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## **Invalid party wall awards and how to avoid them**

### **Abstract**

Considers the reasons for the invalidity of party wall awards. Examines decided cases under earlier party wall legislation in the context of the Party Wall etc Act 1996. Explains invalidity on the basis of an excess of the surveyors' statutory authority. Defines this authority in terms of jurisdiction and power. Demonstrates the limits of the surveyors' authority and emphasises the importance of strict compliance with statutory procedures. Concludes that surveyors should adopt an inquisitive and analytical approach to the scope of their authority to avoid the possibility of invalid awards. Echoes John Anstey's earlier warning that surveyors should avoid a broad-brush approach to their duties which will only leave them "covered in soot".

### **Keywords**

party wall, surveyor, award, ultra vires, power, jurisdiction

### **Introduction**

The Party Wall etc Act 1996 is intended to facilitate certain categories of construction operations in the vicinity of property boundaries. It achieves this by enabling the most appropriate construction solutions to be employed on affected structures irrespective of their location in relation to the boundary or to any common law rights affecting them.

Building owners are given a statutory right to undertake construction work at the boundary and this replaces any previous common law right to do so.<sup>1</sup> The adjoining owner's common law rights in tort are also replaced by a statutory right not to be subjected to unnecessary inconvenience by the building owner's works.<sup>2</sup>

Where the Act applies, construction solutions which meet the building owner's needs whilst minimising inconvenience to the adjoining owner can be negotiated between the parties<sup>3</sup>.

More usually, through the machinery provided by the statute, surveyors will be appointed by the parties who negotiate these solutions on their behalf. The surveyors' decision will then be embodied in a statutory award which, unless appealed, becomes binding on the parties.<sup>4</sup>

The surveyors' involvement is therefore central to achieving the purposes of the legislation and is widely credited with avoiding disputes between neighbouring owners that might otherwise result in litigation.

The essence of this involvement is said to involve the application of practical common sense rather than legal principles<sup>5</sup> and surveyors tend to adopt a helpful and pragmatic approach to the resolution of potential conflicts between neighbouring owners. This approach was also typical of the earlier London legislation<sup>6</sup> upon which the Act is modelled and, writing in 1961, Leach<sup>7</sup>, perhaps unwittingly, provided an insight into its potential dangers as well as its undoubted advantages:

"On the whole these provisions have worked well, not because of their drafting, which is riddled with doubts, but because their operation has been left so much to surveyors who have not been too analytical or too inquisitive as to the exact scope of their powers thereunder."

The risk to surveyors who fail to be sufficiently analytical or inquisitive as to the scope of their powers is that they might inadvertently exceed these powers with potentially serious consequences for themselves and their appointing owners.

An award which falls outside the powers laid down in the Act will be invalid and will provide no protection for either of the parties to the award. An invalid award may therefore result in

litigation between the parties and a possible liability in negligence by the surveyors to each of the appointing parties.

John Anstey<sup>8</sup> warned of these dangers in this journal in 1996 when he cautioned that:

"Case after case in modern times has turned on precise interpretation of words, or on legality of procedures - never on the actual works or the manner of carrying them out.....It follows therefore that the broad brush approach is utterly unsafe."

This paper echoes this warning and seeks to provide guidance on the avoidance of invalid awards. It examines the basis of the surveyors' authority under the legislation and the prerequisites for the validity of their awards. It considers examples of invalid awards from reported cases under the London party wall legislation and attempts to draw conclusions for surveyors who accept appointments under the present Act.

### **Basis of Surveyors' Authority**

Appointed surveyors are not agents for their appointing owners and therefore have no contractual authority to bind those who appoint them. Neither do they have any contractual right to determine disputes between the parties in the manner of an arbitrator or independent expert. Their authority to impose solutions on the parties by award is derived solely from the statute and a failure to comply with its requirements may therefore jeopardise that authority.

Whilst in some circumstances it is possible that minor departures from the legislative provisions will be tolerated by the courts<sup>9</sup>, surveyors would be unwise to rely on this. Indeed, because the Act invests surveyors with far-reaching powers to interfere with the property rights of adjoining owners the court in *Gyle-Thompson v Wall Street (Properties) Ltd*<sup>10</sup> took the view that they were subject to a corresponding duty to comply strictly with all aspects of

the legislation. Brightman J's oft-cited *dicta* in that case reinforce the importance of John Anstey's warning about the dangers of the broad brush approach<sup>11</sup>:

"Those surveyors are in a quasi-judicial position with statutory powers and responsibilities. It therefore seems to me important that the steps laid down by the Act should be scrupulously followed throughout, and short cuts are not desirable.

.....Having regard to the functions of surveyors.....and their power to impose solutions of building problems on non-assenting parties, the procedural requirements of the Act are important and the approach of surveyors to those requirements ought not to be casual."

It is helpful to understand that the surveyors' overall authority is founded on the twin concepts of *jurisdiction* and *power*. Surveyors who lack jurisdiction will have no authority to make an award and any attempt to do so will therefore be ineffective. If surveyors possess the necessary jurisdiction then their awards may still be invalid to the extent that they purport to exercise powers that have not been bestowed on them by the statute.

The importance of these two overlapping concepts of jurisdiction and power to the validity of surveyors' awards is considered in the remainder of this paper.

### **Nature of Surveyors' Jurisdiction**

The appointed surveyors collectively constitute what has been referred to as a "practical tribunal".<sup>12</sup> Although concerned with practical matters rather than with matters of law this description reflects their role in adjudicating between the parties and in imposing decisions upon them.

As with any tribunal, the jurisdiction of this tribunal is dependent on it having been properly constituted and is also limited to those matters over which it is competent to adjudicate upon.

To the extent that one of these essential requirements is not satisfied the tribunal will lack the jurisdiction to make a valid award. Let us therefore examine each of these in turn.

## **Proper Constitution of Tribunal**

### *Composition of Tribunal*

The tribunal must either consist of a single "agreed surveyor" or of two party-appointed surveyors and a "third surveyor".<sup>13</sup> Although neither of the parties can be appointed as their own surveyor there are no other statutory restrictions on who may act.<sup>14</sup> As separate legal personalities the appointment by a company of one of its directors or employees would not therefore seem to invalidate an award.

### *Appointment of Surveyors*

Whatever the particular composition of the tribunal, it will be improperly constituted unless all relevant appointments, and the selection of any third surveyor, are in writing.<sup>15</sup> To be valid the written appointment must clearly relate to the particular dispute under the Act upon which the surveyors are required to adjudicate.<sup>16</sup>

A course of dealings, involving a telephone conversation later confirmed by letter, has been held to satisfy the statutory requirements although this was on the basis of the particular surrounding circumstances appertaining at the time.<sup>17</sup> Surveyors will rarely be so fortunate as was demonstrated by the decision in the *Gyle-Thompson* case, referred to above. In that case a retrospective written confirmation of an earlier informal appointment was held to be insufficient in respect of an award based on a second notice which was subsequently served under the Act.

The lessons for surveyors are that written appointments should be contained in a single formal document in terms which leave no doubt about their intended purpose and scope. One of the published forms of words should be used<sup>18</sup> and no action taken by the appointed surveyor until the document has been signed and returned by the appointing owner.

Unfortunately even this will not guarantee the proper constitution of the tribunal if there is some defect in the appointment of the other surveyor or in the selection of the third surveyor. Cox & Hamilton<sup>19</sup> provide a simple but effective method for ensuring the validity of the third surveyor's selection in the RIBA Guidance Note and Brightman J's advice for confirming the validity of other appointments should now be familiar practice for most surveyors<sup>20</sup>:

"It would be a wise precaution for the surveyor of the building owner and the surveyor of the adjoining owner to inspect each other's written appointment before they perform their statutory functions. Neither of them has power to concur in an award unless both of them have been duly appointed.

.....It would be a wise precaution for the third surveyor, on accepting office, to inspect the written appointments of those selecting him; unless they have been duly appointed, they have no power to select a third surveyor; if the third surveyor has not been validly selected in writing, he has no power to concur in an award."

### ***Existence of Dispute***

The existence of a dispute within the terms of the Act forms an essential prerequisite for the appointment of surveyors and for the proper constitution of the tribunal.<sup>21</sup> In most situations this will be through the device of a "deemed dispute" which arises automatically where a building owner's originating notice is not consented to within 14 days.<sup>22</sup> Where there is some

impediment to the validity of the notice, all subsequent steps in the statutory procedure, including the surveyors' award may therefore also be rendered invalid.

### *Validity of Notices*

The validity of originating notices depends on their containing the requisite information and on being validly served. They do not have to be in any prescribed form although mistakes are more easily avoided if they are drafted according to one of the published precedents.<sup>23</sup>

The information to be included within the notice is set out in the statute<sup>24</sup> and sufficient detail must be included to enable the recipient to decide on an appropriate response to it.<sup>25</sup> In certain situations drawings must also be attached.<sup>26</sup> Whilst there is no requirement that notices be dated or even signed the omission of these details may lead to problems of evidence that could potentially invalidate the notice.<sup>27</sup>

Notices must be served by the building owner, as defined by the Act, upon all persons falling within the Act's definition of adjoining owner, although it is only necessary to serve a notice on one of two or more joint owners of a single interest in land.<sup>28</sup> Where work is to be undertaken to a property in joint ownership all joint owners must however join in the notice as building owner.<sup>29</sup> A notice served by an intending developer who has not yet acquired the necessary qualification of ownership will be invalid.<sup>30</sup>

The Act specifies a number of methods for service of notices<sup>31</sup> although service is not restricted to these methods. In particular, service can be effected on a surveyor or other agent having authority to accept service on behalf of an adjoining owner.<sup>32</sup> Where no such authority exists service will be invalid unless it is effected directly on the adjoining owner.<sup>33</sup> Service may also, of course, be effected on behalf of a building owner providing that specific authority has been given for this.<sup>34</sup>

## **Competence of Tribunal**

### ***Statutory Requirement***

The surveyors' tribunal is only competent to make awards on matters which are in dispute between the parties and which are also connected with work to which the Act relates.<sup>35</sup>

### ***Nature of Dispute***

If the parties have a difference of opinion about a matter then this is sufficient to constitute a dispute.<sup>36</sup> The word "difference" was used in the earlier London statutes instead of "dispute" but there is thought to be no practical distinction between the two terms.<sup>37</sup> In *Selby v Whitbread & Co*<sup>38</sup> McCardie J was of the view that the term should not be too strictly defined in the context of the party wall legislation:

"I do not think it would be in conformity with the scheme of the Act.....to give too rigid or confined a meaning to the word "difference" as used in such Act. Moreover, a difference is none the less a "difference" because the divergence of view as to law or fact has been indicated by phrases of courtesy rather than the language of vehemence."

In fact, the term has an even broader meaning within the Act as the surveyors are clearly competent to adjudicate on deemed disputes which arise under the legislation (see above) in addition to any actual differences of opinion between the parties. In these situations the simple absence of a written consent between the parties will be a sufficient basis for the surveyors' jurisdiction. Once this jurisdiction has arisen the surveyors are competent to resolve the various issues that may arise throughout the continuance of the works and may make any number of successive awards without the requirement that further disputes should have first arisen between the parties.<sup>39</sup>

*Connection with work to which the Act relates*

Whilst a surveyors' award will rarely founder on the absence of a dispute it may still do so if the matters addressed do not have the necessary degree of connection with work to which the Act relates.

An award will therefore be ineffective to the extent that it addresses works which are not regulated by the Act and may be invalid on account of this. Piling work falling outside the 3 or 6 metre limits within the Act, the regulation of the general conduct of development work on site and agreements affecting easements and crane oversailing are all matters which fall outside the Act and which therefore have no place in the surveyors' award.

Once appointed, surveyors may indeed be called upon to resolve a variety of disputes between the parties but they must be careful to distinguish between those that must be settled by consensual negotiation and those upon which they have power to adjudicate under the Act. Slessor LJ emphasised this distinction in *Burlington Property Company Ltd v Odeon Theatres Ltd*<sup>40</sup>:

"It seems to me entirely contrary to all recognised principles that arbitrators, not having differences at large submitted to them, but limited powers under a statute, can under pretext of the differences submitted to them adjudicate upon matters upon which the statute gives them no power to adjudicate."

Even where the award addresses works which are regulated by the Act it will still be invalid if these works do not form the subject-matter of the dispute actually submitted to the surveyors for adjudication. Unless this submission arises out of works which an adjoining owner has consented to<sup>41</sup> this means that the works being addressed by surveyors must have been referred to in the originating notice.<sup>42</sup> This was emphasised by Collins MR in *Leadbetter v Marylebone Corporation*<sup>43</sup>:

"[The section] is expressly and in terms limited to matters referred to in the notice; it does not give the surveyors general jurisdiction over every dispute 'in respect of any matter arising with reference to any work to which any notice given under this part of the Act relates'; it cannot oust the fresh jurisdiction of a fresh surveyor....."

In that case an award was held to be invalid where it attempted to regulate future matters in respect of which no dispute had yet arisen. A similar decision was reached in the more recent case of *Woodhouse v Consolidated Property Corporation Ltd*<sup>44</sup> where an award purported to resolve a dispute about the collapse of a party wall. Here, the dispute was held to be outside the tribunal's competence because it pre-dated the appointment of surveyors and could not therefore have been one of the matters submitted to them under the Act.

### **Surveyors' Statutory Powers**

Where the surveyors have jurisdiction under the Act they are invested with the power to make binding awards which may determine any of the following issues<sup>45</sup>:

- (a) the right to execute work under the Act
- (b) the time and manner of executing any such work; and
- (c) any other matter arising out of or incidental to the dispute referred to them including the costs of making the award.

An award which purports to determine some other issue or which determines one of these issues in a manner which was not anticipated by the legislation will have exceeded the

statutory powers and will be invalid. The extent of the surveyors' powers in respect of each of these three issues will now be explored.

## **The Right to Execute Work under the Act**

### ***Limited scope of surveyors' powers***

It will always be a question of fact as to whether the particular works proposed by a building owner fall within one of the categories of work authorised by the statute. The surveyors' powers to determine the right to execute work under the Act must therefore be read in this context as they clearly have no power to confer or abrogate rights in general.<sup>46</sup>

In *Gyle-Thompson*<sup>47</sup>, Brightman J emphasised the limited nature of the surveyors' powers in this context:

"If it is asked what 'right' is within the contemplation of [the Act] as appropriate to be determined by an award, an example applicable to section 46(1)(a)<sup>48</sup> would be the determination by the surveyors of the 'necessity' of the intended work on account of want of repair; in the absence of such necessity the 'right' under that paragraph (for example) to underpin would not exist. In fact many of the 'rights' conferred by section 46(1) are conditional rights which are only exercisable on proof of some fact appropriate to be determined by the surveyors in their award. That, in my judgement, is the context in which [the Act] enacts that the award may determine the 'right' to execute works."

### ***Declaratory role***

Whilst this might accurately describe the limits of the surveyors' power to impose decisions on the parties, few awards are so restricted. Such an interpretation ignores the parties' expectations, and common practice, that awards should also be seen to provide a more general

authorisation for works under the Act. Although such practices may simply be declaratory of existing statutory rights they serve a useful purpose in setting out the nature of the permitted works and so in enabling the parties to understand the practical implications of the bare legal rights referred to in the statute.

Before endorsing works in this way the surveyors will however wish to ensure that they are authorised by the legislation and that the award is not therefore *ultra vires*. This will often involve them in making decisions concerning the interpretation of the statute in addition to those relating simply to the nature of the work.

### ***Interpretation of statutory rights***

In addressing the likely scope of the various rights granted by the Act the approach of the courts to similar questions in the past can be instructive. In particular, there is a general presumption of statutory interpretation that, in the absence of clear wording in a statute, Parliament does not intend to expropriate private property rights without providing full compensation<sup>49</sup>.

On this basis an award which purported to allow a building owner to knock archways in a party wall has been held to be *ultra vires*<sup>50</sup> and in another case the construction of a lining wall on the adjoining owner's side of a party wall was also held to be outside the powers contained in the Act.<sup>51</sup> For the same reason the court in *Gyle-Thompson* held that the 1939 Act contained no right to reduce the height of a party wall or party fence wall.

These cases can be contrasted with a more liberal approach to interpretation in situations where the right claimed involves no expropriation of property. For example, in *Standard Bank of British South America v Stokes*<sup>52</sup> the court decided that a right in the 1855 Act to raise a party wall also included a right to underpin, although no such express right was contained in the statute.

## **The Time and Manner of Executing Work**

### ***Significance***

The surveyors' power to determine the time and manner of executing the works is fundamental to achieving the goals of the legislation. By regulating the conduct of the works they achieve an equitable balance between the rights of the building owner to undertake the works and those of adjoining owners to be free from damage or unnecessary inconvenience which might result from them.

### ***Time for execution of work***

In practice, the surveyors' power to determine the time for executing the work is subject to a number of restrictions. Unless agreed by the parties to the contrary the work cannot commence until the Act's minimum notice period has expired following service of the originating notice.<sup>53</sup> After commencement the surveyors' do have the power to restrict working hours during the day but probably only in the case of excessively noisy work.<sup>54</sup>

The requirement to balance the competing interests of the parties means that some level of inconvenience during the working day must ordinarily be endured by an adjoining owner. In the case of excessively noisy work even this will not automatically amount to an actionable nuisance at common law unless the perpetrators have failed to take reasonable steps to minimise its impact.<sup>55</sup> These steps might include some restriction on the frequency and duration of the offending works and, as the Act displaces common law rights in this context<sup>56</sup>, it is for the surveyors to impose appropriate restrictions in their award. On this basis it is submitted that restrictions imposed by the surveyors will be *ultra vires* to the extent that they exceed those required by the common law.

***Manner of executing work***

The surveyors' extensive powers to regulate the manner of executing the work were described by Leach<sup>57</sup> in the following terms:

"The surveyors are concerned with workmanship, the materials, and the method of execution of the works to be carried out to the structure....[and].....for the protection of the adjoining premises from injury....."

Although the exercise of these powers is, once again, subject to the requirement to balance the competing interests of the two parties, in practice the surveyors are given a wide discretion to make construction-related decisions which will rarely be challenged by the courts.

In *Barry v Minturn*<sup>58</sup> an award required a particular repair solution to be undertaken to a party wall, partly on the basis of the wall's past history. Whilst the House of Lords was satisfied that this was an improper basis for a decision they were unwilling to overturn the award. Because there was evidence that the tribunal making the award had also, as required by the statute, considered the level of inconvenience that the works would cause to the adjoining owner they held that the award should stand.

The courts have also been unwilling to overturn awards which have arguably interfered with the substantive rights between the parties whilst purporting simply to regulate the manner of executing the works. The decision, in *Standard Bank of British South America v Stokes* (see above), to allow a party wall to be underpinned in the absence of a statutory right to do so provides an early example of this.

A similar decision was reached in *Selby v Whitbread & Co*<sup>59</sup> where a party wall was left exposed and unsupported following the demolition of the building owner's adjoining building. The building owner had an unfettered right to demolish his building at common law and any

entitlement to support for the adjoining owner's building might have been expected to depend on the existence of an appropriate easement. Nevertheless, presumably on the basis of practical expediency, the court upheld an award which required the erection of a brick pier to support the party wall.

The Court of Appeal went even further in *Marchant v Capital & Counties plc*<sup>60</sup> where they upheld an award which imposed an obligation to provide weather protection to an exposed (non party) wall, despite the decision in *Phipps v Pears*<sup>61</sup> that no such right could exist at common law. This decision is also remarkable as it supports the rights of surveyors to impose continuing obligations on the parties rather than restricting the exercise of their powers to matters arising during the continuance of the works. This seems to be at variance with the spirit of the legislation and with the decision (referred to above) in *Leadbetter v Marylebone Corporation*.

### **Other matters arising out of or incidental to the dispute**

#### ***Powers limited by existing jurisdiction***

The surveyors also have the power to determine any other matter that may arise out the dispute which has been referred to them or which is in some way incidental to it.<sup>62</sup>

Although phrased in very broad terms it should be emphasised that these words relate to the powers enjoyed by the surveyors and cannot be used as a pretext for extending their jurisdiction. As previously discussed they are generally only competent to adjudicate in relation to works described in an originating notice and the reference to matters which are incidental to the dispute has to be understood in this context.

***Exercise of the powers***

In practice, the various ancillary matters to be adjudicated under this head often relate to the responsibility for payment of surveyors' fees, the liability for the costs of the work and to obligations by the building owner to compensate adjoining owners or to make good damage to their property.

Although the building owner will normally be required to pay the surveyors' fees the surveyors do have a discretion in this regard<sup>63</sup> and would be entitled to depart from this practice if they considered it appropriate. They have less discretion in the context of the other matters. The Act determines the substantive liability for the costs of the works<sup>64</sup> as well as the situations in which compensation and making good are appropriate.<sup>65</sup> The surveyors' powers are therefore limited to the implementation of the statutory rules and they have no general discretionary power, for example, to award compensation.<sup>66</sup>

***Power to rule on jurisdiction?***

There is some doubt as to whether surveyors may also adjudicate on questions relating to their own jurisdiction under this head. Surveyors are invariably required to make a number of decisions in the early stages of their appointment which relate to their competence to adjudicate or even on the extent to which their tribunal has been properly constituted. This may often involve questions about whether a particular structure is a party wall and about related questions concerning the position of a legal boundary line. Decisions may also have to be made about the validity of notices or of letters of appointment.

It is submitted that the surveyors cannot avoid these decisions on the basis that they have no power to decide them. If every doubtful boundary line and every challenge to the surveyors' jurisdiction by an obstructive adjoining owner had to be decided by the courts then the legislation would be failing in its purpose. The court appears to have taken a similarly pragmatic view in the recent case of *Loost v Kremer*<sup>67</sup> where the third surveyor had ruled that

both the party structure notice and the building owner's appointment of his surveyor were valid. The court upheld both rulings as explained by His Honour Judge Cowell:

"It seems to me that an arbitrator, a third surveyor, does have the jurisdiction to decide a matter, even if it is a matter of law, which is fundamental to the question of whether he makes an award or not. It is possible for an arbitrator to say: 'This is a matter of law, it ought to be decided by a court first, then bring it back to me', but I can see nothing wrong in the arbitrator saying: 'I must decide this point because it is fundamental. I will decide it and I will say what my award would be on one basis or another', and then leave it to the party aggrieved to appeal to determine the point of law."

The judge's remarks conceal a distinction between the surveyors having jurisdiction to make a final and binding decision on the matter and their simply making a pragmatic decision to enable the matter to proceed. In the former case, subject to a 14-day appeal period, their decision would be conclusive and could not be challenged by the courts. In the latter case they would be acting outside their authority and their decision would be subject to appeal at any time on the basis of its invalidity.

It is submitted that the latter scenario is the more realistic. Whilst the courts have readily endorsed awards by surveyors dealing with construction-related issues they have jealously guarded their own power to determine questions concerning the surveyors' jurisdiction. In *Crofts v Haldane*<sup>68</sup>, for example, the court rejected the submission that the surveyors were the proper tribunal to determine whether the right to raise a party wall could authorise an interference with an easement of light. On the same basis, in *Sims v The Estates Company*<sup>69</sup> the court held that the surveyors had no authority to determine whether a wall was a party wall and that this was a matter for the courts.

This suggests that, despite the widespread practice by surveyors in deciding questions concerning their own jurisdiction, they probably have no authority to do so under the Act. For the reasons outlined above, the successful operation of the legislation demands that surveyors continue to make these decisions upon acceptance of their appointment. They should be aware however that these decisions are taken as a prelude to their appointment to enable them to advise on its validity. As they fall outside the scope of the surveyors' statutory authority they should not therefore, despite current practice, be included within the body of an award.

### **Conclusion**

This paper has considered the various circumstances that might lead to the invalidity of surveyors' awards under the Party Wall etc Act 1996. The surveyors' authority is derived solely from the statute and, to the extent that an award exceeds this authority, it may be invalid.

This authority has been shown to consist of the related concepts of *jurisdiction* and *power*.

Whilst the surveyors' jurisdiction determines whether they may address a particular issue, the extent of their power determines the way in which they may do so.

It has been argued that surveyors' awards will rarely be challenged by the courts to the extent that they confine themselves to regulating the time and manner of executing work under the Act. However, despite the apparent breadth of the words in the statute, the extent of the surveyors' powers is otherwise extremely limited. Their apparent power to determine the right to execute work under the Act has, for example, been demonstrated to be severely restricted and, despite recent suggestions to the contrary, it has been argued that they have no power to rule on their own jurisdiction.

The surveyors' jurisdiction has been shown to depend on the proper constitution of their tribunal and to be restricted to matters within their competence. Because this jurisdiction entitles surveyors to adjudicate on matters affecting private property rights the courts will usually demand a strict compliance with the statutory requirements. Tribunals have therefore been held to be improperly constituted because of deficiencies in originating notices and in surveyors' letters of appointment. The courts have also been unwilling to extend surveyors' jurisdiction to matters other than those referred to in the originating notice.

Whilst the surveyors' authority is strictly defined by legal rules, the nature of their role is quite the opposite. As already noted, their task is concerned with the application of practical common sense rather than with legal principles and, for this reason, they have sometimes been described as constituting a 'practical tribunal'. The difficulty for surveyors lies in restricting their pragmatic and common sense decisions to the narrow confines of their statutory authority.

This difficulty can be mitigated by developing an awareness of the problem and, contrary to the practice described by Leach<sup>70</sup> in the introduction to this paper, in adopting an inquisitive and analytical approach to the scope of the surveyor's authority. This must inevitably require a closer attention to the detail of the Act's procedures than has sometimes been the practice.

This paper has attempted to echo John Anstey's graphic warning in this regard that "the broad sweep will leave you covered in soot". It is therefore perhaps appropriate to leave the final words to him<sup>71</sup>:

"The lesson is sad, but clear. Eschew the broad sweep and cling to the fine camel brush of the miniaturist....it is your professional duty, and it should be your pride, to get it perfect every time."

## References

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- <sup>7</sup> Leach, W. A. (1961) *Party Structure Rights in London*, Estates Gazette, p. 9
- <sup>8</sup> Anstey, J. (1996) 'The broad sweep will leave you covered in soot', *Structural Survey*, Vol. 14, No. 1, pp. 49 - 50
- <sup>9</sup> See, for example, *Whitefleet Properties Ltd v St Pancras Building Society* [1956] 167 EG 262
- <sup>10</sup> [1974] 1 All ER 295
- <sup>11</sup> *Gyle-Thompson and others v Wall Street (Properties) Ltd* [1974] 1 All ER 295, at p. 304
- <sup>12</sup> Fletcher Moulton L J in *Adams v Marylebone Borough Council* [1907] 2 KB 822, at p. 840
- <sup>13</sup> Party Wall etc Act 1996, s. 10(1)
- <sup>14</sup> Party Wall etc Act 1996, s. 20
- <sup>15</sup> Party Wall etc Act 1996, s. 10(2)
- <sup>16</sup> Brightman J in *Gyle-Thompson and others v Wall Street (Properties) Ltd* [1974] 1 All ER 295, at p. 303
- <sup>17</sup> *Whitefleet Properties Ltd v St Pancras Building Society* [1956] 167 EG 262
- <sup>18</sup> See Cox, S. & Hamilton, A. (1997) *Architect's Guide to Job Administration: The Party Wall etc Act 1996*, RIBA Publications, p. 16, Morrow, N. S. (1998) *Party Walls Workbook*, RIBA Publications, p.26 and RICS (1997) *Party Wall Legislation and Procedure: A Guidance Note*, RICS Books, p.38
- <sup>19</sup> *ibid*, p. 53
- <sup>20</sup> Brightman J in *Gyle-Thompson and others v Wall Street (Properties) Ltd* [1974] 1 All ER 295, at p. 304
- <sup>21</sup> Party Wall etc Act 1996, s. 10(1)
- <sup>22</sup> Party Wall etc Act 1996, ss. 5 & 6(7)
- <sup>23</sup> See note 17 above. A comprehensive library of precedents also appears in Bickford-Smith, S. & Sydenham, C. (1997) *Party Walls: The New Law*, Jordans, Appendix 4
- <sup>24</sup> Party Wall etc Act 1996, ss. 1(2), 1(5), 3(1) & 6(5)

- <sup>25</sup> *Hobbs, Hart & Co v Grover* [1899] 1 Ch 11
- <sup>26</sup> Party Wall etc Act 1996, ss. 3(1)(b) & 6(6)
- <sup>27</sup> *Bennett v Howell* [1981] reported in Anstey, J. (1996) *op cit*, p. 49 and Anstey, J. & Vegoda, V. H. (1997) *An Introduction to the Party Wall etc Act 1996*, Lark Productions, p.73
- <sup>28</sup> *Crosby v Alhambra Co Ltd* [1906] 1 Ch 295
- <sup>29</sup> *Lehman v Herman* [1992] 1 EGLR 172
- <sup>30</sup> *Spiers & Son Ltd v Troup* [1915] 84 LJKB 1986
- <sup>31</sup> Party Wall etc Act 1996, s. 15
- <sup>32</sup> *Whitefleet Properties Ltd v St Pancras Building Society* [1956] 167 EG 262
- <sup>33</sup> *Gyle-Thompson and others v Wall Street (Properties) Ltd* [1974] 1 All ER 295
- <sup>34</sup> See RICS (1997) *Party Wall Legislation and Procedure: A Guidance Note*, RICS Books, p.38 for an appropriate form of authority
- <sup>35</sup> Party Wall etc Act 1996, s. 10(10)
- <sup>36</sup> Mustill, M. J. & Boyd, S. C. (1989) *The Law and Practice of Commercial Arbitration in England*, Butterworths, p. 127
- <sup>37</sup> *ibid*, p. 129
- <sup>38</sup> [ 1917] 1 KB 736 at p. 745
- <sup>39</sup> *Selby v Whitbread & Co* [ 1917] 1 KB 736
- <sup>40</sup> [1939] 1 KB 633 at p. 642
- <sup>41</sup> This obviates the requirement for service of an originating notice under the Party Wall etc Act 1996, s. 3(3)(a)
- <sup>42</sup> The changed wording in the 1996 Act which refers to matters connected with work to which the Act relates rather than the express references, in earlier legislation, to matters referred to in the notice is thought by many party wall practitioners to make no difference to this. See also Bickford Smith & Sydenham, *Party Walls: The New Law*, Jordans 1997, p. 50, footnote 13
- <sup>43</sup> [1904] 2 KB 893 at p. 900
- <sup>44</sup> [1993] 1 EGLR 174
- <sup>45</sup> Party Wall etc Act 1996, s. 10(12)
- <sup>46</sup> Leach, W. A., *op cit*, p. 45
- <sup>47</sup> *Gyle-Thompson and others v Wall Street (Properties) Ltd* [1974] 1 All ER 295 at p. 302
- <sup>48</sup> Broadly equivalent to Party Wall etc Act 1996, s. 2(2)(b) although the reference to the right to underpin now appears in s. 2(2)(a)
- <sup>49</sup> *Central London Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744

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- <sup>50</sup> *Burlington Property Company Ltd v Odean Theatres Ltd* [1939] 1 KB 633
- <sup>51</sup> *Barry v Minturn* [1913] AC 584
- <sup>52</sup> [1878] 9 Ch D 68
- <sup>53</sup> Party Wall etc Act 1996, s. 10(12)
- <sup>54</sup> Leach, W. A., *op cit*, p. 14, footnote 2
- <sup>55</sup> *Andreae v Selfridge & Company* [1937] 3 All ER 255
- <sup>56</sup> Chynoweth, P., *op cit*
- <sup>57</sup> Leach, W. A. *op cit*, p. 45
- <sup>58</sup> [1913] AC 584
- <sup>59</sup> [1917] 1 KB 736
- <sup>60</sup> [1983] 2 EGLR 156
- <sup>61</sup> [1964] 2 All ER 35
- <sup>62</sup> Party Wall etc Act 1996, s. 10(12)(c)
- <sup>63</sup> Party Wall etc Act 1996, s. 10(13)
- <sup>64</sup> Party Wall etc Act 1996, s. 11
- <sup>65</sup> Party Wall etc Act 1996, ss. 1(7), 2(3) to (7), 7(2), 11(6) and 11(8)
- <sup>66</sup> *Adams v Marylebone Borough Council* [1907] 2 KB 822
- <sup>67</sup> Unreported Judgement of His Honour Judge Cowell in the West London County Court, 12 May 1997
- <sup>68</sup> [1867] LR 2 QB 194
- <sup>69</sup> [1866] 14 LT 55
- <sup>70</sup> Leach, W. A., *op cit*
- <sup>71</sup> Anstey, J., *op cit.*, p. 50