

**Using ‘The Party wall etc. Act 1996’ to gain access to a neighbouring property
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Abstract

This paper considers the right created by section 8 of the Party Wall etc. Act 1996, which allows an owner of a property to enter onto an adjoining owner’s property without their consent, whilst protecting the adjoining owner’s legal rights. It identifies the procedures that an adjoining owner has to prevent unlawful access and to protect themselves from damages arising from the access. The author has reviewed the implementation of that part of the Act dealing with access, informed by his professional experience as a party wall surveyor.

Whilst there is an explicit right of access onto an adjoining owner’s property, the access is for works “in pursuance of the Act”. If the building owner can satisfy the criteria then the right of access is provided. If not the access is a trespass and therefore should be dealt with as a tort in common law. The paper identifies the correct processes and factual evidence required to achieve access.

This paper makes a contribution to the limited existing literature and theoretical interpretations of the Party Wall etc. Act 1996. It provides a framework for considering the procedures and principles necessary to achieve a right of access whilst protecting the adjoining owner rights.

Introduction

The intent of this paper is to examine the Party Wall Act, etc 1996 principle of ‘a right of access’ on to a neighbouring land to exercise “work in pursuance of the Act” Section 8(1). The Act is rather unusual because it enables an owner, in certain circumstances, to legally enter onto an adjoining owner’s property, an action that was previously prevented and deemed a trespass at common law. Accordingly, when considering the works in relation to rights of access, the surveyor(s) must apply the principles of s.8(1) for it is within this section that there is an expressed right for a building owner and/or his agents and servants to access an adjoining owners land “for works in pursuance of the Act”. If the surveyor(s) do not properly interpret the Act in relation to the intended works they will unlawfully award an act of trespass.

The surveyor(s) must consider the proposed works and establish whether they require notice to be served for works relating to s.1, 2, and 6. If the proposed activity does not satisfy this criteria they are not works in pursuance of the Act and therefore a right of access does not flow from s.8(1) and access cannot be allowed. However, a note of caution must be exercised: although the works may require notice it does not necessarily follow that the right of access should be granted. S.7(1) prevents any unnecessary inconvenience on the adjoining owner. Therefore, the surveyors are required to consider alternative methods of executing the works to minimise any inconvenience.

Furthermore, in some circumstances elements of a building project will include works that only partly require notice (such as foundations). It is imperative that the party wall surveyors have an understanding of the process to be adopted by the building owner to complete the works and/or their contractor to ensure that access is only used for works in pursuance of the Act.

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The practising party wall surveyor(s) must fully understand the limitations of the act, in order to apply the Act properly. Subsequently, to understand the Act, one must read it from first principles, the explicit wording of the Act is there for a specific purpose. This paper will therefore apply first principles when explaining and applying the professional interpretation of the rights of access afforded by section 8(1) and any other supporting sections of the Act.

2.0 An owner's right of access in pursuance of Section 8(1)

2.1 An enabling Act

The purpose of the Act is to enable certain works to be executed which were not previously possible under earlier legislation. Section 8(1) is explicit; it is to enable a right of access 'for works in pursuance of the Act'. However section 8 does not stand alone, for example, it is reasonably foreseeable that any access on to an adjoining owner's property will cause disruption and inconvenience (and therefore possible damage) to the adjoining owner(s) property. The Act therefore seeks to protect an adjoining owner with the provision of s.7(1).

Section 8(1) provides:

*A building owner, his servants, agents and workmen may during usual working hours enter and remain on any land or premises for the purpose of executing any work **in pursuance of this Act** and may remove any furniture or fittings or take any other action necessary for that purpose (emphasis added).*

And

section 7(1) provides:

A building owner shall not exercise any right conferred on him by this Act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier (emphasis added).

2.2 When does the Act apply?

The Act only applies for works relating to either section 1, 2, and 6 and to activate the provisions of the Act it is necessary to serve a valid notice in accordance with the provisions of the Act and it is not unusual find that a project may require several notices.

The works requiring notice are:

Section 1 works relate to activities 'on the line of junction (boundary).

1(1) This section shall have effect where lands of different owners adjoin and-

(a) are not built on at the line of junction; or

(b) are built on at the line of junction only to the extent of a boundary wall (not being a party fence wall or to the external wall of a building),

and either owner is about to build on any part of the line of junction.

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Section 2 works relate to:

2(1) This section applies where lands of different owners adjoin and at the line of junction and the said lands are built on or a boundary wall, being a party fence wall or the external wall of a building, has been erected.

The Act provides various definitions of the types of wall or structure that can be built on the line of junction (boundary) within section 20. A party fence wall is a wall that sits across the boundary.

And section 6 works relates to:

6(1) The section applies where-

- (a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured horizontally from any part of a building or structure of an adjoining owner; and*
- (b) any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations of the building or structure of the adjoining owner.*

3.0 Establishing the principles of a right of access

3.1 A right of access

It is difficult to consider the various sections of the Act without applying the issue to a theoretical situation to illustrate how the Act should or can be applied. There are indeed many ways of interpreting the Act and considering that all building projects vary enormously, their individual circumstances will dictate which sections are ultimately applied. However, the Act is explicit, access is available only for ‘works in pursuance of the act’ and the service of a valid notice is essential to establish that a right of access flows from s.8(1).

A party wall surveyor must always consider the first principles of section 8(1). To illustrate this point, if we consider that excavations as a ‘whole’ can simultaneously fall within and out with s.6(1)&(2) notice, it must follow that those excavations which satisfy the s.6 criteria (that is, within 3m and 6m and to depth greater than the adjoining owners foundations as defined in the Act) are the ‘**only**’ works in pursuance of the Act. The building owner cannot use the section 8(1) right of access to excavate foundations that are outside of the limits and criteria established within either s.6(1)&(2). Excavations greater than 3m or 6m from the adjoining owner’s property are outside of the requirements of s.6(2) and do not require notice and cannot be ‘work in pursuance of the Act’.

3.2 Assessing the works

Understanding the proposed works and method of execution is imperative if the surveyors are to provide accurate advice to the owner(s). The surveyor(s) should consider the individual elements of the work before

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determining if a right of access exists or is indeed necessary. The following principles are a suggestion for assessing a right of access:

- (i) Identify the individual elements of the work,
- (ii) Consider an alternative method to avoid inconvenience (Section 7),
- (iii) Damages and security for expenses (Section 12).

Adopting this process will provide the surveyor(s) with important information when making an informed decision on whether a right of access should be awarded.

(i) Identify the elements of work

Whilst certain foundations may require a s.6(1) or (2) notice, it does not necessarily follow that the wall built on the foundation will also require notice unless built on the line of junction (Section 1(5)). If the wall is wholly on the Building Owner's land access cannot be awarded by the surveyors in connection with any activity to construct the wall. The right of access is removed when the works in pursuance of the Act (the foundations) have been completed.

Furthermore, if we consider that excavations often simultaneously fall both within and out with s.6 works we have to consider what restrictions (if any) are placed upon the building owner when executing those works. Can the works be carried out in phases? If so, the surveyors can only award for the phased works that require either a 3m or 6m notice and therefore 'are works in pursuance of the Act'.

(ii) Consider an alternative method

Any works that require notice and possibly access should be considered in relation to s.6(8)(b) (only where Section 6 works apply), s.7(1) and s.12(1). Surveyors have to understand the explicit and implied principles, intention, and relationship between the various sections of the Act. Having an overall appreciation and knowledge of the Act is therefore fundamental to properly determining if a right of access exists.

The restrictions imposed by these sections are very important because they protect the adjoining owner(s) common law rights inter alia, an entitlement to the quiet enjoyment of their property. Any activity that unreasonably interferes with or disturbs the Adjoining Owner's quiet enjoyment would be at common law an act of nuisance. S.7(1) therefore ensures that the surveyors should consider this legal principle when considering and determining if the methodology of works is reasonable.

The importance of 'unnecessary inconvenience' is the key to satisfying this requirement of the Act. Building works are by their very nature a noisy and an intrusive process: for example, the delivery of building materials and general inconvenience from the construction activities will be frustrating to adjoining owners, but that would not necessarily make them unreasonable. It is unconscionable that an owner would accept that they have to lose (either temporarily or otherwise), a part of their property while a building owner undertakes works which are to the benefit of the building owner. There has to be a control mechanism to minimise the interference flowing from the work. S.7(1) provides the appointed surveyors(s) with that control.

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If the surveyor(s) allow the building owner to use access rights to complete works that are outside of the Act, even if they are attached to notifiable works (excavations that span across the s.6 zone of influence) the building owner and/or his contractors will be committing an act of trespass and nuisance, unless there is an agreement between the owners (a license created between the owners allowing the trespass) to do these works.

The method of work is critical to establishing and limiting the extent of disruption and inconvenience to an adjoining owner. The right to erect scaffolding on an adjoining owner's land is always a contentious issue. For example where notice in respect of s.6(1) & (2) works have been served, the building owner simply cannot exercise s.8(1) rights of access and erect scaffolding on an adjoining owners land because the superstructure works do not require notice and therefore are not in pursuance of the Act (unless s.1(5) applies).

There can be no doubt that a building owner must establish that the proposed works and right of access satisfy the Act, and to do so the methodology of executing those works should be considered by the appointed surveyors.

If there is an alternative method that allows the works to be completed and eliminates the need for access, it should be considered by the surveyors and approved as the only method that reasonably satisfies s.7(1). The surveyor(s) are not required to consider whether the alternative scheme has an adverse effect on the building owner, in terms of cost or time. The Adjoining Owner's rights of quiet enjoyment override the Building Owner's rights of Access.

Alternatively if access through the adjoining owner's property is deemed the only method of executing the works then access must be provided, but is further restricted by the requirements of s.6(8)(b) (for s 6 works).

The purpose of s.6(8)(b) is self evident and clearly establishes the principle that time is a factor when reducing or limiting inconvenience. Ensuring that the building owner must complete the works as quickly as reasonably possible will reduce any inconvenience to the adjoining owner. For example the Building Owner cannot simply stop mid way and/or carry out the works at their leisure. This is an explicit requirement that the surveyors should consider when deciding which method of works are adopted. Furthermore, the surveyors should request a schedule and programme to assist them in determining that:

- (a) the building owner is only doing the notifiable works, and
- (b) the extent of the inconvenience that the access may cause to the adjoining owner is minimised.

(iii) Damages and security for expenses

The purpose of s.12 is to protect the Adjoining Owner from any loss arising out of the works. S.10(13)(c) is helpful and provides the appointed surveyor(s) with the jurisdiction to deal with matters arising out of a dispute: The Act provides the surveyors with the broad jurisdiction to decide on the matters arising out of the Act within section 10(13) below:

s.10(13)(a)(b)&(c)

(13) The reasonable costs incurred in-

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- (a) making or obtaining an award under this section;
 - (b) reasonable inspections of work to which the award relates; and
 - (c) any other matter arising out of the dispute,
- shall be paid by such of the parties as the surveyor or surveyors making the award determine.

When considering access the surveyor(s) should be aware that it is reasonably foreseeable that damage to an adjoining owner's property is likely to arise as a consequence of the movement on or across the Adjoining Owner's land, than if the works are being carried out solely from the building owner's property. The surveyor(s) should therefore consider this eventuality at the time of awarding any rights of access. The Act provides a statutory right for the adjoining owner to serve a notice requiring security to be agreed either between the owners or the appointed surveyor(s) for any reasonably foreseeable damage and costs.

It is incumbent upon the surveyor(s) to consider the likelihood of any matter, and to assess the potential damage that could arise. This would include the cost of putting the works right, any subsequent professional fees, out of pocket expenses such as alternative accommodation (in extreme cases). Furthermore, the surveyors should also consider the possibility that the building owner may fail to complete the works. Ensuring that there is sufficient funds available to complete any works necessary to put the adjoining owners in a position that they were prior to the commencement of the works is fundamental if access is awarded..

The importance of s.12(1) has become more prominent in recent years given the economic climate and the recession. In some situations adjoining owner(s) have been left in vulnerable positions because the Building Owner has been put into liquidation. In the absence of any security for expenses considerable financial losses have been incurred, by the adjoining owner. The surveyors should ensure that the adjoining owner is aware of this protection.

New structure on a line of junction – Section 1 notices

The author has purposefully ignored s.1 until this part of the paper because the interpretation and application of Section 1 is arguably one of the most debated sections of the Act in relation to rights of access. This section is often invoked as a means to achieve access through an adjoining owner's property by undertaking limited works on the line of junction and simultaneously executing other works which are outside of the Act's jurisdiction.

If we consider the principles of s.1(5), the Adjoining Owner cannot dissent when a Building Owner exercises his right to build a wall on the line of junction. The Building Owner can simply proceed as soon as one months notice has expired, but is there a right of access to execute these works? Additionally, s.1(6) allows the building owner:

“.....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”.

However, the important words to note in this section are “as are necessary”. Consequently, s.1(6) only grants additional (not conditional rights) and therefore if the foundations can be designed in such a way as to avoid

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trespassing across the boundary then these should be adopted because the projecting foundation would be unnecessary.

Furthermore, s.1(6) only applies to the foundations and not the structure built on the foundation, if the wall is 'inside' and not 'on' the boundary for example to accommodate a overhanging guttering, and thereby prevents an over sailing trespass then it must follow that access is no longer available.

s.1(5) specifically relates to walls on the line of junction. Ainsworth (2000) has said:

"I would suggest that if the courts were asked to define "on" they would apply one of a number of plain and natural meaning(sic) such as "in contact or connection with", "attached to" or "in the immediate vicinity of" These definitions would sit comfortably within both s.1(2) and 1(5) of the Act without causing confusion or absurdity" (emphasis added).

Ainsworth's suggestion "in contact or connection with", or "attached to" may be considered to have the same legal definition as "on" in relation to the point of contact with the line of junction. However, "in the immediate vicinity of " cannot have the same meaning as 'on'. The best way to construe a document is to read it as it would have read at the time it was written (*contemporanea est exposito est optima et fortissimo et lege*). It could not have been the intention of the authors when drafting the Act to include Ainsworth's interpretation as having the same meaning as 'on'.

Ainsworth's interpretation has all sorts of implications, for example one could equally apply that 15mm or 150mm is within the vicinity and therefore on the line of junction. This would appear to be a flawed interpretation of the word 'on' and creates an absurdity. The Author suggests that if the wall is away from the line of junction for any distance, it will be wholly on the building owners land and therefore not subject to notification or the jurisdiction of the Act.

Conclusion

The sections of the Act that contribute to, (but are not exclusive) to the right of access are s.1(5), s.2 , s.6, s.7(1) s.8(1), and s.12(1). It would be unwise to infer anything into a document that does not or could not have reasonably been intended by the author(s). Furthermore, the Act should be considered in its entirety and not as individual elements. There are relationships between the various sections of the Act that impact upon the Act's overall application and interpretation.

s.8(1) is explicit in its wording limiting any rights of access to "*works in pursuance of the Act*". However, it clearly does not stand alone, any access rights granted must also satisfy s.7(1) and must not cause "*unnecessary inconvenience to the Adjoining Owner/Occupier*". S.6(8)(b) requires the works to be carried out with '*due diligence*', s1(6) further restricts any works "*to being necessary*, and it is seldom necessary to place foundations across the boundary.

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If it can be demonstrated that the foundations can be designed and constructed to avoid projecting across the line of junction, then any proposed projecting foundations are *unnecessary works* and the need for access is removed.

Certain s.2 works to a party wall may require access to the Adjoining Owner's property. Where there is a joint ownership and liability to maintain and repair the party wall and this is to the benefit of both owners, it is unlikely that there will be an issue regarding access or indeed a dispute. If a dispute arises then s.10 allows the appointed surveyor(s) to deal with the relevant issues accordingly.

The appointed surveyor(s) are required to determine any loss and can include inter alia, disturbance, inconvenience, and damage to the adjoining owner(s) property. The future cost of cutting back and removing the projecting (trespassing) foundations (if s.1(6) has been exercised) is a loss that must be considered and included within an award by explicit reference. However, this loss can only be quantified when the adjoining owner(s) decide to remove the projecting foundation (it is important to advise an adverse possession). This is the only time that they will incur a loss. Until this time arrives the loss is only a 'perceived' and not an 'actual' loss, but nonetheless it should be recorded within an award as a potential future issue.

Accordingly, if the s.6 works require access, these activities must be limited to satisfy s.7(1). Therefore, if the only means of access is through the adjoining property then those works must be completed without delay. The building owner cannot use the Act as an opportunity to execute additional works that do not require notice.

It would be an absurdity for an Act of Parliament to actively encourage and allow a trespass and nuisance to be committed. Consequently, upon closer examination of s.8(1) it would appear that the Act introduces certain qualifying principles that must be satisfied to support the right of access.

If the Act does not create a right of access the only option available to the Building Owner is to negotiate a licence with the Adjoining Owner. This can be dealt with by the appointed surveyors acting in the agency capacity.

Consequently, having examined the principles of s.8(1) of the Act and the rights of access, it is quite clear that it is open to interpretation, any interpretation should be based on the nature of the works and how they will be executed, specific attention being given to the requirements of s.7(1). Failure to understand the principles of these sections of the Act could create unnecessary inconvenience and a nuisance for the adjoining owner. Given that there is an explicit statutory provision not to cause a nuisance or inconvenience. It is the author's opinion that the Adjoining Owner's rights to quiet enjoyment of their property should exceed any perceived rights that the Building Owner may consider exist when undertaking notifiable works.

Reference

Ainsworth, R. (2000) 'The Party Wall etc. Act 1996: differences of opinion in interpreting section 1' Structural Survey Volume 18 . Number 5 . 2000 . pp. 213-217.

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