1. I am instructed by the Faculty of Party Wall Surveyors, under the Direct Public Access Scheme for barristers. I have been asked to respond to a number of questions posed by a member of the Faculty that have arisen in relation to my recent Advice on the case of *Onihanjo v Pearson*.

2. The questions are as follows:
   i) Do you have an opinion as to whether a dispute can arise without a notice? I think it can as the act confers rights which do not depend on notices.
   ii) Do you understand why the judge would have modified the award?
   iii) The judge stated that if he were wrong as to the interpretation of paras. 4-6 of the award...he would modify the wording. How does this modification make the award more just? Surely justice is better served if all the individuals get paid directly? Paragraph 3 deals with the costs the Adjoining Owner would have received.
   iv) I have heard legal opinion that an award may not require a Building Owner to pay the Adjoining Owner’s surveyor, even if it specifically says, “the Building Owner shall pay to the Adjoining Owner’s surveyor his costs of £...”. Do you agree this is wrong?
   v) People talk about Act being invoked. I cannot understand this – the Act is there as law; it is not a matter of invoking it. Surely the question is: “does the Act apply?”
   vi) The wording of 1 (2) says “If a Building Owner desires to build....he shall....serve on an adjoining owner a notice...”. Therefore a person can be a Building Owner before serving notice i.e. he is a Building Owner independent of service of a notice. 1 (5) is worded in similar fashion. 3 (1) says “Before exercising any right conferred on him by section 2 a Building Owner shall serve...” Again the person is a Building Owner before the notice is served. 6 (5) is similar. A Building Owner is
defined as someone who is “desirous of exercising rights under the Party Wall Act”. Just because he does not serve a notice does not mean that he is not desirous of exercising his rights – he has just omitted to serve notice. Therefore it is reasonable to take it that a person could be a Building Owner without a notice, simply by virtue of his wanting to do work. This would automatically bring in the Adjoining Owner as his existence depends on that of a Building Owner.

Section 10 says “where a dispute arises or is deemed to have arisen between a Building Owner and an Adjoining Owner in respect of any matter connected with any work to which this Act relates...(one or two surveyors have to be appointed).”

If the Building Owner does not do this because he wants to get on, then his omission can surely not take away the rights of the Adjoining Owner granted by the Party Wall Act.

3. In responding to the above questions, I feel that it is useful to group questions i), v), and vi) together, which relate to the role of party wall notices in the applicability of the Act. Further, questions ii), iii) and iv) can also be grouped together, since they relate to the judge’s ruling on modification of the award. I shall therefore attempt to answer the questions raised in the context of these two groupings.

Questions i), v) and vi)

4. Does the Act apply irrespective of the service of notices? Can a building owner and/or and adjoining owner rely on the rights bestowed upon in the Act, even where a notice has not been served? I believe that this is the crux of the questions asked at i), v), and vi) above. My simple answer to this is “No.” Either owner cannot rely upon the various provisions of the Act unless a valid notice has been served.

5. Not serving a notice under the Act is a very different matter to consenting to a notice that has already been duly served. The point in the Onigbanjo case was that consenting to a notice does not prejudice an adjoining owner’s rights
conferred under the Act. ‘Consent’ effectively means that the adjoining owners are happy for the building owner to proceed with the works without recourse to the need for a party wall award to govern those works. However, the statutory regime and all the rights that are conferred by the Act on the respective owners will still apply, despite that consent.

6. What is the situation then if the building owner serves no notice? In the case of *Louis v Sadiq* [1997] 1 EGLR 136, the building owner commenced notifiable works under the London Building Act 1939, without first serving a notice. The adjoining owners obtained an interim injunction restraining the building owner from carrying out any works until such time as he had complied with the 1939 Act. Lord Justice Evans, at page 139, paragraphs C and H-J stated,

“So the statutory regime is clear. The building owner has certain express rights, but these can only be exercised (1) with the adjoining owner’s written consent, or (2) in accordance with a valid award by the surveyor or surveyors…”

and

“The adjoining owner’s common law rights are supplanted when the statute is invoked, which can have the effect of safeguarding the building owner from common law liabilities when he complies with the statutory procedures, just as he may incur liabilities under the statute which did not exist at common law…”

Whilst his lordship was analysing the provisions of the 1939 Act, I see nothing in the current 1996 Act which suggests that any other interpretation should be adopted.

7. Section 1(6) of the Act is clear that before a building owner acquires the right to place projecting footings or foundations, a notice must be served. Section 3(1) of the Act is quite clear that the rights conferred upon the building owner by section 2 are dependent on the service of a notice. The rights afforded to an adjoining owner in section 4 are again dependent on the service of notice by the building owner (as well as a counter notice from the adjoining owner). The
The various provisions of section 7 of the Act (which impose obligations/rights on the respective owners) are conditional upon the work being executed “in pursuance of the Act” or the building owner exercising “any right conferred on him by this Act”. It is beyond the remit of this Advice to debate the meaning of the words “in pursuance of the Act”, but it is my opinion that works which have proceeded without such a notice being served cannot be works “in pursuance of the Act”. It has already been seen that a building owner cannot exercise his rights conferred by the Act unless a valid notice has been served first.

The requirement for a building owner to serve notice does not expressly appear in sections 8 of the Act, which provides the building owner and/or his agents with the right of entry to the adjoining owner’s land. Nevertheless, it is again clear that such rights of entry are solely “for the purpose of executing any work in pursuance of the Act”.

The rights of an Adjoining owner provided for by section 11 of the Act are also either dependent upon it being work “under this Act”, or pursuant to section 2 of the Act. Similarly, the rights of an adjoining owner under section 12 of the Act to demand security for expenses is dependant upon the building owner exercising his “rights conferred by this Act”, which as we have seen, cannot be exercised without a valid notice being served.

With respect to question vi) above, it is of course true to say that the ‘Building owner’ and adjoining owners are so defined in section 20 of the Act. Section 10(1) of the Act, as cited in question vii), mentions only a ‘dispute’ arising. Can a dispute under the Act therefore arise without the building owner first serving notice? I think not. It appears to me that the various ‘disputes’ which can arise under the Act are either expressly dependent on the service of a notice, or implicitly so, because they are disputes arising for work that is “in
pursuance of the Act” “under this Act” or “in the exercise of rights conferred by this Act.”

12. On this particular point, Lord Justice Etherton’s words on the recent Court of Appeal case of Reeves v Blake [2009] EWCA Civ 611, at paragraph 21 should be noted:

“As a matter of interpretation, the ‘dispute’ mentioned in section 10(1), 10(b), 12(c) and 13(c) is of a dispute arising under the provisions the 1996 Act, whether and actual dispute within s.1(8), or a deemed dispute under s.4(5) or s.6(7), or a dispute under some other provision, such as 7(2), s.11(2), s.11(8) or s.13(2).”

13. If the building owner does not comply with the Act and serve notice, what recourse does an adjoining owner have? He does of course still have his common law rights to protect him, as he always has had. The words of Lord Justice Evans in Louis v Sadiq, cited above, remind us of this. Further, his lordship’s use of the word ‘invoked’ should also be noted. It is therefore true to say that this Act is not one of ubiquitous applicability – its provisions will only ‘apply’ and consequently supplant the common law when the Act has been properly ‘invoked’ by the building owner serving a valid notice on the appropriate adjoining owners.

Questions ii), iii), and iv)

14. Returning more specifically to the case of Onigbanjo v Pearson, I shall answer questions ii), iii) and iv) in turn.

15. Turning first to question ii), it should be remembered that the case was one where the building owner had not kept to his initial offer to conduct remedial works to the adjoining owner’s property, which the building owner’s works had damaged. Accordingly, the adjoining owners, despite having initially consented to the works, were forced to incur legal costs to preserve their position, as well as
subsequently appointing a surveyor to settle the dispute that had arisen under section 11.

16. There was a direction in the subsequent award that was settled that the building owner should pay the fees of these professionals. The building owner, relying on the earlier case of *Re Stone and Hastie* [1903] 2 KB 463, attempted to avoid liability for these fees by arguing that an award could not order payment directly to those professionals. However, the learned judge did not interpret the words in the Award as constituting an instruction to the building owner to pay those fees directly to those professionals. Therefore the case of *Re Stone and Hastie* was not applicable, and the building owner’s arguments on that point failed. However, and in relation to question ii) above, it should be noted that the judge did not stop there. At paragraph 42 of the judgment he went to say,

“If I am wrong, that paragraphs 4 and 5 of the Award are instructions for the Appellant to pay the Adjoining Owners’ surveyor, barrister and solicitor directly, then I would modify the Award to specifically provide that those sums should be made payable by the Appellant to the Respondents.”

The judge therefore wanted to ensure that the fees incurred by the adjoining owners (the respondents) were indeed paid, and paid for by the building owner (the appellant). Accordingly, he provided an alternative solution (i.e. modification of the wording of the Award), just in case his initial interpretation was erroneous. Either way, the fees incurred by the adjoining owners would be paid: the building owner was not going to escape his liabilities due to a possible deficiency in the wording of the award.

17. Question iii) above raises the issue as to whether a more just result would have been to allow the award to direct payment directly to those professionals. At first blush that suggestion seems to provide the simplest solution. However, the purpose of a party wall award is to settle a dispute between the two appointing parties. It adjusts and supplants the normal common law rights of those parties in order to resolve that dispute, allowing the building owner to conduct his works, but at the same time protecting the adjoining owner. An award therefore solely relates to those parties in dispute. That is why when an award is appealed in the County Court the surveyors are not named as parties to that appeal. Hence,
current legal thinking, with which I concur, is that because of the case of *Re Stone and Hastie*, an award cannot order payment directly to persons other than the parties in dispute (question iv, above). If such a course of action were permitted then it would be open to argument that party wall surveyors also become parties to an award. I am certain that this is not a consequence that party wall surveyors desire, nor does it sit easily with the definition of a ‘surveyor’ in section 20 of the Act as being a person who is not “a party to the matter”. Thus when directing the payment of fees in an Award, surveyors should be careful to state that the fees that are payable are those that have been incurred by either of the parties.

18. I trust that some clarification has been provided by way of response to those questions posed. However, should those instructing me have any further queries, they should not hesitate to contact me.

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