

“The Approach to their task of the party wall surveyors”: A response to an observation from HH Judge Edward Bailey

For those of you who attended the Faculty’s Moot last December, or indeed if you intend to digest the video of the Moot at one of the Faculty’s Forums, you will note that at the end of the event HHJ Edward Bailey (‘the Judge’) made an observation regarding the approach by party wall surveyors in carrying-out their statutory duties under section 10 of the Party Wall etc. Act 1996 (‘the Act’).

The title to this article quotes the Judge at paragraph 165 in the transcript of the case of *Welter v McKeeve*¹ where he says:

“This appeal presents a perfect paradigm of how a party wall surveyor **should not** [my emphasis] approach his task. It matters not whether a party wall surveyor acts in a capacity which is quasi-judicial (per Brightman J in *Gyle Thompson v Wall Street (Properties) Ltd* [1974] 1 All ER 295 295, 303a) or quasi-arbitral (per The Earl of Lytton introducing the Party Wall Bill on the second reading in the House of Lords on 31 January 1996, Hansard Col.1538). The party wall surveyor must act impartially and professionally. He is not an agent of or mouthpiece for the owner who appointed him.”²

The Judge informed us at the Moot that this was a “startling case where on one side there was a party wall surveyor who acted with great meticulousness and concerned himself properly with the requirements of the Act, and on the other were two party wall surveyors in succession, who approached their task with, shall I say, appreciable concern for their appointing owner’s interests.”³

As we know, section 20 of the Act defines a surveyor as “any person not being a party to the matter appointed or selected under section 10 to determine disputes in accordance with the procedures set out in this Act.” The surveyor’s appointment is therefore made under statute not contract.⁴ This is confirmed in an analysis by Nicholas Isaac QC who, nevertheless, recognises that “[t]he role of surveyors in relation to party walls and the Act is a difficult one. Surveyors engaging with and appointed under the Act have to wear various hats during their involvement with any particular wall. Not only do building and adjoining owners commonly have difficulties

¹ *Jens Welter and (1) Raymond John McKeeve (2) Belinda Lucy McKeeve*, judgment given by HHJ Edward Bailey in the County Court at Central London Technology and Construction List 27 November 2018. I am grateful to the Judge for forwarding me the transcript following a discussion at the end of the Moot and alerting me to the issues that form the basis of this article. I am also grateful to have since been invited by Michael Kemp, representing the P & T, to attend a meeting with the Judge, along with the barrister Stuart Frame, and Graham North.

² *Ibid.*

³ The Judge’s observation is included at the end of the transcript for the Faculty of Party Wall Surveyor’s Moot, held at the Royal Society of Arts on 12 December 2018.

⁴ See Alex Frame, *Misunderstandings and Guidance* (Faculty of Party Wall Surveyors, third Edition) p.65

understanding the subtleties of such roles, but surveyors themselves occasionally find the lines between them blurring.”⁵

When a surveyor is first engaged by a building owner who is considering or planning work to or in the vicinity of a party wall, or by an adjoining owner concerned at the prospect or fact of such work next door, such an appointment is a contractual one.⁶ Nicholas Isaac informs us that the rights and duties between the appointing owner and the surveyor will in those circumstances be defined by “(1) the surveyor’s standard terms and conditions, usually set out or referred to in a client care letter signed by the appointing owner, (2) the surveyor’s general duties as set out in the RICS Rules of Conduct, and (3) the surveyor’s common law duty of care arising from the relationship of surveyor-client.”⁷ Nicholas Isaac adds a footnote to (2), stating that this is made on the assumption the surveyor is member of the RICS; this is a point to which I shall return.

To emphasise the point made by the Judge, Nicholas Isaac confirms that “once appointed or selected as a surveyor under section 10 of the Act, a surveyor’s duty is no longer primarily to his appointing owner but is a statutory duty to resolve the actual or deemed dispute to that section.”⁸ And therein lies the rub, for it is at this juncture that the appointing owners can quickly become disillusioned with both the Act and the surveyor they have appointed, frequently complaining that they are being ignored by their surveyor.⁹

The surveyor will no doubt come under pressure from such an appointing owner, but it is key that he/she should manage expectations at a very early stage both in conversation and writing. This requires a degree of skill in the art of communication on the part of the surveyor for it is appreciated that there are some appointing owners who will choose not to acknowledge that they were informed at an early stage of the surveyor’s statutory duties. The Judge observed that the “meticulous” surveyor in *Welter v McKeeve* was “a man not to be bullied” and reminds us that “acting impartially requires the party wall surveyor (whether an owner-appointed surveyor or a third surveyor selected by the owner-appointed surveyors) not to favour either owner over the other.”¹⁰

The Judge has also observed that “Both the Pyramus & Thisbe Club and the Faculty of Party Wall Surveyors take great pains to ensure that party wall surveyors are aware of their statutory responsibilities and that there is training available for any

⁵ Nicholas Isaac, *The Law and Practice of Party Walls* (Property Publishing, Mosley), p.97. (The second edition is due to be published around the time of writing this article.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Paragraph 168, *Welter v McKeeve*.

surveyor who wishes to practice in this field. Their work is plainly not yet done." This conclusion was drawn from the Judge's experience of over 100 party wall appeals.¹¹

The Pyramus & Thisbe Club and the Faculty of Party Wall Surveyors include amongst their membership Architects, Structural and Civil Engineers as well as Chartered Surveyors;¹² these professional bodies have their own code of conduct. But what of those practitioners who do not belong to one of these professional bodies? On the second reading of the Bill (later to become the Act) in the House of Lords, the Earl of Kinnoul remarked in relation to the definition for surveyor that "it means a competent **or** [my emphasis] a relevant professional person."¹³ We have seen in the definition quoted above that the Act does not actually repeat the words of the Earl. The Act allows anyone who is not actually the building owner or adjoining owner to be appointed or selected as a surveyor whether or not they have any particular knowledge of or competence in party wall matters. It should be noted, however, that membership of a professional body does not necessarily mean that the practitioner has the necessary knowledge and skills in party wall matters. For example, a Chartered Surveyor may be practicing solely as a quantity surveyor, estate manager or building pathologist. As a footnote, it is also surprising how relatively little time is given to Party Wall education on many University courses which have RICS accreditation.¹⁴

As the Judge observes, there is still much to do. As a professional body, the Faculty states their mission on their website:

"The Faculty of Party Wall Surveyors was born out of a need for education and support for building surveyors and other professionals, but also to enhance awareness and provide advice and guidance to the general public."¹⁵

This remains the focus of the Faculty. The party wall practitioner must be multi-disciplined to enable him/her to have: a full understanding of the Act and associated case law; the relevant construction knowledge; and the ability to communicate with the parties, other surveyors and professionals. It is inevitable that some practitioners will be stronger in some disciplines than others and the Faculty provides the opportunity of training in all these areas through Forums, Moots, training sessions, books, articles in this Newsletter, and legal seminars.¹⁶ Once the minimum standards have been achieved it is essential that the practitioner not only maintains but improves his/her knowledge through Continued Professional Development ('CPD'), so that he/she can "act as a quasi judge [...], invite arguments, take them on board, and consider them in an impartial manner, when you come to your decisions given in any award."¹⁷ The Judge summed up his observation at the end of the Moot by

¹¹ Paragraph 171, *Welter v McKeeve*.

¹² There are practitioners who are members of both the P & T and the Faculty.

¹³ Hansard 31 January 1996, column 1541, quoted in Isaac, *The Law and Practice*, p.47.

¹⁴ The Faculty has approached Universities in terms of proposals to set-up party wall courses.

¹⁵ <https://fpws.org.uk/>

¹⁶ See the Faculty's website.

¹⁷ The Judge's observation given at the end of the Moot's Transcript

confirming that “You are fortunate that you do not have to explain your reasoning in the way required of a judge, but that does not mean you do not reach your decisions in a thorough and impartial manner. I would encourage you to read the judgement.”¹⁸

The Judge’s observations give clear reasoning for the Faculty’s decision to introduce compulsory CPD and set-up a Disciplinary panel, ensuring compliance with their own Code of Conduct. My person view is that unless the party wall profession addresses the issues raised by the Judge along with other examples of poor practice, the government will one day step into the breach and regulate the profession; we have seen it already in the world of estate agency and letting agents. The RICS took the lead some years ago in the discipline of valuation. In order to improve standards and accountability the RICS introduced the Registered Valuer scheme. It was no longer enough to be just a Chartered Surveyor in order to undertake ‘Red Book Valuations’.¹⁹ To carry-out these professional duties the Chartered Surveyor has now to be part of a monitoring programme ensuring valuations are carried out in accordance with RICS Valuation Standards; from my own personal experience, this has clearly improved standards. Perhaps the day of an equivalent registered party wall surveyor scheme, monitored by a national body, is not too far away.

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¹⁸ Ibid.

¹⁹ The “Red Book” (The RICS Valuation Standards – Global and UK, 7th edition), which is the code of practice for all members of the Royal Institution of Chartered Surveyors. Compliance with these standards is the subject to monitoring under the Institution’s conduct and disciplinary regulations.