The Party Wall Consultancy

I have my reasons

James McAllister, Director of The Party Wall Consultancy, explores the scenarios where reasoned awards are demanded under the Party Wall etc. Act 1996.

Introduction

The Party Wall etc. Act 1996 came in to force on 1st July 1997 and is law in England and Wales. The Act provides a statutory mechanism for resolving disputes where the implementation of 'notifiable' works by one property owner impacts on an adjoining property owner. Notifiable works generally comprise adjacent foundation excavations, works to repair, rebuild or modify a shared 'party' wall and the construction of walls at, or astride, the legal boundary between the lands of two or more owners. In the event a 'dispute' arises between the respective property owners over the notifiable works, the Act requires both parties to appoint their own party wall surveyor, whereby the two surveyors then select a third surveyor to adjudicate any dispute they may have. Alternatively, the parties may elect to jointly appoint a single 'agreed surveyor' as a neutral arbiter. The agreed surveyor or the three surveyors, as the case may be, then resolve the dispute by way of an 'award' which is legally binding unless rendered invalid through procedural defect or where successfully appealed by either party in the county court within 14 days of service.

There is no legal requirement for an award pursuant to the Party Wall etc. Act 1996 to contain reasons behind the determination. This is in stark contrast to awards made under the Arbitration Act 1996. Under the Arbitration Act 1996 the provision of reasons for the determined outcome is a statutory requirement, unless it is an 'agreed award' or the parties have agreed to dispense with the need for reasons .[1] An award otherwise made under the Arbitration Act 1996 must contain reasons or risk challenge on grounds of serious irregularity.[2]

There are obvious similarities between the Party Wall etc. Act 1996 and the Arbitration Act 1996. Aside from the fact they were both enacted in the same year, they principally deal with the resolution of disputes between parties by a neutral, the determination of which is via a legally binding and enforceable award. However, there are also some fundamental differences between both pieces of legislation, not least the procedural formalities imposed upon the tribunal making the award.

This paper is specifically focussed on exploring the circumstances where fully reasoned awards are appropriate under the Party Wall etc. Act 1996 by firstly exploring the legal justification for reasons. For the purposes of this paper, the Party Wall etc. Act 1996 shall be referred to as 'PWeA 1996' and the Arbitration Act 1996 shall be referred to as 'AA 1996'.

'Sui Generis'

Awards made under section 10 of PWeA 1996 are unique. They are unlike any other legal award or determination, either made under statutory provision or at common law. Party wall awards are made by a 'practical tribunal' possessing statutory powers, thus perhaps more appropriately termed as a 'statutory tribunal'. The tribunal usually comprises a surveyor acting either alone,[3] or alongside another surveyor and a 'selected' third surveyor within a tripartite tribunal.[4] The primary function of the tribunal, in whatever

[1] Arbitration Act 1996, section 52(4).
[2] Arbitration Act, section 68(2)(h).
[3] As an 'Agreed Surveyor' under section 10(1)(a) of the Party Wall etc. Act 1996.
[4] Where each party appoints their own surveyor and the two party-appointed surveyors then select a third surveyor under section 10(1)(b) of the Party Wall etc. Act 1996.

configuration, is to resolve a dispute that has arisen, either by express communication or silence,[5] between two or more adjoining property owners usually following service of a prior notice regarding the construction works proposed.

The tribunal has statutory jurisdiction to make an award that legally regulates and, ultimately, authorises the notifiable works to proceed. The award will contain clear directions as to the consequences of any damage so caused to the adjoining property owner as a direct result of the works authorised by the award. Importantly, the award entitles one property owner to exercise rights that affect the property rights of another property owner in a way that would not be permitted at common law. Both parties are therefore subjected to statutory obligations but enjoy statutory rights.

The award process is not 'adversarial' in the litigation sense, nor is it necessarily 'inquisitorial'. The tribunal does not ordinarily call for evidence, nor is either party usually invited to make submissions as to their position on the dispute. The tribunal may use and rely on its own knowledge and there is no legal requirement that they must be independent - an appointed surveyor may well be involved with the design or monitoring of the works to which the award relates. Despite these clear and flagrant deviations from traditional tribunal-made awards, a legally binding and enforceable award is, nonetheless, the outcome of this process.[6]

It is unsurprising, therefore, that party wall awards have been termed 'sui generis' by the courts; that is, they are 'of their own kind':

> "An Award under the Act is, in my judgment, *sui generis*".[7]

Perhaps the most apposite example of this is the fact that a party wall award need not contain reasons, contrary to the minimum procedural and legal requirements of just about every other type of award or determination made by any court or tribunal under English law. It cannot be overlooked that reasons provide a helpful audit trail of the tribunal's decision-making rationale leading up to the determination. This is so that the parties to the determination can understand the basis upon which they have won their case - or a particular point - but most importantly, why they have lost. This, in turn, allows any appellate court or tribunal to properly discharge their function in reviewing the determination of the lower court/tribunal to ascertain whether the decision was correct and should be upheld, or whether the court/tribunal erred in law and the decision should be overturned. The need for reasons is, understandably, a tenet of natural justice; a party to the dispute needs to know why they have won or lost.

In their report on The Arbitration Bill before AA 1996 was made law, the Departmental Advisory Committee made clear their opinion on this issue:

> "it is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making their decisions".[8]

The requirement for reasons in arbitration awards is now enshrined in arbitral legislation. Section 52 of AA 1996 deals with the 'form' of an award in which subsection (4) states:

"The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons".[9]

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[5] Failure to express consent to notices served under sections 3 and 6 of the Party Wall etc. Act 1996 will default to a 'deemed dispute'.
[6] This assumes the absence of any procedural defect otherwise affecting legal validity.
[7] *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155 at 157. It should be noted that this case was decided under the London Building Acts (Amendment) Act 1939.
[8] DAC Report, February 1996, p. 247.

Section 68(2) of AA 1996 identifies the grounds upon which an arbitral award can be challenged for 'serious irregularity':

> "Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-[10]
>
> Failure to comply with the requirements as to the form of the award".[11]

In their comprehensive monograph on AA 1996, Mustill & Boyd argue that this "overstates the case".[12] They consider that the Departmental Advisory Committee's opinion on the need for reasons, as a basic rule of justice, overlooks areas "where the law does not regard transparency of reasoning as fundamental to a correct decision on the rights and obligations of others".[13] They further opine that "it would be unfortunate if reasons were regarded as an absolute and indispensable feature of an award".[14]

There is no such codification within PWeA 1996 requiring reasoned awards as a minimum statutory requirement. Section 10 of PWeA 1996 goes to great length to stipulate how the dispute should be settled. This has been so carefully drafted that it broadly reads chronologically, thereby guiding the parties, moreover the tribunal, as to the necessary steps to be taken from initial appointment of the tribunal through to appeal of the tribunal's award. Notwithstanding this, there is no mention within PWeA 1996 as to the need for the tribunal to state the reasons for their determination, nor is there any suggestion that the tribunal must invite the parties to make representations.

It is, therefore, pellucidly clear that the statutory draftsment tasked with writing AA 1996 had in mind the spirit of natural justice in making reasons a minimum requirement for arbitral awards, unless, of course, the parties agree otherwise. This does not come without warning. Section 52(4) of AA 1996 makes it clear that dispensing with the need for reasons also precludes any later right of appeal on a point of law.[15] Thus, the failure to provide reasons in the absence of agreement by the parties leaves an arbitral award wide open to challenge on grounds of serious irregularity. This is an undesirable prospect for any arbitrator.

Accordingly, it is naturally open to question why awards under PWeA 1996 can successfully evade the basic principles of natural justice, yet remain legally just; and enforceably so. The logical explanation is that most party wall awards are 'enabling' awards by their very nature. Whilst they clearly resolve the underlying dispute – despite the fact the dispute may only be 'deemed'[16] merely through lack of any response to the originating notice - the principle function of a party wall award is, ultimately, to legally authorise, and thus facilitate, notifiable works to take place which would otherwise be open to injunctive relief and/or damages or even an action in tort for breach of statutory duty.[17] On a practical level, the basic function of a party wall award is to clear the way for the works to take place legally without really deciding on any points of law or which party is 'right'. Accordingly, the fact a party wall award resolves a 'dispute' during the process is something of a side issue. The dispute may have triggered the award process under PWeA 1996, but the process soon becomes one of procedural administration and due diligence so as to ensure the works to be authorised do not cause unnecessary inconvenience to the adjoining owner.[18]

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[9] Arbitration Act 1996, section 52(4).
[10] Arbitration Act, section 68(2).
[11] Arbitration Act, section 68(2)(h).
[12] Mustill, M J. & Boyd, S C, *Commercial Arbitration* (2001 Companion), Second Edition, Butterworths 2001, p. 336.
[13] Ibid, p. 336.
[14] Ibid, p. 336.
[15] Arbitration Act 1996, section 69(1).
[16] For example, failure of an adjoining owner to respond to notices served under sections 3 and 6 of the Party Wall etc. Act 1996 will mean a dispute is deemed to have arisen.
[17] For failing to comply with the requirements of the Party Wall etc. Act 1996, albeit this is likely to be limited to situations where damage has arisen.
[18] Party Wall etc. Act 1996, section 7(1).

The term 'dispute' within the aegis of PWeA 1996 is, in legislative parlance, therefore nothing more than a statutory construct to give effect to a procedural formality, which ultimately allows something to happen lawfully.

On a legal level, a party wall award also enables basic common law rights to be supplanted by statutory permission. For example, if a party has properly served notice in accordance with the provisions of PWeA 1996, certain rights exist which could not otherwise be enjoyed outside the Act. To the contrary, such actions would potentially give rise to legal action by way of injunctive proceedings and/or damages. These rights include authorised trespass, and in some instances, nuisance, both of which are torts actionable at common law. A good illustration of this is the right of a party to build a wall entirely on their own land up to the boundary with another property, yet project their foundations on to the land of the adjoining property owner. Furthermore, the party undertaking the works may even have a right of access on to the land of the adjoining property owner in order to build the wall, irrespective of the fact no such permission may have been granted.

'Quasi-Judicial'

The uniqueness of party wall awards is not limited to being merely 'sui generis'. The unusual, perhaps unparalleled, role of the party wall surveyor also plays a part in further distancing party wall awards from any other type of judicial or arbitral post.

Party wall surveyors have been described as being "in a quasi-judicial position with statutory powers and responsibilities".[19] It is arguable this statement does little to clarify or advance matters. This statement suggests party wall surveyors acting as a statutory tribunal have 'almost' judicial powers, but not quite. It is further open to question whether this infers that stopping short of full judicial powers and responsibilities gives party wall surveyors an open mandate to dispense justice in *carte blanche* fashion with abandon. The sobering reality of the party wall surveyor's 'quasi-judicial' role is the notable absence of judicial immunity, which presumably comes at the cost of being 'quasi'.

'Quasi-Arbitral'

Party wall surveyors have also been labelled as 'quasi-arbitral'. In *Mills v Savage*[20] His honour Judge Bailey stated: "[p]arty wall surveyors are exercising a quasi-arbitral function".[21] However, in this case, HH Judge Bailey expressed his view that the role of the party wall surveyor should not necessarily deviate from the basic principles of natural justice or the judicial/arbitral process:

> "Party wall surveyors are exercising a quasi-arbitral function. They are bound by the rules of natural justice. It is axiomatic that in considering and making an award a party wall surveyor, and this must include the third surveyor, must enable the parties to make submissions if they wish and must give due consideration to any submissions made".[22]

HH Judge Bailey also stated in this case: "[r]eceiving and considering any submissions or representations each side wishes to make is an essential part of the quasi-arbitral role of the party wall surveyor".[23] In these statements HH Judge Bailey appears to espouse the arbitral bias of a party wall surveyor's duty in

making an award, despite the absence of any clear wording within the Act itself. This also appears to contravene the views of the court under the legislative predecessor to PWeA 1996. In *Chartered Society of*

[19] *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 WLR 123.
[20] Unreported, Central London County Court, 15th June 2016.
[21] Ibid at 131.
[22] Ibid at 131.
[23] Ibid at 128.

Physiotherapy v Simmonds Church Smiles[24] Judge Humphrey Lloyd QC stated that "the Act makes no provision for the parties to be heard or for the surveyor(s) to proceed as one might expect … an arbitrator to act".[25] It is notable that PWeA 1996 is less instructive of the party wall surveyor than its earlier incarnations.

The 'quasi' aspect of the seemingly interchangeable terms 'quasi-judicial' and 'quasi-arbitral' in the context of a party wall surveyor's role might appear to be somewhat patronising. After all, *'qua'* is Latin for 'as' and *'si'* is Latin for 'if'. Hence party wall surveyors act, in the eyes of the courts at least, 'as if' they were in a judicial or arbitral role. Again, at the cost of judicial immunity, it would seem party wall surveyors are expected to fulfil the same procedural expectations of a judicial or arbitral post, but are recognised as not being quite the same. Thus, 'sui generis' is perhaps the only appropriate explanation of a party wall award and the party wall surveyor's role.

Expert Determination

There is a further view on the status of awards under PWeA 1996. Whilst in *Chartered Society of Physiotherapy v Simmonds Church Smiles*[26] party wall awards were considered to be 'sui generis', they were also considered to be "more in the nature of an expert determination".[27]

The role of an expert, certainly in the context of expert determination, is even less shackled by the expectations of natural justice insofar as the need to invite representations from the parties or setting out a carefully scripted audit trail of reasons leading to the final determination. The expert is not restricted by statutory code and is, at best, informed by professional guidance only.

Therefore, it is apparent that the 'sui generis' - and ultimately unique - status of awards under PWeA 1996, conflated with the unique 'quasi' judicial/arbitral role of a party wall surveyor to provide a convenient means of circumventing the established principles of natural justice in providing no reasoned explanation for the determination given.

Right of Appeal

A further explanation as to how party wall awards can seemingly evade the rules of natural justice might be explained by the award appeal process. In contrast to the limited, and notoriously narrow, grounds of appeal against arbitral awards under AA 1996, parties to an award under PWeA 1996 enjoy an absolute right of appeal. Thus, providing the strict timeframe conditions set out in section 10(17) of PWeA 1996 are met, and absent any procedural defects, a party wall award can be appealed on practically any grounds. The prospects of such an appeal succeeding, however, is a different matter. The absolute right of appeal, and the accessibility of the appeal process, arguably provides a further insight in to why PWeA 1996 does not impose an obligation on the tribunal to provide reasons, notwithstanding the fact this might be inherently useful to the parties.

It is, therefore, open to speculation whether there are situations when a reasoned party wall award in the vein of an arbitration award under AA 1996 is appropriate, if not essential.

Reasons for Reasons

It is acknowledged the majority of party wall awards are merely perfunctory in nature; their primary function is to authorise the undertaking of works that a building owner has a right to do without necessarily resolving a 'dispute' along the way. In many instances the dispute will be implied merely through the absence of

[24] [1995] 1 EGLR 155.
[25] Ibid at 157.
[26] Ibid.
[27] Ibid at 157.

express consent being communicated within a specified timeframe. However, there are situations where an award with reasons, in the vein of an arbitral or judicial award, is perhaps demanded.

Third Surveyor Awards

Undoubtedly the most universally accepted example of where a reasoned party wall award is required is that of the third surveyor's award. Under section 10(11) of PWeA 1996 either of the parties or the surveyors may refer the 'disputed matters' to the third surveyor. This right obviously does not apply where the tribunal comprises an agreed surveyor under section 10(1)(a) of PWeA 1996. The third surveyor then has the unenviable task of making a determination that may well be a dispute within a dispute. Occasionally the parties, or the surveyors, may refer the entire dispute to the third surveyor for determination, albeit this is unusual in practice. In most cases, the third surveyor will be called upon to decide points of law, or matters of liability and quantum. All too often this will be merely to decide the reasonable fees of the surveyors, or, as is usually the case, one of them.

Rarely, therefore, will the third surveyor's role be properly discharged without explaining the issues referred before then setting out the background and moving on to make the determination. This will require supporting reasons for the determination so that the parties, and the surveyors, can understand the outcome of the referral. The third surveyor is usually also required to determine which party shall be liable for the costs of the referral. Where costs are to follow the event, it is difficult to see how such an award could survive an appeal if adequate reasoning for the determination on the substantive issue(s) is not given.

Addendum Awards

On occasion, the initial award will need to be supplemented by a further award. This may be due to a turn of events that renders the initial award either wholly or partially obsolete. An example of this is a design change that affects the scope or nature of the notifiable works. In such cases, an 'addendum award' may be required to accommodate any deviation.

It is appropriate that, in such situations, the addendum award provides a summary of the initial award and then explains the reasons for the further award before making the final determination. Keeping in mind that all awards under PWeA 1996 are subject to a right of appeal by the parties within a limited timeframe,[28] the chances of the award being set aside or substantially modified by the court will be significantly reduced if the award explains its purpose; this is a principle not usually adopted within the initial 'enabling' award based on traditional templates.

Liability Awards

In the unfortunate event of damage being caused by the works authorised under an initial 'enabling' award, and assuming the parties have been unable to resolve this between themselves, then resolution of this 'dispute' is within the jurisdictional capabilities of the party wall tribunal. Given that such an award will invariably allocate culpability, and with it liability, it is a situation where natural justice must prevail.

Accordingly, a detailed background of events leading to a determination supported by clear and transparent reasoning will properly inform the parties as to the basis for the outcome. A well reasoned award will go a long way to reducing the likelihood of appeal, more so an appeal that finds the party wall tribunal has erred.

[28] Party Wall etc. Act 1996, section 10(17).

Unconventional Awards

Perhaps the most notable example of where a fully reasoned award under PWeA 1996 is demanded is where 'unconventional' awards are required to deal with circumstances falling outside the traditional norms of party wall practice and procedure. An example of this is where notifiable works have been started in the absence of valid notice being served, a dispute has arisen and the parties have agreed to participate with the dispute resolution mechanism available under section 10 of PWeA 1996. These are frequently termed as 'retrospective' awards where regularisation is all that is demanded, but an award to resolve damage may also be required despite the absence of an originating notice.

Under the legislation that was the forerunner to PWeA 1996 it was settled law that surveyors could assume no jurisdiction under the statutory regime, insofar as resolving the 'dispute', in the absence of an originating notice.[29] This was due to the explicit wording within these Acts that inextricably linked the legal validity of a surveyor's appointment to the existence of a notice served prior to the implementation of works covered by the legislation. Thus 'no notice, no appointment'. The effect of this is that any notifiable works undertaken in breach of these Acts could not be regularised retrospectively by the surveyors as it is not possible to serve notice after the event. No such limitations exist within the wording of PWeA 1996. Section 10(1) of PWeA 1996 adopts a more liberal approach to the initiation of a dispute and the ability for surveyors to then be appointed to resolve it:

> "Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either-
>
> (a) both parties shall concur in the appointment of one surveyor (in this section referred to as an "agreed surveyor"); or
> (b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as "the three surveyors")."

Furthermore, section 10(10) of PWeA 1996 states:

> "The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter-
>
> (a) which is connected with any work to which this Act relates, and
> (b) which is in dispute between the building owner and the adjoining owner."

It would seem Parliament had the foresight to widen the remit within which disputes can be satisfactorily resolved under PWeA 1996, thereby reducing the burden on the courts within the purview of neighbourly disputes. Therefore, a 'dispute' need not evolve directly from a notice; it is submitted that the very absence of notice may in itself be grounds for dispute.

Where a 'retrospective' award is required at the behest of both parties – and it is difficult to see how this could be achieved without the bilateral cooperation of both parties – the purpose will be to regularise the notifiable works already undertaken. This may avoid future conveyancing issues should either party wish to sell. In this instance, it would be necessary to set out a reasoned determination following a chronological overview of the preceding events. Where an award is required to resolve issues of damage and the making good or compensation thereof, but where no originating notice existed, a carefully reasoned award will be essential to the legal validity of the award and to mitigate the prospect of a successful appeal.

The above highlights some of the scenarios where an award should contain reasons as a matter of natural justice and procedural correctness. Whether the parties should also be invited to submit representations in these circumstances remains a moot point.

[29] London Building Act 1930, section 117; London Building Acts (Amendment) Act 1939, section 55.

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Conclusion

The unique 'sui generis' nature of awards under PWeA 1996, and the equally unique 'quasi' judicial/arbitral role of the party wall surveyor perhaps best explains how party wall awards, despite being the legally binding determination of a statutory tribunal, can arbitrarily dispense with reasons and avoid the need to consider the representations of the parties. However, given the expectations of the courts that the process should be no different to any other judicial/arbitral process in the context of natural justice - despite the notable absence of any codified rules within the Act itself - these conflicting doctrines are difficult to assimilate.

It is established that a party wall surveyor, either acting alone or as part of a tripartite tribunal, possesses statutory powers enabling the making of legally binding determinations affecting the rights of others. Yet, the majority of party wall awards are perfunctory in nature; they merely allow works to proceed, as opposed to settling any principled dispute on points of law. In such cases, are the representations of the parties really needed? Furthermore, in the absence of any real 'winner' or 'loser', is it necessary for such awards to provide the audit trail of reasons behind the determination that is so vital to statutory arbitration awards or the decisions of courts and tribunals in the traditional context?

It would seem to be unconscionable for third surveyor awards and awards dealing with liability and compensation not to provide a reasoned determination, particularly when there is a 'winner' and a 'loser'. Addendum awards would seem to necessitate reasons, if nothing else, to convey their purpose.

Clearly, where the circumstances demand an unconventional award under PWeA 1996, then an unconventional approach is also demanded of the party wall surveyor. A carefully set out chronological background, followed by a distillation of the issues in dispute, in turn followed by the determination would be a meaningless exercise without transparently conveying the reasons for the determination. At a simple level, this allows the parties to see how the decision was arrived at, which will be essential to mitigating the prospect of appeal, especially where the issues are contentious. Where an appeal is inevitable, a well-reasoned and transparent award will make the task of the appellate court/tribunal that much easier resulting in what can only be a shorter and less costly appeal process.

Perhaps the absolute right of appeal of either party to an award under PWeA 1996 provides a succinct explanation as to the basis upon which an otherwise legally valid award can apparently circumvent the rules of natural justice. Unlike the limited grounds of appeal against arbitral awards under AA 1996, a party to an award under PWeA 1996 may appeal without the need for permission and on virtually any grounds. What does it matter, then, if the award falls short of the traditional expectations of those being bound by the tribunal's determination?

Whilst the legal distinction of a party wall surveyor's role may well fall short of a judicial or arbitral one, there is evidently a requirement that, in certain situations, a party wall surveyor should maintain the same commitment to natural justice as their fully-fledged judicial/arbitral counterparts, notwithstanding the fact this comes without the comfort of judicial immunity.

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