

Unnecessary Inconvenience and Compensation within the Party Wall Legislation

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Abstract

Examines the obligations to avoid unnecessary inconvenience and to pay compensation for loss or damage within the Party Wall etc Act 1996. Considers the argument that the two obligations are directly related. Demonstrates that the obligation to pay compensation only relates to work lawfully undertaken under the Act and that the obligation to avoid unnecessary inconvenience exists to define the limits of such work. Concludes that the two obligations are separate but complimentary aspects of the statutory code and that no direct relationship exists between the two.

Keywords

Party Wall, Compensation, Making Good, Unnecessary Inconvenience, Surveyor

Introduction

The Party Wall etc Act 1996 regulates a variety of construction operations, including work to party walls, where these are carried out in close proximity to neighbouring properties. The Act grants rights to building owners to undertake certain categories of work subject to the prior service of notices on adjoining owners. Where adjoining owners do not consent to the intended work the Act also makes provision for the appointment of surveyors to resolve disputes that subsequently arise.

These aspects of the legislation have already been extensively covered in the various professional journals (eg. Anstey 1996, de Burgh Sidley 1996, Mendleblat & Lindley 1997). However, in addition to these procedural requirements the Act also creates a number of important rights in favour of adjoining owners and occupiers. These rights have been

described as the Act's 'ancillary rights and obligations' (Bickford-Smith & Sydenham 1997, pp. 33 - 37) and form two distinct categories.

The first category consists of a number of specific obligations that are imposed on building owners in connection with the conduct of the work. The most significant of these is an obligation not to cause unnecessary inconvenience when exercising rights under the Act (s.7(1)).

The second category provides adjoining owners and occupiers with an entitlement to recompense for losses incurred as a result of the work. This may simply involve the building owner "making good" damage to adjoining premises (ss.2(3) to 2(7)). More controversially however, he or she may also be subject to an obligation to pay compensation to a neighbour who has suffered loss (s.7(2)).

This paper examines the building owner's twin obligations not to cause unnecessary inconvenience and to pay compensation for a neighbour's losses. It explores the legal basis for these obligations and their roles within the legislative regime. It considers the legal consequences of an unnecessary inconvenience as well as the preconditions for the requirement to pay compensation. In particular, through its examination of these issues, the paper attempts to clarify the nature of the relationship between the two obligations.

The Two Obligations

The legislative provisions

The obligation to avoid unnecessary inconvenience appears in section 7(1) of the Act in the following terms:

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.

The immediately following subsection (s.7(2)) then sets out the building owner's obligation to pay compensation:

The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act.

A possible interpretation

The close proximity of these two sub-sections within the legislation suggests to some commentators that they should be read together (Alexander 1997, p.24). Indeed, one common interpretation of the two provisions is that section 7(1) imposes an obligation on the Building Owner whilst section 7(2) provides the remedy for its breach (Morrow 1998, p.5). According to this interpretation a building owner's obligation to pay compensation is triggered directly by his prior breach of the obligation not to cause unnecessary inconvenience.

This interpretation is summarised by Cox & Hamilton (1997, p. 11) when they note that:

".....a Building Owner must not cause unnecessary inconvenience to any Adjoining Owner or occupier. If he does.....then he is obliged to compensate them for any loss or damage which results [s.7(1) & (2)]......The Building Owner is obliged to pay compensation for any loss or damage which is the result of his causing unavoidable inconvenience to the Adjoining Owner or Occupier."

If this view is correct then it suggests that the compensation regime, in encompassing both obligation and remedy, forms a completely self-contained code. This would certainly assist the surveyors in their administration of the legislation.

If the causing of unnecessary inconvenience provides the sole basis for payment of compensation then the building owner's conduct can be measured against this single criterion when examining a neighbour's potential entitlement. The need to consider the building owner's behaviour in the context of possible duties of care and other recognised legal duties therefore becomes unnecessary.

Similarly, according to this view, where the building owner's actions have caused an unnecessary inconvenience the automatic availability of the statutory compensation remedy ensures that surveyors have no need to address the relevance of any common law remedies that might otherwise be available.

An alternative interpretation?

This paper will suggest that this is a mistaken view of the legislation and that no such direct relationship exists between the obligation to avoid unnecessary inconvenience and the obligation to pay compensation. It will examine each of these obligations separately with a view to understanding their true significance within the legislation. Based on this it will then suggest an alternative interpretation of these two provisions.

The obligation to avoid unnecessary inconvenience (s.7(1))

The purpose of the obligation

The obligation to avoid unnecessary inconvenience is central to workings of the statutory regime. It has appeared in substantially the same form in all the earlier London party wall legislation upon which the current regime is modelled.

Its role is essentially to define the limits of the rights granted to building owners under the Act. These rights entitle owners to undertake work to land or structures on their neighbour's side of the boundary line. They include the right to place projecting foundations on

neighbouring land, to cut a flashing into a neighbour's building and to underpin their neighbour's side of a party wall.

The extensive nature of these rights was emphasised by Brightman J in *Gyle-Thompson v Wall Street (Properties) Ltd [1974]* when he noted (p. 302) that:

".....the Act.... give[s] a building owner a statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests."

Because the legislation authorises this interference it effectively deprives adjoining owners of their normal common law rights to protect their property. The building owner would not, for example, be liable for the torts of trespass or nuisance for acts which had been expressly authorised by statute. This draconian effect on common law rights was observed by McCardie J (p. 752) in *Selby v Whitbread & Co [1917]*:

".....the rights at common law and the rights under the Act.....are quite inconsistent with one another. The Plaintiff's common law rights are subject to the Defendants' statutory rights.....Hence I think that the Act.....is not in addition to but in substitution for the common law with respect to matters which fall within the Act. It is a governing and exhaustive code, and the common law is by implication repealed."

In the absence of any limits at common law the statutory regime must therefore itself define the limits of the building owner's rights if substantial injustice to adjoining owners is to be avoided. It achieves this by providing that the building owner's statutory rights can only be exercised in such a way that unnecessary inconvenience is avoided to adjoining owners and occupiers.

The concept of unnecessary inconvenience

The nature of this restriction clearly acknowledges that some inconvenience will inevitably result from the exercise of the building owner's rights and inconvenience *per se* is not therefore made unlawful. It is only when the inconvenience is caused unnecessarily that it crosses the threshold into illegality.

This might suggest, where several alternative methods of working are available, that the building owner must always adopt the least intrusive method to stay within the law. Most commentators favour a less restrictive interpretation and argue that, as with the law of nuisance, the task is to balance the competing interests of the two parties in a way that is reasonable. For example Leach (1961, p. 14) suggests that:

".....what is necessary must have regard to the orderly reasonable execution of the works, the rights of other persons, the costs of working at special hours and the effect on the orderly execution of the job, as well as the convenience of the adjoining owner."

In either event the question of what constitutes an unnecessary inconvenience must always be a question of fact and will depend on the individual circumstances of a particular case. The task of determining such questions is allocated to the appointed surveyors who, by section 10(12) of the Act, regulate the time and manner of executing the work by publishing an award which addresses these issues.

The obligation to avoid unnecessary inconvenience therefore provides the practical framework for the lawful execution of the work and its implications are confronted before work actually starts. Provided the works are then undertaken in accordance with the surveyors' award the building owner will be acting lawfully and will have a defence to an

action in trespass or nuisance by an aggrieved adjoining owner or occupier: *Louis v Sadiq* [1996].

Breaches of the obligation

However, to the extent that the works are subsequently undertaken in a way that causes unnecessary inconvenience, the building owner will then be in breach of the statutory obligation. This may occur where the level of inconvenience authorised by the award has been exceeded or where the work involves an unacceptable interference which has not been anticipated by the terms of the award. In either situation adjoining owners and occupiers will be entitled to redress for the breach.

Bickford-Smith & Sydenham (1997, pp.57 - 59) consider that their claim should be based on the tort of breach of statutory duty. This seems appropriate in view of the suggestion (see above) that the statutory obligation not to cause unnecessary inconvenience was created in place of tortious obligations in trespass and nuisance. For this reason suggestions (Ensom *et al* 1997, p.60) that breach of the statutory obligation might also lead to liability in nuisance are probably not correct although, as pointed out by Leach (1961, p.9), nothing in the Act appears to prevent a simultaneous action in negligence.

Despite McCardie J's observations in *Selby v Whitbread* (see above) that the statutory code repeals and replaces the common law he explains (p. 753) that:

"In so holding I in no way negative the proposition that a plaintiff may bring his action for damages if he can establish that the defendant has exerted his statutory privileges so as to inflict injury on the plaintiff by negligence, improper obstructiveness, avoidable nuisance, or unreasonable delay."

The concepts of improper obstructiveness, avoidable nuisance and unreasonable delay all represent the types of interference with the plaintiff's property anticipated by the obligation not to cause unnecessary inconvenience. They all therefore amount to breaches of the statutory duty. In contrast, the concept of negligence involves a breach of a duty of care rather than an interference with the plaintiff's property. If the plaintiff can recover damages for negligence it must therefore be on the basis of its survival as a separate cause of action.

Enforcing the obligation

Whatever the nature of the cause of action the courts are clearly the proper venue for enforcing breaches of these obligations. It seems unlikely that the appointed surveyors also have some inherent jurisdiction to award compensation where an unnecessary inconvenience has occurred.

The issue was considered by the Court of Appeal in the case of *Adams v Marylebone Borough Council [1907]*. Lord Justice Vaughan Williams (p. 833) felt that the surveyors might have some jurisdiction to adjudicate on whether particular conduct amounts to an unnecessary inconvenience but was unsure as to whether they also had the power to award compensation on the strength of this. Lord Justice Fletcher Moulton (p. 841) was quite clear that they had no such power and that these were matters for the courts. Although the court's deliberations on this issue proved inconclusive it was ultimately not prepared to sanction an award of compensation on this basis (p. 835).

The obligation to compensate for loss or damage (s.7(2))

Recompense mechanisms

Whilst the concept of unnecessary inconvenience defines the limits of the building owner's statutory rights, the obligation to compensate for loss or damage is a condition of the exercise of these rights. This condition forms one of the mechanisms within the legislation which

recompenses adjoining owners and occupiers for losses suffered in consequence of the exercise of rights by the building owner.

The primary mechanism for providing such recompense is the requirement that a building owner should make good (or pay expenses for) the damage which he causes to adjoining premises or their internal furnishings and decorations. Although a general requirement to make good is often included in surveyors' awards this form of recompense is strictly only applicable to certain categories of work to existing boundary structures authorised by section 2(2) of the Act.

Different rules have traditionally applied for other categories of work under the Act. In circumstances where the work benefits the adjoining owner because it involves maintenance to a shared structure (ss. 2(2)(a) & (b)) an adjoining owner has traditionally had no entitlement to recompense. Where the work involves the construction of a new wall at the line of junction (s.1) the traditional recompense has taken the form of compensation for any damage which the work causes to the adjoining owner's property.

The more extensive compensation for "any loss or damage", which is the subject of this paper, has traditionally only been available in connection with works of adjacent excavation which are now regulated by section 6 of the 1996 Act. This entitlement to compensation extends far beyond mere physical damage to property and Bickford-Smith & Sydenham (1997, p.35) have suggested that its scope may even be as extensive as the entitlement to damages for the tort of nuisance. On this basis compensation would be available to neighbouring owners and occupiers for any loss of trade, diminution in the value of property or mental distress which they suffer as a result of the building owner's works.

By section 7(2) of the 1996 Act this far-reaching entitlement to compensation has been extended to all types of work regulated by the Act, including those maintenance works where there has traditionally been no entitlement to recompense at all.

A condition of exercising rights

The Act's various recompense mechanisms make no attempt to attribute blame to the building owner where some loss or damage is caused to an adjoining owner or occupier. The obligation to compensate or make good is owed irrespective of fault for, as pointed out by Lord Justices Vaughan Williams (p. 827) and Fletcher Moulton (p. 837) in *Adams v Marylebone Borough Council*, it is a condition of the exercise of the building owner's statutory right. If a building owner chooses to exercise rights under the Act and thereby causes loss or damage to his neighbour he will therefore be responsible for this, however reasonable his conduct may have been.

The compensation and making good provisions can therefore be seen to be regulating lawful conduct that has been authorised by the legislation rather than conduct which is unlawful because it causes unnecessary inconvenience or is undertaken negligently. Lord Justice Fletcher Moulton emphasised this distinction when he observed in *Adams v Marylebone Borough Council* (p. 826) that:

"The general principle applicable in such cases is that "compensation" as distinguished from "damages" properly so called, is only for acts done within the statutory powers, which, if not authorised by the Act, would have been actionable."

Leach (1961, p. 9) also contrasts the role of the compensation and making good provisions for lawful conduct with that of damages for negligence:

"The Act does not authorise negligence and the provisions thereof as to making good damage and compensation.....do not supplant the common law right to damages for loss or injury caused by negligence: they are related only to the proper execution of the works."

Surveyors' jurisdiction to award compensation

This paper has argued that the courts have exclusive jurisdiction to award damages for unlawful conduct which falls outside the provisions of the Act. It is submitted however that the appointed surveyors have the sole responsibility for determining questions relating to compensation and making good.

They have a wide remit to settle disputes relating to matters connected with the work (s.10(10)) and their award may determine a variety of matters arising out of or incidental to such disputes (s.10(12)). The preparation of schedules of condition and subsequent determinations about making good form a central part of the surveyors' role and are clearly accepted as falling within the scope of the legislation.

Although awards of compensation by surveyors are less common, commentators (Ruddall 1922, p.91), (Chanter 1946, p. 73), (Leach 1961, p.9), (Bickford-Smith & Sydenham 1997, p. 49) have consistently regarded this as also falling within their jurisdiction. This was also the view of Lord Justice Vaughan Williams in *Adams v Marylebone Borough Council* (pp. 834 - 835) who ventured the following opinion:

"Speaking for myself, I am disposed to think that in all cases in which the Act provides for compensation the intention is that the amount of compensation is to be determined by the statutory tribunal, to which is also relegated the determination of the questions which form conditions precedent to the existence of the right to compensation."

The relationship between the two obligations

Lawful conduct

This paper has shown that the obligation to avoid unnecessary inconvenience defines the limits of the building owner's statutory right to interfere with what were previously the common law rights of adjoining owners and occupiers. The appointed surveyors are responsible for helping to define this limit by the terms of their award and for regulating the lawful conduct of the subsequent work.

This regulatory role has been shown to include the responsibility for administering the Act's recompense mechanisms which protect adjoining owners and occupiers from works which have been authorised by the legislation. Where an adjoining owner or occupier suffers loss or damage as a result of lawful works the surveyors therefore have jurisdiction to award compensation for this, irrespective of any fault on the part of the building owner.

Unlawful conduct

In the event that the building owner's conduct exceeds the limits that have been defined then it becomes unlawful and the surveyors have no further authority to act. Whilst grappling with these issues in *Adams* Lord Justice Fletcher Moulton had this to say about the surveyors' role (p. 841):

"I confess that, as at present advised, I, personally, am disposed to think that, with regard to any act of the building owner outside the provisions of [the Act] the special tribunal would have no jurisdiction; but at the same time I think that it would have the widest powers of determining the manner and time of doing the work, so as not to cause unnecessary inconvenience to the adjoining owner or occupier."

Unlawful conduct by the building owner falling outside the provisions of the Act will therefore fall within the jurisdiction of the courts. The proper remedy for an aggrieved neighbour would then be an action for damages for either breach of statutory duty or negligence rather than a request to the surveyors to award compensation.

Conclusion

It follows from this analysis that the relationship between the two obligations is very different from that suggested by Morrow (1998, p.5) and Cox & Hamilton (1997, p.11). The two obligations can instead be seen to be quite separate but complimentary aspects of the statutory code. Whilst one obligation regulates conduct within the code, the other acts as its gatekeeper.

Rather than a breach of the obligation to avoid unnecessary inconvenience triggering the obligation to pay compensation it in fact extinguishes that obligation which is only appropriate where a building owner acts lawfully. The causing of unnecessary inconvenience is instead an unlawful act which takes the building owner outside the provisions of the statutory code and unleashes the full force of the common law upon him.

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