pleased to welcome the following individuals into the Faculty:

ASSOCIATES:

Dafydd Owen, Pengaron Group Limited, London
David Matthews, David Matthews Associates (Bath) Ltd, Bath
Jonathan Callard, Thomas & Thomas, Northwood, Middlesex

Associate membership is aimed at part time students and less experienced party wall surveyors who are working towards full membership of the Faculty. Please do not hesitate to call upon the Regional Director (see www.fpws.org.uk) in your area should you require help or advice.

MEMBERS:

Tony Osbourn MFPWS, Eastern Square, Colchester, Essex
Sam Russell MFPWS, Sheldon Bosley, Shipston-on-Stour, Warwickshire
Colin Goodes MFPWS, PBA Structural Consulting, Maidstone, Kent
Kathryn Hampshire MFPWS, Green Box Surveys Ltd, London
Robert Sheppard MFPWS, Newbury, Berkshire
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Paul Merriman MFPWS, VKHP Consulting, Tunbridge Wells, Kent
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Rob Wonnacott MFPWS, The Wonnacott Partnership, Teddington, Middlesex
James Dunstan MFPWS, Paul Carpenter Associates, Exeter, Devon
Vicki Turner MFPWS, Turner & Hoskins, Edenbridge, Kent
Jamie Brock MFPWS, Route One Building Consultancy, London
Ray Callcut MFPWS, Richard Jackson Limited, London
Nathan Tifford MFPWS, Smithers Purslow Property Services, Rutland
Gareth Gwynne MFPWS, Angorfa Limited, London

If you have good experience in party wall surveying, you might be looking to upgrade to Fellow status. This would entail attending our ‘Third Surveyor’ course (next one in June) for upgrade to be considered.

Please contact Nicky in the Administration office on 01424 883300 or by email enq@fpws.org.uk for details.

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**ABC of Party Walls**

S is for **SURVEYOR**
The Act clearly defines a surveyor is section 20 as ‘means any person not being a party to the matter appointed or selected under section 10 to determine disputes in accordance with the procedures set out in this Act.’

This must be understood as to exactly what the Act says – ANY person NOT being A Party to the Matter can be a party wall surveyor, albeit that many surveyors do not wish to act as such when they are involved in the design as they feel that this is a conflict of interest; there is of course merit in this but that is not what the Act says. The designer can act as a party wall surveyor if he so wishes.

S is for **SELECTION**
This is the important word that is often overlooked in the Act. Section 10(1)(b) says that ‘the two surveyors so appointed shall forthwith select a third surveyor’. Notice that the two surveyors are appointed but the third surveyor is selected. This continues right through the Act and the third surveyor is never referred to as being appointed. See sections 10(8)(9) and (11).

Section 10(2) says that ‘All appointments and selections made under this section shall be in writing and shall not be rescinded by either party’

For this reason the third surveyor shall require payment of his costs before he serves his Award as he has only been selected by the two surveyors and not appointed by the parties. He has no ‘contract’ with either of the parties.

S is for **SPECIAL FOUNDATIONS**
Special foundations is again defined in section 20 of the Act and has a rather quaint definition, however the assemblage of ‘beams and rods’ is simply reinforcement.

S is for **SECURITY FOR EXPENSES**
This is found in section 12 of the Act whereby the Adjoining Owner can ask for security, by way of a Notice. This is not discretionary but an absolute right but that is not to say that security will be given or agreed upon. If there is a disagreement between the owners on this matter then the dispute is covered by section 10 of the Act. The surveyor or surveyors may consider that security is or is not appropriate.

S is for **SECRETARY OF STATE**
The Secretary of State may be called upon to select a third surveyor in the situation where the two surveyors cannot agree upon a selection and that one of the parties is the Local Authority – see section 10(8)(b). I believe this to be rarely used if it ever has been. The Government have no knowledge of such when asked about this particular matter!

Series continued in the next issue.

**Alex Frame**
FFPWS MSc MRICS FCIOB MCM

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**Forum Representatives**

1. **NORTH WEST**
   Graham Shone
   0151 489 5440

2. **NORTH EAST**
   Neil Cunningham
   0191 389 1057

3. **WALES**
   Phillip Beck
   01874 713133

4. **WEST MIDLANDS**
   Jim Jackson
   0121 233 3113

5. **EAST MIDLANDS**
   Jim Jackson
   0121 233 3113

6. **SOUTH WEST**
   Andrew McAllister
   0117 944 4419

7. **WESSEX**
   Vacant
   (Contact Andrew McAllister 0117 944 4419)

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   01582 346 940

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   01245 492495

10. **SOUTH EAST**
    Malcolm Lelliott
    01483 416411

11. **LONDON**
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    South
    Simon Price
    0207 736 7311
    East
    Philip Antino
    01245 492495

"I'd never join a club that would allow a person like me to become a member.”

Groucho Marx
The Bristol Improvement Acts

Andrew McAllister of McAllister Associates Limited takes a look at a piece of less well known party wall legislation.

The Bristol Improvement Act of 1847 (repealed) expanded and enlarged the provisions of an 1840 Act for “regulating Buildings and Party Walls within the City and County of Bristol, and for forming certain Streets and for widening certain Streets, within the same.” The Acts enabled the improvement of an area of Bristol linking the newly established Great Western Railway terminus, Temple Meads Station, with the City’s extensive docks; a major trading centre at the time.

The 1847 Act defined party walls and specified a minimum thickness. If a Party Wall, Party Arch, Party Fence Wall etc needed to be thickened, taken down and rebuilt (in whole or in part) on account the wall being so far out of repair or of insufficient thickness, or that the wall was made wholly or in part of timber, and the adjoining was unwilling or unable to join in the taking down and rebuilding, the Act provided a form of notice for service on an adjoining owner by a building owner. Such a notice (no less than 42 days) required the owners to meet with their respective surveyors on site on a specified day and time. If the adjoining owner’s surveyor failed to turn up within an hour of the specified time the building owner could appoint another surveyor to act for the adjoining owner.

Notices had to be served in writing on the “Part Owner or Owner of the same, either by delivering it to them personally or by leaving it at his usual or last known place of abode, or in the case of Infancy or Lunacy, then to his Guardian or Committee, or in case of such Owner or Part Owner being absent or not known, by delivering same to the Tenant or Occupier of the Premises, or in case the same shall be unoccupied, then by affixing the same on some conspicuous Part of such Premises, of his Intention, to have such Party Wall, Party Arch, Party Fence Wall, or Partition, or such House, Warehouse, or other Building, surveyed....”

Form of Notice: “APPREHENDING the Party Wall, Party Arch, Party Fence Wall, or Partition situate.................to be insufficient in Thickness, [or that the same, or house, Warehouse, or other Building, situate.................as the case may be, to be so far out of repair, or insufficient in Thickness, as to render it necessary to have the same taken down, or the same or some part thereof should be rebuilt, or that the same or some Part thereof should be or in part of Timber,) take notice, that I intended to have the same surveyed, pursuant to an Act passed in the......Year of the Reign of Her Majesty Queen Victoria, intituled [here insert the title of the Act], and that I have appointed ..............of ..............to meet at ..............within the said City and County on my Behalf, on the .....Day of ...........at .........of the Clock in the ..............noon; and I do hereby require and call upon you to appoint another Surveyor or able Workman on your Part, to meet at the Time and Place aforesaid, to view the Premises, and to certify the State and Condition thereof, and whether the same or some Part thereof ought not to be taken down, and whether the same or some Part thereof ought not to be rebuilt. Dated this........ Day of............One thousand eight hundred and............”

The surveyors’ role was to ascertain the condition of the party wall and to determine to what extent any improvements or rebuilding was required, what (if any) compensation was payable and by/to whom. They would then issue a certificate to this effect.

If any person appointed to act as a surveyor did not sign such a certificate within a month following appointment, the building owner could apply to a Justice of the Peace for another (third) surveyor, referred to in the 1847 Act as an “Umpire”, to be nominated and appointed to act in conjunction with the appointed surveyors and issue a certificate. There was no way for surveyors to act ex parte.

The surveyors’ certificate had to be filed in the Office of the Town Clerk of the City of Bristol. A copy of the certificate would be issued to the owners within three days of signing. Owners could appeal certificates to “any two Justices of the Peace”, within thirty days of delivery, giving fourteen days written notice of appeal. The Justices would then make such an Order as they thought right, including costs, and their decision and Order would be final.

Access was permitted after fourteen days following issue of the surveyors’ certificate or Justices’ Order “upon and into any Ground, House, or Premises necessary for the Purpose of such Work at any Time between the Hours of Six of the Clock in the Morning and Six of the Clock in the Evening”.

Penalties! Unlike the current legislation, if a “Master Builder, Master Mason, Master Carpenter, Master Workman, or other Person” failed to comply with the 1847 Act, including the determination of the surveyor, they (any, either or some of them!) could be convicted and fined a sum not exceeding twenty pounds. Furthermore, they would be required to “make good all such Defects, Omissions, and Irregularities....and render such Wall or Place....conformable” and if they did not, they would be fined a further ten pounds for each month the defects or irregularities continued. To put those sums into perspective, a skilled building tradesman would have earned about £5 per month in 1847.¹

Andrew McAllister
FFPWS MRICS MCIOB RMaPS

¹ Williamson 1982 The Structure of Pay in Britain, 1710- Research in Economic History
Professional Services

Alex Frame
FFPWS MSc MRICS FASI FCIOB MCM

A-D-S Building Services
Architectural Designers & Surveyors
Party Wall Specialist
Tel: 01635 864956
Mob: 07816 070 740

ACONSULT
Party Wall Surveyors

Mile End, Old Odiham Road
Alton, Hampshire, GU34 4BW

Telephone: 01420 84263
Email: arthurcross@btinternet.com

Malcolm V Lelliott (Managing Director)
PPASI Hon FASI MRICS FCIOB FFPWS FRSA
Chartered Surveyor

19 Church Street, Godalming, Surrey, GU7 1EL
Tel: 01483 416411
E-mail: Malcolm@mvlelliott.demon.co.uk
www.mvl-architects.co.uk

James Jackson FFPWS
• QUANTITY SURVEYORS
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The Jewellery Quarter
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Simon J. Price BSc(Hons) FRICS FFPWS
Principal
Tel: 020 7736 7311
Email: post@pricepartnership.co.uk

15 Harwood Road, London, SW6 4QP
Also at: 15 The Street, Shalford
Surrey, GU14 8BT, Tel: 01483 456012

FREETEC ASSOCIATES
Chartered Surveyors

Graham Shone
MFPWS MRICS MCIOB FBEng DipHi DipVal

105 Tarbock Road
Huyton, Merseyside, L36

Tel: 0151 489 5440 5TD
E-mail: graham@hspack.co.uk
Professional Services

HTB Consult Ltd

Phillip Beck BSc(Hons) MRICS FFPWS
Plas Derwen, Beacons View
Trefecca, POWYS, LD3 0PW
Tel: 01874 713133
E-mail: admin@htbconsult.co.uk

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County Durham
DH3 3UP
Tel: 0191 3891057
Fax: 0191 3892496
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About Us

Prior to 1997 procedures covering works to party walls, party structures and certain excavations close to adjoining properties were generally limited to central London; although historically similar legislation had been born in cities such as Bristol, this had long since fallen by the wayside. Consequently, there were few surveyors practicing in this field.

In 1997 the Government introduced party wall legislation across the whole of England & Wales in the form of the Party Wall etc. Act 1996. It was recognised by a number of experienced practitioners that the shortage of surveyors available to administer this legislation had to be addressed and the Faculty was born out of this national need for education and support for surveyors but also to enhance awareness and provide advice and guidance to the general public.

The objective of the Faculty of Party Wall Surveyors is to promote the highest standards of professional practice in this field of expertise and to expand the knowledge and study of all matters to do with party walls, to encourage the exchange of information and ideas amongst its Members.

We have enjoyed steady and continual growth nationally since our inception and we now benefit from legal support and counsel when required; this is available to all Members. Referrals for appointments as Party Wall Surveyors are also provided to Members via our website.

Influence

Our Members belong to various professional bodies in the construction and property sectors such as RICS, RIBA, ICE, IStructE, CIOB, CIAT and ABE. We maintain strong links with many professional associations and Local and Central Government departments. The Faculty provides training in a number of formats including a Certificate of Party Wall Studies through the Association of Building Engineers and seminars on the role of the Third Surveyor. Short talks are also offered to professional organisations and Local Government.

Forums

As a national organisation we aim to raise awareness of current developments in the party wall arena and promote dialogue between Members and other practitioners through regular regional forum meetings and seminars.

Publications

The Faculty currently produces the quarterly newsletter ‘Party Wall Surveyor’ with relevant articles and information keeping Members in touch and up to date with developments. Our website provides a Members Area with a library of case law, legal advice, guidance and templates available for download. The Faculty currently publishes two books by Alex Frame: Misunderstanding & Guidance, and the Third Surveyor.

Red Herring

Those of you with young children will know it is often difficult to come up with new and inventive ways to persuade them to do things they may not want to do – be it homework, tidying their room, helping around the house etc etc. Recently, in an attempt to persuade my 10-year-old son to practice a bit harder for his forthcoming Grade 1 cornet exam (and thereby justify the extortionate amounts being spent by his loving parents on lessons and instrument hire), I made a deal with him. In return for his practicing sufficiently to pass his exam, I would enter the X Factor this year(!). Now, given the strained tones that had been emanating from the cornet up to that point, I was fairly confident that I would not have to make good on my rash promise. Unfortunately, the prospect of my making a complete ass of myself on national television was sufficient to spur my first born into action – he didn’t feel enough practice to scrape a pass. Of course, to back down then would have been unthinkable – what sort of example would I be setting the next generation?

And so it was that last Saturday, along with thousands of other deluded individuals, I found myself queuing outside Cardiff City FC’s new Leckwith Stadium for 6 ½ hours in my best tuxedo – if this was to be my shot at stardom, I was damn sure I was going to look the part. Unfortunately, last Saturday was one of those rarities in Wales – an absolute scorcher.

By the time I was finally ushered into the pitchside cubicle for my one-to-one audition, I was drenched with sweat and so mentally frazzled that I mucked up the words and spluttered to an undignified halt halfway through the second verse. Strangely, the programme researcher who was the unfortunate recipient of my outpourings, failed to recognise the huge vocal talent behind the dripping wreck that stood before him and I failed to progress to the next stage.

I was left to reflect that, whilst it is indeed sad that the UK’s answer to Michael Buble will remain an undiscovered talent, at the very least I had earned the respect of a 10-year old; simply for having had the guts to ‘give it a go’. So this autumn, when the X Factor returns to our screens, look out for the middle-aged sweaty fat bloke waving at the camera like a loon in the crowded scenes outside the stadium and think what strange and ridiculous things we parents do for the love of our children.

Philip Beck

FPWS BSc(Hons) MRICS RMAPS

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Articles of between approx. 500 and 1500 words (or more) on party wall and related matters are gratefully received. We also invite completely unrelated but entertaining contributions for our occasional ‘Red Herring’ section. Copyright will be retained jointly by the Faculty and the author and all submissions will be subject to editorial control.

Deadline for submissions for the next issue is

Friday 15th July 2011