

The Scope for Agreement in Statutory Party Wall Procedures

Introduction

Statutory procedures

Statutory party wall procedures are now an almost inevitable feature of city centre construction projects. They involve the service of notices and the appointment of surveyors who publish awards to resolve a variety of construction-related issues affecting structures in boundary locations. They are part of a statutory code which has operated under the London Building Acts since 1855 and which was extended to the whole of England and Wales by the Party Wall etc Act 1996.¹

The statutory procedures apply to construction operations in three different situations. They are most frequently encountered where works ('party wall works') are carried out to a party wall or other shared boundary structure.² They also apply to the erection of a new boundary structure³ ('line of junction works') and to excavations which have the potential to interfere with the stability of an adjacent building or structure⁴ ('adjacent excavations').

There are minor differences between the procedures in each of these three situations. However, they all commence with the service, by a property owner wishing to undertake the work (the 'building owner'), of an originating notice on an adjoining owner whose property will be affected by it.⁵ The adjoining owner can respond in a number of different ways but in most cases a dispute will arise between the parties within the meaning of the legislation. Although there is then scope for this to be resolved by a single agreed surveyor the parties will usually each appoint a surveyor and the two surveyors will publish a joint award which will regulate the conduct of the works.⁶

Agreements between the parties

Despite the existence of this procedural framework it is common for the parties, or their surveyors, to depart from it by agreement. This may sometimes involve reaching an agreement to undertake the works entirely outside the statutory framework. More frequently, it will involve an agreement, or series of agreements, about the future

conduct of the statutory procedures which may be at variance with the strict wording of the legislation. The motivation for the agreement may lie in a wish to avoid the delays and costs associated with the statutory framework. Alternatively, it may arise from a reluctance to institute a formal dispute resolution procedure in situations where, in reality, a situation of amity exists between the parties.

Agreements typically arise in four different contexts. Firstly, as stated above, the parties may seek to exclude the Act entirely by concluding an agreement which pre-empts the service of an originating notice. Secondly, in circumstances where an originating notice has already been served, they may seek to avoid the need for surveyors to produce an award by themselves reaching agreement about the nature and conduct of the works. Thirdly, where works have commenced in breach of the Act, the parties sometimes seek to regularise the situation by agreeing on the retrospective operation of the statutory machinery. Finally, and most frequently, the parties or their surveyors may agree that variations can be made to the nature of the proposed work.

Although these practices have become commonplace it is unclear whether the Act anticipates that the parties and their surveyors should be free to contract in and out of its provisions at will. This article therefore explores the extent to which they are free to do so. It examines each of the four practices in turn and considers the validity of the agreements reached in each case.

Agreements in lieu of notice

Informal agreements

Let us first consider the situation where the parties conclude an agreement about the conduct of the works in the absence of an originating notice having first been served. These agreements, sometimes described as ‘informal agreements’, purport to contract out of the Act entirely by recording the basis on which the parties agree to the work proceeding.⁷

They will often be prepared by a surveyor and will typically be based around a signed statement by the adjoining owner consenting to the proposed work. The work will usually be described by reference to drawings which will be appended to the

document. Other terms might also be included with a view to regulating the ongoing conduct of the works including a requirement that damage to the adjoining owner's property be made good.

Informal agreements are most likely to be encountered in what have become known as "small works" situations involving small scale house alterations by owner occupiers.⁸ The costs of administering the statutory procedures (typically borne entirely by the building owner) may be disproportionate to the value of such a project and there will be considerable savings for a building owner who can persuade his neighbour to reach agreement in these circumstances. They might also be entered into, possibly on payment of monetary consideration to the adjoining owner, where a building owner is anxious to circumvent the statutory notice periods in order to make an early start on site. However, the question posed by this article is whether these agreements can effectively free the parties from compliance with the statutory procedures.

Section 3(3)(a)

The question is only partially answered by the express provisions within the Act. Section 3(3)(a) waives the requirement for service of an originating notice where the adjoining owner consents to party wall works in writing. Unfortunately, the Act is entirely silent on whether the parties have a similar right to contract out of the statutory procedures in the context of line of junction works and adjacent excavations.

It might be thought that attempts to evade the statutory provisions are, in their nature, unlawful and that section 3(3)(a) provides a special dispensation for such arrangements in the limited context of party wall works. The decision in *Stevens v Gourley*⁹ might be seen as providing some support for this view. The court in that case held that a contract made in contravention of the Metropolitan Building Act 1855, in which the party wall code first appeared, was void on grounds of illegality.

Inherent right to contract out

The alternative possibility is that section 3(3)(a) is merely declaratory of the parties' inherent right to contract out of the legislation in respect of all types of work. Its failure, for whatever reason¹⁰, to make any reference to line of junction works and

adjacent excavations would therefore have no impact on the parties' ability to contract out of these works in addition to those dealing with party walls.

It is submitted that this is the better view and that, in the context of the present discussion, *Stevens v Gourley* should be distinguished. The contract in that case was for the erection of a building in contravention of the building control provisions in Part I of the 1855 Act. Such provisions are matters of public law, enforceable by criminal sanction. They deal with matters of public safety and it is entirely right that the courts should prohibit their exclusion by private agreement. In contrast, the party wall code, which first appeared in Part III of that Act, is a creature of private law. Although having its origins in the same statute as London's building control regime it is concerned solely with the adjustment of private rights between individuals and other legal persons.¹¹ When viewed in this context there seems little justification for interfering with the parties' freedom to contract in relation to matters which are entirely personal to them.

This view is further supported by the particular way in which the code operates. It grants rights to building owners to undertake certain categories of work to adjoining owners' properties that would otherwise constitute a trespass.¹² Rights are granted in the context of line of junction and adjacent excavation works in addition to those affecting party walls so there seems no reason why the legislators should have intended to treat these works any differently.¹³ Where these rights are exercised the statutory procedures provide protection for adjoining owners whose property is being interfered with.¹⁴ Compliance with these procedures, beginning with the service of an originating notice, is therefore an essential precondition for the exercise of the statutory rights.¹⁵ However, if the building owner chooses not to exercise his statutory rights, for example because he has secured equivalent rights by agreement with his adjoining owner, the statutory procedures must be redundant. For all these reasons it is considered that the parties are at liberty to contract out of all the statutory arrangements by informal agreement, should they choose to do so.

Subsequent disputes

Entering into an informal agreement is, of course, no guarantee that the parties can avoid subsequent disputes about the conduct of the works. Where such disputes arise

it is often assumed that they can still be referred to appointed surveyors for resolution under the Act.¹⁶ Such assumptions are based on an assumption that the Act, rather than the common law, continues to define the underlying rights between the parties. They are reinforced by a literal reading of section 10(1) which provides that surveyors must be appointed to resolve disputes “in respect of any matter connected with any work to which this Act relates”.

It is unlikely that either notion is correct. Despite the apparent breadth of section 10(1) the courts have consistently ruled that rights under the Act, and the surveyors’ statutory jurisdiction, are each dependent on the prior service of an originating notice.¹⁷ In the absence of such notice neither these rights, nor the surveyors’ statutory function can have any relevance. Once the parties have concluded an informal agreement to contract out of the Act, the statutory code, by definition, ceases to have effect. From that point, the parties’ rights are regulated by the terms of their agreement rather than by the statute.¹⁸ Subsequent disputes about the interpretation of the agreement are therefore a matter for the courts, rather than for surveyors, to resolve.

Finally, it should be noted that informal agreements to contract out of the Act sometimes contain express provisions referring subsequent disputes to surveyors for resolution under the Act.¹⁹ For the reasons already described, the statute has no role in the absence of an originating notice and these provisions must, of necessity, be ineffective. Unless they can be construed in some other way²⁰ they will also be void for uncertainty and may even jeopardise the whole agreement on this basis. Having taken a decision to contract out of the Act, such attempts to contract back in again are therefore unwise. If the parties see the ongoing involvement of surveyors as desirable then their agreement would be better served by the inclusion of an arbitration or expert determination clause. As an alternative, in view of the undoubted benefits provided by the Act, they might wish to reconsider their decision to contract out of its procedures in the first place.

Agreements subsequent to notice

Consent notices

We can now consider the various forms of agreement which are commonly entered into once an originating notice has actually been served. The most straightforward form occurs where an adjoining owner simply serves “a notice indicating his consent” (or ‘consent notice’) to the works described in the originating notice within fourteen days of receiving the same, as anticipated by sections 5 and 6(7) of the 1996 Act. He will typically do so, either by completing and returning a standard acknowledgement of service form to this effect²¹ or by confirming his consent by letter.

The service of such a notice indicates the absence of a dispute between the parties and enables the Act’s dispute resolution procedures to be dispensed with²². The building owner is therefore immediately able to proceed with his work on the basis of the adjoining owner’s agreement rather than having to wait for the publication of an award by surveyors.

Effect of consent notices

In these situations it is not entirely clear whether the building owner’s authority to undertake the work arises from a contract with the adjoining owner or whether, despite the adjoining owner’s consent, it continues to rest on the exercise of his statutory rights²³. The issue is important as it will determine how subsequent disputes between the parties should be resolved.

If authority rests on a contract between the parties the situation will be synonymous with that, already described, under an informal agreement. The contract will displace the statutory code which will then have no further relevance. Subsequent disputes about the conduct of the works will be matters for the courts. The other possibility is that service of an originating notice triggers a statutory procedure which cannot then be displaced. By serving the notice the building owner asserts his intention to exercise the statutory rights and the procedure is then bound to take its course to ensure that he is able to do so.

According to this second interpretation, an adjoining owner who consents to the work should not be regarded as indicating a wish to depart from the statutory procedures

and indeed he would not be free to do so. He is simply consenting, in accordance with the Act's express provisions, to the exercise of the building owner's statutory rights. Although the adjoining owner's consent obviates the need for the immediate implementation of the Act's dispute resolution machinery it would not exclude it permanently. Instead, it would continue to be available to the parties and could be called upon by them at any time should a dispute subsequently arise.

On balance, the Act appears to favour the second interpretation. Specifically, in section 7(5), it describes works which proceed on the basis of an agreement as still being "executed in pursuance of the Act". This suggests the exercise of statutory, rather than contractual, rights as well as the continuing relevance of the statutory code²⁴. Further support for this position is provided by *Leadbetter v Marylebone Corporation*²⁵ where the statutory time limit for commencement of notified works was held to apply, notwithstanding the service of a consent notice by the adjoining owner.

If the statutory code continues to be relevant then so too must its dispute resolution machinery, should the parties decide to call upon it. Its operation is not confined to disputes which arise immediately following the service of an originating notice but is also available to settle ongoing disputes during the course of the works²⁶. Although, in the absence of an initial dispute, surveyors will generally not yet have been appointed, there appears to be no impediment to their subsequent appointment if the need arises²⁷.

Conditional consents

In practice, despite the ongoing availability of the Act's dispute resolution machinery, it will often be unwise for an adjoining owner to provide his unconditional consent to the works by way of a consent notice. In reality, he will only be properly protected where the works have been described in considerably more detail than will typically have been included in an originating notice. The condition of his own property should also have been recorded in advance, in order to provide a basis for calculating compensation in the event of damage occurring.

As the statutory dispute resolution machinery provides protection in both these areas most surveyors advise adjoining owners against consenting to the works. Others argue that, particularly in small works situations, the use of formal dispute resolution procedures is divisive and unnecessarily costly in terms of professional fees.²⁸ They suggest that it is often more appropriate to protect adjoining owners by what are usually referred to as “conditional consent” agreements.²⁹

As their name implies, these agreements record the adjoining owner’s consent to the originating notice, subject to particular conditions regarding the conduct of the work. They are invariably prepared by surveyors and will typically incorporate detailed drawings and a schedule of condition as well as addressing many of the issues usually included in a statutory award. They are often expressed as being “issued under” the Act and usually contain an express provision referring subsequent disputes to surveyors to be settled by award in accordance with its normal provisions.

Status and validity of conditional consents

In common with other forms of hybrid agreement considered in this article, it is difficult to determine the legal status, or the validity, of conditional consents with any certainty. Nevertheless, for the reasons already discussed in the context of consent notices³⁰, it seems that they cannot be contractual arrangements and must therefore depend on the Act for their validity.

The Act contains no express provisions dealing with conditional consents and confines its consent arrangements to those already described in the context of consent notices. It therefore seems that conditional consents can only be effective to the extent that they are consistent with these arrangements. In practice this will depend on the nature of the conditions imposed and on the extent to which a particular agreement can still be regarded as “a notice indicating...consent” to works described in an originating notice³¹.

In this context, the inclusion of detailed drawings and a schedule of condition which were not part of the originating notice are probably not, in themselves, inconsistent with the Act’s provisions. They represent good practice by the parties and clarify matters of detail rather than challenging the nature of the works described in the

notice. Indeed, section 7(5)(b) contemplates that the parties may agree on “plans, sections and particulars” without any requirement that these should have been served with the originating notice. Other conditions may also be included along the lines of those commonly contained in a statutory award. The adjoining owner’s consent to the originating notice is presumably unaffected by these to the extent that they simply echo the statutory obligations which already exist between them.

However, conditions which purport to impose additional obligations, some of which may even be at variance with the statute, will be ineffective. The primacy of the statutory rules over contractual arrangements has already been described³² and is also illustrated by the decision in *Mason v Fulham Corporation*³³. In that case the plaintiff sued to recover a contribution towards the cost of party wall works under the relevant provision in a conditional consent. As an originating notice had previously been served the works were undertaken under statutory, rather than contractual, authority. The court therefore confined itself to an analysis of the equivalent provision in the legislation³⁴ and rejected the claim on this basis. The provision in the conditional consent was thus entirely irrelevant.

More seriously, such conditions may also jeopardise the adjoining owner’s consent itself. The Act makes provision for him to consent to works which are described in an originating notice and which the building owner proposes to undertake in accordance with its particular statutory framework. If the adjoining owner consents to the works, but on some other basis, or subject to additional conditions, a court may well follow established contract principles and conclude that he has not consented at all³⁵.

Delayed consents

It will be recalled that sections 5 and 6(7) anticipate a consent being forthcoming within fourteen days of an originating notice being served³⁶. It is sometimes suggested that this cannot prevent the parties from concluding an agreement at a later date as it cannot defeat their inherent right to contract out of the Act.³⁷ Indeed, conditional consents, which in practice often fall foul of the fourteen day time limit, frequently cite section 3(3) as providing the necessary authority to do so.

It is submitted that this is not how the Act is intended to operate. As we have seen, section 3(3) deals with the situation before the statute has been triggered by service of an originating notice and preserves the parties' inherent rights to conclude their own agreement.³⁸ However, once triggered by notice the statute imposes its own regime on the parties, including the requirements dealing with post-notice consents in sections 5 and 6(7). These leave no room for an agreement between the parties outside the fourteen day time limit. Both sections provide that an adjoining owner who fails to serve a consent notice within fourteen days "shall be deemed to have dissented from the [originating] notice and a dispute shall be deemed to have arisen between the parties".

The Act's dispute resolution machinery then immediately comes into operation. Under section 10(1) the parties are required to appoint surveyors who, by section 10(10), are then obliged to settle the dispute by award. There is no suggestion that these statutory arrangements can be halted by the parties at any time and, in fact, every indication to the contrary. In particular, once surveyors have been appointed, the parties have no right to dismiss them.³⁹ The surveyors perform a statutory function and, even if they receive contrary instructions from the parties, must bring matters to a satisfactory conclusion through the publication of an award⁴⁰.

Although perhaps initially surprising, this element of compulsion is entirely consistent with the aims of the legislation. The statutory regime is not primarily a dispute resolution mechanism but a means of facilitating construction operations involving boundary structures⁴¹. As we have seen, it achieves this by granting building owners an absolute right to undertake such works, subject only to the provision of adequate safeguards for adjoining owners. The primary mechanism for providing these safeguards is through a surveyors' award rather than by agreement. By taking matters out of the parties' hands, and entrusting them to independent professionals, the Act provides building owners with a degree of certainty and reduces the risk of works being frustrated by protracted negotiations. Although it preserves a limited facility for the parties to proceed by agreement, the primary concern is to achieve a solution rather than an agreement. If the parties have failed to achieve this by the expiry of the fourteen day time limit the Act will impose one upon them. By doing so, even in the

face of a later agreement by the parties, it denies the opportunity to an obstructive adjoining owner to further protract negotiations.

It is therefore considered that the service of a consent notice, or the making of a conditional consent, can have no effect where they take place more than fourteen days after the service of the originating notice. Parties who enter into such arrangements will deprive themselves of legal protection during the subsequent works and surveyors who collude in them will be exposed to liability in negligence.⁴² Nevertheless, the statutory procedures need not be in conflict with the wishes of the parties. Although the surveyors have exclusive authority to determine the basis on which the works should proceed they will rarely do so in isolation from their appointing owners. Where the owners are in agreement about the conduct of the works it will normally be appropriate for the surveyors to reflect this within the terms of their award.

Agreements to regularise unlawful works

Written agreements

A third category of agreement is sometimes encountered which is entered into once work has actually started. Despite the requirements of the Act it is not uncommon for building owners to commence works without any prior communication with their adjoining owners. In the absence of consent or originating notice these works are, of course, unlawful and would entitle an adjoining owner to redress in the law of trespass.⁴³ As an alternative to litigation the parties may attempt to regularise the situation by agreement.

This will often involve entering into a written agreement which records the basis on which the adjoining owner's claim is settled and the terms on which any future works are to proceed. There seems no reason to question the validity of such arrangements. They deal with the private rights of the parties and, for the reasons already explored in the context of informal agreements⁴⁴, the parties retain their freedom of contract in relation to such matters, despite the provisions of the Act.

Retrospective notices

Unfortunately, once again, the situation is often complicated by the use of an alternative hybrid form of agreement in place of that described above. This takes the form of an agreement between the parties to belatedly proceed under the statutory code. It involves the service of an originating notice, which the parties agree shall have retrospective effect, followed by the appointment of surveyors and the publication of an award in the normal way.

The difficulty arises over the concept of a retrospective notice by consent. Firstly, it seems unlikely that the Act can be intended to operate in such a way that an unlawful act can retrospectively be transformed into a lawful one. Secondly, the limited possibilities for tailoring the statutory machinery by agreement have already been noted in the context of conditional consents and delayed consents.⁴⁵ It is difficult to reconcile this with the notion that the parties should be free to contract into their own version of the machinery at will, rather than through strict adherence to its statutory provisions.

The words of the statute certainly seem to support the first proposition as they expressly require the service of originating notices to take place before commencement of the works to which they relate⁴⁶. Similarly, in *Woodhouse v Consolidated Property Corporation Ltd*⁴⁷ an award was held to be invalid where it purported to address works which predated the appointment of surveyors. The possible curative effects of a notice on earlier unlawful works were also considered in *Louis v Sadiq*.⁴⁸ Although the Court of Appeal recognised that the building owner was entitled to legitimise future work by service of a belated notice it held that he remained liable for continuing losses arising out of the earlier works. In other words, the service of the originating notice could not retrospectively sanction that which was already unlawful.

Despite the apparent clarity of these authorities the parties may nevertheless be able to vary this position by agreement. In *Adams v Marylebone Borough Council*⁴⁹ works undertaken without service of an originating notice were restrained by injunction and damages awarded for the losses suffered by the adjoining owner. The situation was subsequently regularised by service of an originating notice which the parties agreed

was to have retrospective effect. The Court of Appeal later rejected a claim by the plaintiff for further losses incurred as a result of the original works as these had now been rendered lawful by the notice which Vaughan Williams LJ described as having been validly served *nunc pro tunc*.⁵⁰

It therefore seems that, contrary to all expectations, an agreement between the parties will be sufficient to give retrospective effect to the statute. Indeed, in *Louis v Sadiq*, Evans LJ declared that, although the *Adams* decision might appear to be “not in accordance with principle” it would nevertheless, in the absence of distinguishing factors, have been binding on the Court of Appeal.

Agreements relating to variations

Authority to undertake variations

A building owner may sometimes decide to vary the nature of his proposals after all the party wall issues have been satisfactorily concluded by agreement or award. This presents him, and his professional advisors, with the challenge of obtaining authority to undertake the revised works within a very short time scale. Surveyors often express uncertainty as to whether a further award (an addendum award), or even service of a further notice, is required in such circumstances or whether it is possible to expedite matters by agreement. The final section of this article explores these issues and considers the extent to which variations can legitimately be dealt with by agreement between the parties or their surveyors.

Works in pursuance of the Act

If arrangements for undertaking the original works were concluded after service of an originating notice then, as already discussed, such works are said to be “in pursuance of the Act”⁵¹. As we have seen, this will be the case whether these works were ultimately authorised by agreement or by award⁵². According to the statute the appropriate mechanism for dealing with a variation in these circumstances then seems to depend on whether it amounts to a change in the design of the original work or a proposal to undertake new and different work from that referred to in the originating notice.

Design changes

The former situation is governed entirely by section 7(5) which provides that “deviations” from the original design can be agreed between the parties. Therefore, even where the original works have been authorised by a surveyors’ award, the parties retain the right to agree subsequent design changes between themselves. For the reasons previously discussed in the context of conditional consents⁵³ the effect of such an agreement is to clarify the nature of the building owner’s statutory rights rather than to create new rights in contract. In practice these agreements are usually concluded by the parties’ surveyors, on an agency basis, rather than by the parties themselves.⁵⁴

In default of agreement the section also provides for the matter to be resolved by surveyors’ award through the normal dispute resolution procedures. Despite the ability of the parties to reach their own agreement the building owner can therefore rely on the ultimate safeguard of an imposed solution if his adjoining owner is unwilling to cooperate. Whichever course is followed, it should be noted that the delays associated with the service of a further notice are avoided entirely. The works have already been the subject of an originating notice and this remains effective despite changes to the original design.

New works

Where the substance of the variation involves entirely new work to that referred to in the originating notice it seems unlikely that the arrangements set out in section 7(5) will apply⁵⁵. As the new work has not been the subject of an originating notice it cannot be said to be in pursuance of the Act. The building owner will therefore have to obtain an entirely separate authority for the work. Unfortunately, when dealing with an obstructive adjoining owner the building owner will have no alternative but to implement a new set of statutory procedures in full, and to accept the inevitable delays that will result.

However, where the adjoining owner’s co-operation is forthcoming it will be possible to expedite matters by agreement. This might, as we have shown⁵⁶, be through an informal agreement or, alternatively, by an agreement to expedite the statutory procedures themselves. In view of the benefits of proceeding under the Act⁵⁷ it is

considered that the latter option will usually be preferable. As the original works are already in pursuance of the Act it is likely that both parties will be represented by surveyors. Providing the surveyors have the appropriate authority they can therefore usually conclude all necessary formalities between themselves with minimal delay. Notices can be served and received by surveyors as agents and an award can be published in respect of the new work, often within a matter of days. With the co-operation of the adjoining owner the statutory time limit for commencement of work can also be waived⁵⁸ and the whole process can be concluded without any adverse effects on the programme of works.

Situation following informal agreement

Where the original works have been authorised by an informal agreement rather than through the Act the building owner's position will be similar to that, already described, in the context of new works. In the absence of an express provision dealing with variations⁵⁹ an informal agreement can provide no authority for works other than those actually referred to within it. The building owner will therefore have to obtain further authority before being able to proceed with any variations to his original works.

As before, in view of the right to contract out of the Act, the parties will be free to reach a further informal agreement dealing with the new works. An agreement to expedite the statutory procedures would also be possible although, in the absence of earlier statutory arrangements which could be mirrored, some delays would be inevitable. Of course, any agreement is only possible with the cooperation of the adjoining owner. Without this, the building owner would have no alternative but to commence new procedures under the Act with all the delays that this would entail.

Conclusion

The above analysis confirms the legitimate role of agreements in each of the four situations considered. However, it has also demonstrated that some of the arrangements in common use are of questionable effect and that they are probably best avoided.

Most fundamentally, it has been shown that the parties retain a right to contract out of the Act entirely at any time prior to the service of an originating notice. The Act is concerned with the private rights of the parties rather than with questions of public safety. There is therefore no obligation to observe its procedural requirements where the parties choose to regulate these rights by what we have described as informal agreements, rather than through the statutory machinery. Where they do so the Act is permanently excluded and the parties' rights become matters of contractual construction rather than statutory interpretation. We have seen how this can create difficulties for building owners who later wish to make variations to the works, or where subsequent disputes arise between the parties.

We have seen that agreements are also possible following the service of an originating notice. However, unlike informal agreements, it has been shown that these do not operate as contractual arrangements but as consents, by the adjoining owner, to the exercise of the statutory rights described in the notice. As these agreements take effect within the statutory framework the problems described in the context of informal agreements are avoided and subsequent difficulties can be referred to appointed surveyors to be resolved by award.

Although the Act expressly sanctions these post-notice agreements their scope has been shown to be quite limited. Specifically, they will only be valid to the extent that they record the adjoining owner's unequivocal consent to the works referred to in the originating notice. They may also include a reference to drawings and a schedule of condition but the inclusion of provisions which attempt to supplement or vary the parties' statutory obligations will be ineffective and may even jeopardise the validity of the agreement itself. In the case of party wall and adjacent excavation works it is also clear that such agreements must be entered into within fourteen days of service of an originating notice. After that time a dispute is deemed to arise between the parties which can only be settled by a surveyors' award.

Most surprisingly it has been demonstrated that agreements to the retrospective operation of the statutory machinery will be upheld by the courts. This provides the parties with the facility to regularise works which have already been commenced without either the service of an originating notice or the adjoining owner's consent.

These agreements can extend beyond the regularisation of future works and are capable of conferring retrospective authority on unlawful acts which have already taken place.

Finally, it has been shown that agreements can be a useful mechanism for expediting matters where the building owner wishes to vary the nature of works which have already been authorised. Where work is executed in pursuance of the Act the building owner can ultimately rely on the surveyors to authorise any reasonable design changes by award. However, the Act expressly preserves the parties' rights to agree such matters and, in practice, they will usually proceed on this basis. Where the proposed variation goes beyond a mere design change and involves new work we have seen that the role of agreement becomes crucial to enabling the works to proceed without delay.

In conclusion, the parties retain the freedom to reach agreement, both as an alternative to the statutory procedures, and, to some extent, as a means of adapting the procedures to their own particular needs. Either type of arrangement might be advantageous to the parties if entered into within the limitations set out in the statute, and with full knowledge of its legal consequences. In practice, some agreements stray beyond the areas that are clearly sanctioned by the Act with consequent uncertainty as to their validity.

The decision to depart from the normal statutory procedures should not therefore be taken lightly. In many instances, for reasons which have been explored, the perceived benefits of doing so will be outweighed by the risks. Where the parties nevertheless wish to proceed on this basis they should confine themselves to agreements which have been shown to be clearly sanctioned by the legislation. In view of the complexities that have been highlighted in this article, all other agreements should be restricted to those which have been specifically approved by the parties' legal advisors.

¹ Although a party wall code has existed in London since 1667, the main ingredients of the present code first appeared in the Metropolitan Building Act 1855. Its scope was extended in the London Building Act 1894 and it was subsequently re-enacted, with minor amendments, in the London Building Act 1930 and the London Building Acts (Amendment) Act 1939.

² Section 2

³ Section 1

⁴ Section 6

⁵ Sections 1(2) & (5), 3(1) & 6(5)

⁶ Section 10(1)

⁷ An example of an informal agreement can be viewed in the July 2003 archives of the Party Walls & Rights to Light Discussion Forum at <http://www.partywallforum.co.uk>. See the posting by Vegoda, V., 'Section 3(3) Agreement', 16 July 2003.

⁸ See generally, Anstey, J. (1985) 'The small works problem in party wall procedures', *Structural Survey*, Vol. 4, No. 1, pp. 52 - 53

⁹ (1859) 7 CBNS 99

¹⁰ The failure of section 3(3)(a) to deal with line of junction works and adjacent excavations is not thought to be significant. The section first appeared in the Metropolitan Building Act 1855 which only dealt with party wall works. When provisions relating to with line of junction works and adjacent excavations were introduced in the London Building Act 1894 they sat alongside the existing parts of the code rather than being fully integrated with them. It is therefore no surprise that the section has been successively re-enacted in its original form. The failure to include similar sections within the line of junction and adjacent excavation provisions most likely just represents an oversight by successive generations of legislators. It is typical of inconsistencies that have always existed between the 1855 code and the newer elements introduced in the 1894 legislation.

¹¹ See generally, Chynoweth, P. (2001) 'Impartiality and the Party Wall Surveyor' *Construction Law Journal*, Vol. 17, No. 2, pp. 127 - 137

¹² See *Williams v Golding* (1865) 1 LRCP 79, per Erle CJ; *Burlington Property Company Ltd v Odeon Theatres Ltd* [1939] 1 KB 641, per Greer LJ; *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 All ER 302, per Brightman J.

¹³ Building owners are granted rights, by section 1(6), to place projecting footings and foundations on adjoining owners' land during line of junction works and, by section 6(3), to underpin the foundations of adjacent buildings or structures when undertaking excavations.

¹⁴ *Selby v Whitbread and Company* [1917] 1 KB 744, per McCardie J; *Adams v Marylebone Borough Council* [1907] 2 KB 840, per Fletcher Moulton LJ.

¹⁵ *Williams v Golding*, *op. cit.*; *Standard Bank of British South America v Stokes* (1878) 9 Ch D 76, per Jessel MR.

¹⁶ See, for example, the discussion entitled 'Section 3 Agreement' in the July 2003 archives of the Party Walls & Rights to Light Discussion Forum, *op. cit.*

¹⁷ *Leadbetter v Marylebone Corporation* [1904] 2 KB 893; *Woodhouse v Consolidated Property Corporation Ltd* [1993] 1 EGLR 174

¹⁸ *Bennett v Harrod's Stores Ltd* (1907) *The Builder*, December 7, p. 624. See also *Brace v South East Regional Housing Association Ltd* [1984] 1 EGLR 144

¹⁹ See, for example, Vegoda, *op. cit.*

²⁰ For example, as a reference to arbitration or expert determination.

²¹ See, for example, RIBA (1997) *Architect's Guide to Job Administration: The Party Wall etc Act 1996*, RIBA Publications, p. 51 and RICS (2002) *RICS Guidance Note: Party Wall Legislation & Procedure*, Fifth Edition, RICS Books, pp. 39, 41 & 43.

²² This is expressly provided for, in the context of party wall works and adjacent excavations, by sections 5 and 6(7). Although not strictly necessary in the context of line of junction works (where, in the absence of an express dissent, the building owner's right to undertake work arises automatically) consent notices are nevertheless still used to provide confirmation that there is no dispute. See RICS, *ibid.*, p. 39

²³ The issue is acknowledged in Bickford-Smith, S. & Sydenham, C. (1997) *Party Walls: The New Law*, Jordans, p. 167 and in RICS, *ibid.*, p. 13

²⁴ Identical phraseology is used in the Act's compensation provisions in section 7(2) and its rights of access provisions in section 8, both of which must therefore apply to works which have been the subject of a consent notice.

²⁵ [1905] 1 KB 661

²⁶ *Selby v Whitbread & Co* [1917] 1 KB 742, *per* McCardie J.

²⁷ This possibility is expressly anticipated by section 7(5) which makes provision for disputes over variations to previously agreed work to be settled by surveyors. The same principle must apply to all disputes which arise following agreement to work executed in pursuance of the Act.

²⁸ See, in particular, Jessop, D. (2002) 'Party Wall Practice & Procedure in Brief', *The Journal* (of the RICS Building Surveying Faculty), No. 4, July 2002, pp. 8 - 10

²⁹ Sometimes also referred to as 'statutory consents'.

³⁰ See above under 'Effect of consent notices'

³¹ In accordance with the expression used in sections 5 and 6(7).

³² See above, under 'Effect of consent notices'

³³ [1910] 1 KB 631

³⁴ London Building Act 1894, section 95(2). The provision now appears in substantially the same form as section 11(11) of the Party Wall etc. Act 1996.

³⁵ *Hyde v Wrench* (1840) 3 Beav 334; *Jones v Daniel* [1894] 2 Ch 332

³⁶ See above, under 'Consent notices'.

³⁷ For example, in the discussion entitled 'Section 3 Agreement' in the July 2003 archives of the Party Walls & Rights to Light Discussion Forum, *op. cit.*

³⁸ See the above discussion, under 'Section 3(3)(a)' and 'Inherent right to contract out'.

³⁹ Section 10(2)

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- ⁴⁰ The surveyors are subject to a duty to diligently administer the statutory procedures. See Chynoweth, P., *op. cit.*, pp. 130 - 131.
- ⁴¹ *ibid.*, p. 128 - 130
- ⁴² *ibid.*, p. 130 - 131 & 136
- ⁴³ See, for example, *London & Manchester Assurance Company Ltd v O & H Construction Ltd* [1989] 2 EGLR 185
- ⁴⁴ Under ‘Inherent right to contract out’.
- ⁴⁵ See above, under ‘Status and validity of conditional consents’ and ‘Delayed consents’.
- ⁴⁶ Sections 1(2), 1(5), 3(2)(a) & 6(5)
- ⁴⁷ [1993] 1 EGLR 174
- ⁴⁸ [1997] 1 EGLR 136
- ⁴⁹ [1907] 2 KB 822
- ⁵⁰ *ibid.*, p. 828
- ⁵¹ See the discussion above, under ‘Effect of consent notices’.
- ⁵² Section 7(5)(b)
- ⁵³ See above, under ‘Status and validity of conditional consents’.
- ⁵⁴ Despite a reference to this practice in section 7(5) the surveyors would, of course, require appropriate authority before being competent to act in this way. The RICS standard form of surveyors’ appointment contains no such authority and a separate authority would have to be provided immediately prior to the negotiation of the agreement. Where the surveyors act in this capacity their role as agents for the parties should be distinguished from their statutory role as appointed surveyors under the Act.
- ⁵⁵ Separate items of work would seem to constitute more than a “deviation” from the design of other work and work which is not referred to in an originating notice cannot be the subject of the statutory procedures: *Leadbetter v Marylebone Corporation* [1904] 2 KB 893; *Woodhouse v Consolidated Property Corporation Ltd* [1993] 1 EGLR 174
- ⁵⁶ See above, under ‘Agreements in lieu of notice’.
- ⁵⁷ Discussed above, under ‘Subsequent disputes’ and ‘Design changes’.
- ⁵⁸ Under section 10(12), unless otherwise agreed by the parties, works cannot commence before the expiry of the statutory time limit for service of the originating notice.
- ⁵⁹ In practice, such provisions are not included within informal agreements.