

Abuse of Statutory Procedures by Philip Antino BSc (Hons) MSc MRICS FFPWS

The Party Wall Act is a powerful piece of legislation, empowering surveyors with the ability to award *inter alia* on rights of access, compensation and security of expenses. The significance of these powers are supported by the restrictive practices of appeal procedures which must be commenced within 14 days if an owner disputes the surveyors award. Thereafter, the award stands. It is therefore of paramount importance, not only to the success of the future administration of the Act but also in respect of the professional integrity of the party wall surveying community that surveyors do not abuse these powers.

Whilst there is a legal requirement to serve notice, there are no mechanisms currently within the Act that force an owner to serve notice or indeed punish them in instances where they do not serve notice. The only mechanism available to the Adjoining Owner is to seek injunctive relief and as all of us know, it is very rare that an injunction will be taken out due to the costs that are incurred by the Adjoining Owner. In that regard, the Act could be seen as a toothless tiger and this is clearly being exploited by Building Owners who take a commercial decision knowing that the odds are stacked in their favour.

Subject of course to the provision that is damage occurs in which case, in the event that notice has not been served, their liability increases significantly (*Louis v Sadiq*).

However, that is a matter for the Building Owner's and their conscience. What has caused me concern and prompted me to write this article is that within recent months, certain information has been relayed to me and others that a surveyor has been using the Act in a way that can best be described as ill conceived, at worst dishonest. That causes me concern, not only from my own professional point of view but also for the party wall surveying community generally. The future success of the Act is dependant upon the honesty, integrity and professionalism that is displayed by party wall surveyors and if the procedures are abused, then that will only encourage other owners and surveyors to adopt the same unacceptable approaches. We will be left with mayhem!!!

The surveyor has openly disclosed the fact that he did, (in his capacity as an agent), serve notices for works under the Act that he knew were not intended to be undertaken. He also confirmed that the whole purpose of this exercise was simply to gain access to the Adjoining Owners property to record a schedule of condition. The premise for adopting this strategy was based on a suggestion made by the Building Owner that the Adjoining Owner was a troublesome character who would undoubtedly submit a claim for damage to his property. Therefore the Building Owner wanted to limit any claim by having a schedule prepared.

To add insult to injury, the surveyor then boasts "*it worked like a dream*" and "*notice was served, the Adjoining Owners appointed a surveyor, an appointment was made to record a schedule of condition.*" At that time, the two surveyors then agreed that the Act did not apply but the Building Owner had the schedule of condition. The Building Owner paid those fees incurred up to that point.

The surveyors justification for this approach is that no one lost anything. The Adjoining Owner was not inconvenienced, the Building Owner obtained his protection and the surveyors received a fee!!! I have to say that I find this whole approach repulsive,

unacceptable, unprofessional and dishonest whilst I do not see myself as a St George riding across the country on my big white charger, slaying all the dragons and protecting the party wall community, I do have a full understanding of what is fair, honest, professional and legal.

The situation which I have described above, does not in my opinion satisfy any of the former. In fact, I would go so far as to say that the surveyor and owner have manufactured a situation, falsified documents with nothing other than with the intention to gain unlawful access for their benefit, based simply on a spurious allegation that the Adjoining Owner is a troublesome character.

It seems to me that the Building Owner may well be the troublesome owner if he is prepared to adopt subterfuge to get his own way. We then have to consider the human rights of the Adjoining Owner and I have to say that these have clearly been breached and that cannot be tolerated in any reasonable society.

Responses to this action have been quite surprising. Indeed, one learned gentleman suggests in support of the offending surveyor *"many Judges I have appeared in front of would have considered what happened to have been an elegant solution to a thorny problem. I honestly cannot see any Judge (or any professional body) devising the surveyors conduct in the slightest."* Well I disagree and so have a number of other surveyors who have added their commentary to the debate. One particular surveyor stated *"I don't accept that entering a home of a person by using false pretences (surveyors or clients) is an elegant solution"*. Another response by a surveyor was to suggest *"to lead someone into thinking you are acting in a statutory capacity when you knowingly are not would be a misrepresentation and should be avoided"*.

I contacted the surveyor in question and expressed my concern over his approach to this matter and his response was *inter alia* *"why do I need a legal justification to serve the notice my client want (sic) need to serve on its behalf even though it has been advised it is not statutory necessary?"* and further suggested *"I would never misdirect an AO – the notices were served by the BO, albeit with me acting as his agent - ..."*. Well in my opinion, this surveyor has misdirected the Adjoining Owner by knowingly participating in the preparation and service of invalid notices. When he advised the Adjoining Owner, which he does by serving the notice, he was clearly misrepresenting the Act and misdirecting the Adjoining Owner and that in my opinion is totally unacceptable.

Far be it for me to set myself up on a pedestal and dictate how people should and should not conduct themselves, I will of course always leave that to their own morals, professional and personal integrity. I also acknowledge that sometimes make genuine mistakes and in those situations, where a mistake has been made and the person accepts that what they have done is wrong, I have no problem in assisting and directing them to the correct course of action. Indeed I would openly accept that I have made mistakes in the past (only one or two) and I have graciously accepted good advice from various people in all walks of life. It is after all how we learn and develop as a society and a community. However, having seen the surveyors blatant reluctance to accept that what he has done is wrong and thereby refusing to show any remorse, I am left wondering (frustratingly) what will become of the party wall surveying community and indeed the Act if this matter is left unresolved.

We all operate within our own professional environments, code of conduct and we should be mindful that we do not do anything that brings those professional organisations into disrepute or breach the rules and if we do we most certainly should not be boasting about it and I find the arrogance totally unacceptable.

I have therefore made my feelings about this whole situation known to the appropriate organisations and hopefully, with some guidance, the surveyor will recognise the error of his ways, concede gracefully that what he has done was totally unacceptable, apologise to the appropriate parties and indeed to the party wall surveying community generally and give an undertaking that he would not in the future conduct himself in this way. I think that will be a satisfactory conclusion to this situation.