

Security for expenses under the Party Wall etc. Act 1996: What? When? How?

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ABSTRACT

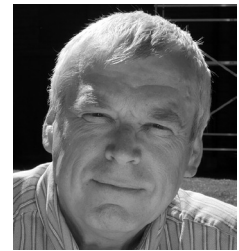
'Until recently, the security provision was a little used element of the Party Wall Act but in light of the current economic climate it is becoming more common for Adjoining Owners to request security to be given.' The Pyramus & Thisbe Club¹ 2010 This trend has accelerated with the continuing increase in basement extensions and a growing reluctance of building owners to meet their obligations under the Act. Guidance on security is confused, out of date and often wrong and, since solicitors were warned in December 2014 by the Solicitors Regulatory Authority against offering banking services, the practical difficulties of arranging security have caused many surveyors to neglect this important right of adjoining owners. This paper reviews the guidance and solutions available.

Keywords: *security, security for expenses, party wall act, party walls, section 12*

INTRODUCTION

The late John Anstey² wrote in 1991³: 'Security for expenses is a little used provision of the Act, sometimes abused, and occasionally not employed when it would have been a good idea to do so.' He was referring to the provisions of Section 57 of the London Building Acts (Amendment) Act 1939 but his observation is as true today as it was then.

If John Anstey had any maxims, one would surely have been 'What does the Act say?' In 1939 it said that security may be required 'for the payment of all such expenses costs and compensation in respect of the work as may be payable by the building owner'. Moreover the 1939 Act also specified that a dispute over security for expenses shall be 'determined by a judge of the County Court', not by the tribunal of surveyors as it is now. In one such dispute, the judge of the County Court⁴ held that if security for expenses was required he had no authority to refuse it, only to decide on the amount to be provided. It has been suggested by some, including John Anstey⁵, that the figure could be zero which would amount to refusal.



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It is worth setting out Section 12 of the 1996 Act in full:

12 Security for expenses.

(1) An adjoining owner may serve a notice requiring the building owner before he begins any work in the exercise of the rights conferred by this Act to give such security as may be agreed between the owners or in the event of dispute determined in accordance with section 10.

(1) Where —

(1.a) in the exercise of the rights conferred by this Act an adjoining owner requires the building owner to carry out any work the expenses of which are to be defrayed in whole or in part by the adjoining owner; or

(1.b) an adjoining owner serves a notice on the building owner under subsection (1),

the building owner may before beginning the work to which the requirement or notice relates serve a notice on the adjoining owner requiring him to give such security as may be agreed between the owners or in the event of dispute determined in accordance with section 10.

(3) If within the period of one month beginning with—

(1.a) the day on which a notice is served under subsection (2); or

(1.c) in the event of dispute, the date of the determination by the surveyor or surveyors,

the adjoining owner does not comply with the notice or the determination, the requirement or notice by him to which the building owner's notice under that subsection relates shall cease to have effect.

The 'tit for tat' application of 12(2)(b) is particularly problematic and none of the recognised authorities has a satisfactory explanation. In all three editions of its Green Book, the Pyramus & Thisbe Club has suggested that this is, in fact, a drafting error and that 12(2)(b) intended to refer to a counter-notice under subsection 1 of Section 4. This is not entirely convincing because the 1939 Act contained a similar provision. The essential difference is that the 1939 Act restricted the provision with the words 'for the payment of such expenses costs and compensation in respect of the work as may be payable by him' (the adjoining owner). I am not aware of any case in which a building owner has required security for expenses simply because the adjoining owner has and we await a legal authority on this point. In any case the matter of security, if not agreed between the parties, will fall to determination by the surveyors so in practice this conundrum is more of academic interest as building owners usually just want to get on with the works without unnecessary delay.

The simple application of the rest of the Section is not without its own problems, however. In their 'Introduction to the Party Wall etc. Act 1996', John Anstey and Victor Vegoda's commentary on Section 12 includes the statement: 'The section is not designed to allow adjoining owners to ask for a deposit against damage, like seaside landlords, or to cover surveyors' fees.' This statement, firmly based on common practice under the 1939 Act, underpins the restrictive view of the section held by many surveyors today, but the commentary goes on to say: 'However, if a building owner is known to

be cavalier in his attitude to making good, an adjoining owner might then be justified in seeking security.’

The words ‘for the payment of all such expenses costs and compensation in respect of the work as may be payable by the building owner’ have not been carried over into the 1996 Act which simply says ‘such security as may be agreed between the owners’ and refers any dispute to resolution by the surveyors, not the County Court, which should, in theory at least, speed things up. One question is whether the omission of those words give the subsection a wider or a more restricted meaning.

Section 12 is one of the shorter sections of the Act and considerably shorter than the preceding Section 11 which, with its 11 subsections, is shorter only than the section on the resolution of disputes. Sections 11, 12, 13 and 14 come under the general heading ‘Expenses’ and the fact that, under that general heading, the Act follows ‘Section 11 — Expenses’ with ‘Section 12 — Security for expenses’ seems to be a strong indication that Parliament intended that security can be required at least for those expenses set out in Section 11. Among those expenses is the cost of making good damage:

- (8) Where the building owner is required to make good damage under this Act the adjoining owner has a right to require that the expenses of such making good be determined in accordance with section 10 and paid to him in lieu of the carrying out of work to make the damage good.

Subsections (10) and (11), however, create real problems for owners and surveyors for they include as ‘expenses’ the additional cost of future works caused by special foundations and the due proportion payable for making use of work carried out at the expense of the other party. All authorities seem agreed that it is not realistic or desirable

for security to be given against the possibility of such expenses arising at some indeterminate time in the future.

There is also a strong argument that where a statute includes a list then that list is exclusive which would mean that only (and thus all) the expenses set out in Section 11 can be secured under Section 12. This would then allow for security for expenses under subsections (10) and (11) while excluding security for loss or damage for which the building owner would be liable under Section 7(2). This, however, does not seem to be the position adopted by Ramsay J in *Kaye v Lawrence* when he said: ‘it does not make sense to grant security for some works but not other works when ... liability for loss and damage under section 7(2) would apply to all works.’⁶

Surveyors are used to working with and around apparent contradictions in the Act and, in most cases, are happy to exclude as a matter of common sense the expenses in Section 11 Subsections (10) and (11) but then not quite so quick to include loss or damage under Section 7(2). This may chime with current Government thinking on cake but does not sit easily with the apparent intention of Parliament in 1996.

GUIDANCE

Having considered the wording of the Act itself, what guidance is available to owners and surveyors?

If the surveyors do not advise the parties on security the first source that an owner is likely to find is our government’s own guidance as set out in the Department for Communities and Local Government Explanatory Booklet (2015) which seems to support the restrictive approach. Although it states in the opening paragraph of Part 3 that the building owner is ‘made legally responsible for putting right any damage caused by carrying out the works, even if the damage is caused by his contractor’

it makes no further reference to damage or expenses in this context. Security for expenses is only referred to in Paragraph 38, which is effectively unchanged from the 2002 edition, putting the very specific question ‘As a neighbouring owner, what can I do to guard against the risk that the Building Owner may leave work unfinished?’ and giving the equally specific answer:

‘If there is a risk that you will be left in difficulties if the Building Owner stops work at an inconvenient stage, you can request them, before he starts the notified work, to make available such security as is agreed (or if not agreed determined by the surveyor/s), which may be money or a bond or insurances, etc. that would allow you to restore the status quo if he fails to do so.’

‘The money remains the Building Owner’s throughout, but if, for example, you need to have a wall rebuilt, you, or more commonly the surveyors, can draw on that security to pay for the rebuilding.’

‘This provision is usually reserved for particularly intrusive or complex works.’

I think it is clear that Government guidance on this provision of the Act is out of date and reflects common practice under the 1939 Act without considering what the 1996 Act actually says.

The Royal Institution of Chartered Surveyors (RICS) suggests a wider application in section 7.8 of its guidance note GN 27/2011⁷ even including a direct reference to compensation payable:

‘Security might relate, for example, to the cost of remedying works left uncompleted, compensation payable under the Act or disturbance allowance.’

‘The risk of default and foreseeable damage should be assessed in each case where the request for security is not agreed by the building owner.’

It also asserts that:

‘Requests for security of (*sic*) expenses are not appropriate for a general risk of damage caused by failure to follow the terms of an award or accidental damage.’

Seeming to include only damage caused deliberately while following the terms of an award, this apparently general but actually quite specific qualification is not very helpful. Generally, GN 27 is a useful summary and offers practical guidance for appointed surveyors but it does contain one more curiosity:

‘The surveyor is not statutorily obliged to advise the appointing owner on security of (*sic*) expenses issues, unless there is a dispute in respect of requested security.’

This guidance is surprising in two respects. In the first place, the statement is fundamentally incorrect. If there is a dispute in respect of security the statutory obligation is to resolve it in accordance with Section 10, in the course of which the surveyors’ professional duty to advise their respective appointing owners remains. Once appointed, surveyors certainly do have a statutory duty, the primary function of which ‘is to safeguard the interest of the adjoining owner; although they must, of course, consider the rights and interests of the building owner and follow the provisions of the Act’⁸. The statutory duty post-appointment does not remove the professional duty owed by a surveyor to his client.

Secondly, although it is correct to say that a surveyor is not *statutorily* obliged to advise an owner on security for expenses, the implication in GN27 is that a surveyor

does not need even to advise an appointing owner that the provision exists. Apparently at least one professional indemnity insurer seemed to think a surveyor may be *professionally* obliged to do so and reportedly settled a claim on that basis.⁹ Many surveyors are only too painfully aware that PI claims are not necessarily settled on the basis of legal liability but on what is commercially expedient for the insurer. It is worth noting that the previous RICS guidance note GN 5¹⁰ did not include this statement and the reported claim may have been settled before the publication of GN 27/2011.

The Pyramus & Thisbe Club's (P&T) Guidance Note No. 5 (2010)¹¹ should also be read in full by any surveyor contemplating the matter of security. Published after the second edition of its 'Green Book',¹² it reflects the judgment in *Kaye v Lawrence* and also supports the wider application of security for expenses.

'However, in instances where such damage cannot be avoided then the reasonably anticipated consequential cost can be included in the security calculations. It would also be appropriate to include for future costs (eg by way of surveyor's fees) that can be reasonably anticipated will arise if they have not been pre-paid or determined under the Award.'

In the 2016 edition of the 'Green Book',¹³ the Pyramus & Thisbe Club has added to its previous comment on Section 12, 'The subsection is not intended to make security a requisite against the ordinary possibility of damage to fabric, or the payment of fees', the words 'unless they can be reasonably anticipated'. The comment goes on to give further guidance reflecting the judgment in *Kaye v Lawrence* and refers somewhat obliquely to the practical difficulties presented by such a requirement.

In the first comprehensive legal textbook on the Act, Stephen Bickford-Smith

and Colin Sydenham¹⁴ wrote in 2009 that 'the right to claim security is not expressly limited in any way' and further that 'it is considered that it extends not only to the works that will be carried out, but to any claim to which their execution may give rise under the Act (including compensation under s 7(2) and allowance for disturbance under s 11(6)), or otherwise'.

This very broad application seems to have been supported by the judgment in *Kaye v Lawrence*, but in his more recent legal textbook¹⁵ Nicholas Isaac dismisses *Kaye v Lawrence* as a County Court judgment and 'takes the view that "expenses" under section 12(1) are limited to the expenses of the building owner in carrying out the proposed notifiable works, and do not include the possible damage which the adjoining owner or his property may suffer as a consequence of those works'. He bases his argument on the fact that the words 'costs and compensation' in the 1939 Act (see above) are omitted from the 1996 Act which refers only to expenses. It should be noted, however, that making good 'the possible damage which the adjoining owner or his property may suffer as a consequence of those works' is referred to specifically as an 'expense' in Section 11(8) of the 1996 Act. Mr Justice Ramsay devoted ten paragraphs (5–14) of his judgment to explaining how a County Court appeal could be heard in the High Court, concluding in paragraph 13: 'given the importance of the matter and the fact that the parties have agreed that the appeal should be determined in the TCC in London, I consider that it was appropriate for this appeal to be dealt with in the High Court.' I discuss this more fully together with the judge's comments on 'artificial distinctions' based on different wording in different parts of the Act in my review of *Kaye v Lawrence* published in a previous issue of this journal.¹⁶ Most significantly, at paragraph 63, the learned High Court Judge said: 'it does not make sense to grant security for some works but not other works when

... liability for loss and damage under section 7(2) would apply to all works.' Another barrister, commenting on *Kaye v Lawrence*, suggested that the anomalies arising out of various different phrases of similar meaning is simply a result of the evolutionary history of the Act and that the courts 'will seek to create a regime of the most consistent applicability, and indeed practicability'.¹⁷ In my submission, Nicholas Isaac's distinction would be regarded by the courts as artificial and the more widely held, wider view of security would be upheld. (Postscript: On 1st March, 2017 Nick Isaac posted an article on Linked In 'Security for Expenses - What can security cover?' in which he appears to have revised this opinion writing: 'it might well be said that it should count for something that experienced senior counsel and a specialist TCC judge all assumed that security could be demanded in respect of potential damage to an adjoining owner's property' and 'until the Court provides us with a more definitive answer, it seems that the "security" under section 12(1) can cover whatever risks the owners agree should be covered, or the tribunal of surveyors determine should be covered'.¹⁸)

The Faculty of Party Wall Surveyors¹⁹ (FPWS) does not itself publish any guidance on the subject but, reviewing the implications of *Kaye v Lawrence* in his capacity as the Faculty's Head of Training and Education, James Jackson wrote in October 2015²⁰ that

'the appropriate interpretation of section 12(1) of the Act should allow an adjoining owner to serve notice requiring the building owner before he begins any notifiable works to give such security as may be agreed between the owners. It goes without saying that section 10 of the Act also exists for the resolution of any disputes between owners in the event of them not being able to agree upon, first, the need for, and secondly

the amount of security which may be decided upon.'

Although merely paraphrasing the Act itself this appears to support the wider view but also perpetuates the popular myth that surveyors can decide on the need for security to be held. This misinterpretation is also given in the RICS guidance note, the 2016 Green Book and the P&T guidance note. The fact is that, if security has been required by one of the parties, the surveyors can only determine how security is given and in what amount. They have no authority to determine that it is not required, it already has been.²¹

Although the available guidance is not entirely consistent, with the late arrival of Nicholas Isaac it does seem to have moved from the restrictive view to the wider view originally espoused by Stephen Bickford-Smith and Colin Sydenham²² in 2009 and apparently supported by Mr Justice Ramsey in *Kaye v Lawrence*.

WHEN?

When should really be the easy bit. The Act requires that notice of requirement for security for expenses is made in writing before 'any work in the exercise of the rights conferred by this Act' begins. This means that it can be made after an award is served, probably triggering a fresh dispute requiring a further award, as long as the work subject to the award has not yet started. This alone seems a good reason to make an adjoining owner aware of Section 12 in good time. It may not prevent an ambush but it could prevent an unintentional and unwelcome spanner in the works at a critical stage.

That was the easy bit. The other aspect of 'when?' is 'under what circumstances?' There does, at least, seem to be agreement that security for expenses should not be considered as something to be required in every case. The RICS advice in GN 27/2011 that 'The risk of default and foreseeable damage

should be assessed in each case' is a sound principle. Assessment of those risks then becomes a subjective judgment on the part of the owners and the surveyors. Some of the warning signs are well known. Overseas owners and project-specific companies will usually prompt an adjoining owner's surveyor to raise the matter. On smaller, domestic works the adjoining owners will often have an informed opinion as to how readily their neighbours will face their responsibilities.

Curiously, building owners' surveyors often adopt a position of defensive outrage when the adjoining owner's surveyor suggests that security might be appropriate. I am no stranger to that feeling myself and have wondered why this is. After all, the Act allows building owners to carry out invasive and potentially destructive building works to their neighbour's own property. Is it really so unreasonable to ask that a sum of money be ring-fenced and accessible against the possibility or even likelihood of damage being caused or other expenses being incurred? I will discuss proportionality later, but I have come to the conclusion that the real problem that we surveyors have with security for expenses is simply the difficulty of making suitable arrangements that give adequate protection to both parties.

HOW?

Some surveyors will still remember how, on the rare occasions when a request was made for security for expenses under the 1939 Act, the two surveyors would simply open a bank account into which the security would be deposited and then disbursed as the surveyors later agreed. Indeed, this is exactly the approach suggested by Anstey and Vegoda in their introduction to the 1996 Act.²³

Times have changed and opening a bank account is not much easier than passing through the eye of a needle. Some surveyors can offer the facility through their own client account, but this creates additional

accounting burdens on those surveyors who do have accounts set up in that way. Furthermore, 'It is the view of RICS Regulation that all security of (*sic*) expenses money held by an RICS member or an employee of an RICS regulated firm, under section 12(1) of the Act shall, for the purposes of the RICS Rules of Conduct, be considered to fall under the full protection of the RICS regulatory scheme for client accounts.'²⁴ This alone is sufficient deterrent for many chartered surveyors. RICS guidance does not specify whether it is acceptable in itself for RICS members or regulated firms to offer banking services to building owners who are not their clients.

In some cases, surveyors have determined that adequate security can be given by appropriate insurance or performance bonds. This was supported as a valid method by the judge in *Kaye v Lawrence* but there are practical difficulties in ensuring that a given policy does provide security for those expenses for which it has been required. Insurance claims can take a while to settle and loss adjusters will have no regard for the intentions of the parties or the surveyors. An insurer will not, for example, pay out for what its loss adjuster considers foreseeable damage. Complications arise in respect of joint names cover, duplicate insurances, non-negligence cover, who claims from who and most surveyors will take cover behind the caveat of not being an insurance expert in the hope that will be more than a fig leaf if tested.

Many surveyors turned to using the client account of one of the parties' solicitors against the solicitor's undertaking that the funds would only be released on the direction of the surveyors. This proved to be effective and relatively simple to arrange once things had been properly explained to the obliging solicitors unused to the peculiarities of the Act. A number of recent High Court cases, nothing at all to do with party walls, raised concerns over the misuse of solicitors' client

accounts. In 2012 Cranston J stated that ‘movements on client account must be in respect of instructions relating to an underlying transaction which is part of the accepted professional services of solicitors’.²⁵ Two years later Popplewell J declared ‘that it is objectionable in itself for a solicitor to be carrying out or facilitating banking activities because he is to that extent not acting as a solicitor’.²⁶ The Solicitors Regulatory Authority (SRA) was the successful respondent in both these appeals and in December 2014 issued a warning²⁷ to solicitors against the improper use of a client account to provide banking facilities. As a result many solicitors have since declined to hold security for expenses, although some are happy to do so if they are also ‘acting as a solicitor’ in giving advice on the statutory dispute.

The sudden withdrawal of this straightforward and increasingly familiar arrangement left surveyors, now more open to the requirement for security, in a quandary. In the latest edition of its ‘Green Book’,²⁸ the Pyramus & Thisbe Club has added the comment:

‘The provision of security for expenses carries a number of disadvantages, including expense and delay, and those disadvantages should be weighed in the balance when deciding whether security for expenses is required.’

This again reinforces the common misconception that surveyors have authority to decide whether security for expenses is required. The comment seems to be more concerned with the practical difficulties of making suitable arrangements for security that surveyors currently face than any actual disadvantage of having security in place. If security for expenses has been required and the assessment of risk and foreseeable damage concludes that security is reasonable is it really acceptable to balance that against perceived disadvantages including expense and delay to the other party?

In discussing how security might be provided, James Jackson of the FPWS went on to say:

‘A more modern and efficient manner of providing security is for an arrangement to be made for the provision of an escrow agreement to be drawn up by a person, or more likely, a company licensed by the Financial Standards authority [*sic*]²⁹ to mitigate the risk of mismanagement of monies administered by the escrow agent.’³⁰

Unfortunately, none such existed.

What is needed is a simple, affordable, accessible and secure facility for holding security in order that the balance can be maintained ‘when deciding whether security for expenses is required’. This would go a long way to enabling surveyors to deal with security in a balanced and rational way without fear of the disproportionate expense and delay that security currently incurs. This is not so straightforward. Any service which effectively receives money from one party and pays it to another is a ‘Money Service Business’ subject to the Money Laundering Regulations (something pointed out by the SRA in its warning to solicitors) and the Payment Services Regulations and is required to be registered and supervised by HM Revenue & Customs and regulated by the Financial Conduct Authority.

HOW MUCH?

If the parties do not agree on security for expenses, then it will fall to the surveyors to resolve the matter in accordance with Section 10 and to determine not only in what form security is to be given but also in what amount.

There is very little guidance as to how the amount of security should be calculated and of course the circumstances will be different in every case. There does seem to

be a consensus that the amount of security required should be related only to expenses that might arise in connection with the works that are notifiable under the Act and not in relation to the entire building project. P&T Guidance Note 5 states:

‘Security is generally considered as being access to sufficient funds to allow the adjoining owner to complete some part of the proposed works or to reinstate its property so that the adjoining owner’s property is not compromised if for some reason the building owner fails or refuses to satisfy its obligations under an Award.’

Bickford-Smith and Sydenham write that although ‘the starting point may well be the realistic total of potential claims for which the building owner may be liable’ this figure must be discounted because security is ‘to guard against the *risk* that the building owner will not fulfil his obligations’.³¹ It does not seem sensible to me, having established that an adjoining owner may incur expense, to discount the amount of security by laying odds on the eventuality. If there is a 50 per cent risk that the building owner will default and security has been discounted accordingly there will be a 50 per cent shortfall in the amount available to meet those expenses.

The various sources of guidance referred to earlier also seem agreed that security should not be set at a level that effectively frustrates the works by locking away the building owner’s financial resources, but Bickford-Smith and Sydenham make the point that

‘whilst security should not be used indirectly as a way of placing unreasonable obstacles in the way of work which the Act entitles the building owner to carry out, it may not necessarily be unreasonable to order security in an amount which *de facto* prevents the particular building owner from proceeding.’

James Jackson of the FPWS observes that

‘The principal defect within the withholding of monies within an escrow account, however, is the need for a building owner to set aside a greater sum of money for this purpose than the basic cost of his proposed building works and consequently, this may thwart the more ambitious nature of certain projects.’

This is at odds with the Act itself as, regardless of how security is provided, the sum involved is entirely within the authority of the surveyors to determine if the parties are not in agreement and there is no presumption that it will be greater than the cost of the project. A balanced approach might well be to require security for those expenses which cannot be covered by insurance, whether the adjoining owner’s own buildings insurance or the various third party and public liability insurances of the building owner and its contractors.

If the surveyors cannot agree on quantum, they should advise the parties of their respective figures and give the party required to provide security the opportunity to accept the figure proposed but not agreed by the other surveyor. If the figure is rejected the surveyors can appoint a specialist, usually a Quantity Surveyor, to advise them. If the specialist adviser’s figure is equal to or lower than the lower of the figures in dispute, then the surveyors should award the adviser’s costs to be paid by the party requiring the higher figure. In my submission, it would be quite in order for surveyors to appoint a specialist adviser in complicated cases rather than trying to come up with a reasonable figure without the particular expertise required. This is no different to appointing an advising engineer to assist the surveyors in structural considerations.³²

One thing is clear, although not necessarily spelled out in the sources above, and that is that security should be released as

soon as it is proper to do so. Surveyors should agree exactly for what expenses security is being held and release it as soon as the risk has passed. Surveyors will sometimes agree that security shall be released in phases as the works progress and any award for security 'must make proper provision for the time, manner and circumstances in which the security will be released ... consistent with the dispute resolution process under section 10'.³³

It is important to remember that we surveyors are only there to resolve disputes and we must resist the temptation to assume that a dispute exists. Complicated arrangements for the phased release of security can require additional inspections and due diligence on the part of the surveyors. A party giving security may prefer that funds are held for longer and released or disbursed as appropriate in one go on completion. It is a strange feature of party wall cases that matters of great importance to the surveyors may be of little significance to the parties who are nonplussed and occasionally irritated by disputes that are not between them. Unfortunately, most of the guidance seems to overlook the fact that the parties may themselves agree to release security even if they were unable to agree on how it was to be provided in the first place. The surveyors need only be involved in the release of security if the parties are not in agreement.

CONCLUSION

The Party Wall etc. Act 1996, following its many predecessors, repeals the common law³⁴ and 'a party wall award can do something that no court can ever do, that is give authorisation for acts which would otherwise constitute a trespass or nuisance'.³⁵ In exercising rights under the Act a building owner can carry out invasive works to his neighbour's property, cutting into it, underpinning it, raising it, even demolishing and rebuilding it. Not unreasonably, the Act also

allows for an adjoining owner to require security for expenses that he might incur as a result of the building owner trespassing on his property, creating a nuisance and even causing damage in the exercise of those rights.

Commentaries on the Act and the guidance offered by the various professional organisations are not entirely consistent and do not always seem to reflect what the Act actually says. Most seem to discourage the holding of security except in exceptional circumstances, reluctantly modifying their position following the judgment in *Kaye v Lawrence*. In practice, surveyors seemed to become more accepting of the principle as solicitors made the holding of security more straightforward, but attitudes may be hardening again since the SRA issued its warning against the practice.

It seems paradoxical that surveyors of the statutory tribunal have been reluctant to consider the holding of security as a reasonable requirement in so many cases. Surveyors will cheerfully call for advising structural engineers, movement monitoring, acoustic engineers and other specialist services all of which can create 'a number of disadvantages, including expense and delay' to the building owner. These specialist services are readily sourced and part of the party wall surveyor's daily life while security for expenses raises a complication with real difficulties for the surveyors. I cannot avoid the conclusion that our instinctive aversion to security is largely because there has been no satisfactory facility for holding it without complicated setting up procedures.

The Act confers on a building owner the right to carry out building work to his neighbour's property, actions that would otherwise be trespass, nuisance and even criminal damage and the ability to require security for expenses is there for a reason. It seems to me incompatible with the spirit of the Act³⁶ and with the statutory duties of surveyors to avoid it simply because it is too

difficult or has disadvantages for the party required to give it.

Surveyors must accept that in conferring invasive rights on building owners, the Act also confers on adjoining owners the right to require security for expenses they might incur as a result of the building owner exercising those rights and to remember that the primary function of their statutory duty 'is to safeguard the interest of the adjoining owner; although they must, of course, consider the rights and interests of the building owner and follow the provisions of the Act'.³⁷ Nevertheless, surveyors need to be flexible and proportional in determining how security should be given and should balance exposure with the protection offered by normal insurance cover.

NOTES AND REFERENCES

- (1) The Pyramus & Thisbe Club is a Learned Society established in 1974 as a forum for discussion on all matters relating to the provisions of Part VI of the London Building Acts (Amendment) Act 1939 and subsequently the Party Wall etc. Act 1996 which replaced it. It is widely regarded as the leading authority on the application of the Act and has received favourable comment in many leading judgments.
- (2) John Anstey BA FRICS FCI Arb (1936–1999), founder of the Pyramus & Thisbe Club and champion of the Party Wall etc. Act 1996
- (3) Anstey, J. (1991), 'Party Walls and what to do with them', 3rd edn, RICS Books, UK, ISBN 0-85406-496-6.
- (4) *Capital & Leisure Hotels Ltd v Independent Estates plc* [1990] County Court decision.
- (5) Anstey, J. and Vegoda, V. (1996), 'An Introduction to the Party Wall etc. Act 1996', Lark Productions Ltd, UK, ISBN 1-898383-55-3
- (6) *Kaye v Lawrence* [2010] EWHC 2678 (TCC), para. 63.
- (7) RICS guidance note (2011) 'Party wall legislation and procedure', 6th edn (GN 27/2011), ISBN 978-1-84219-700-4.
- (8) McCardie J, *Selby v Whitbread & Co* [1917], 1 KB 736.
- (9) Antino, P. (2012), 'A Practitioner's Approach and Interpretation of the Party Wall etc. Act 1996', p. 196, Xlibris Corporation, ISBN 978-1-4797-2637-0.
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- (11) The Pyramus & Thisbe Club (2010), 'Security (for expenses)', Guidance Note No. 7.
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- (23) Anstey, J and Vegoda, V (1996), 'An Introduction to the Party Wall etc. Act 1996'. Ibid.
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- (25) *Premji Naram Patel v SRA* [2012] EWHC 3373 (Admin).
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- (27) Solicitors Regulatory Authority website, <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Improper-use-of-client-account-as-a-banking-facility--Warning-notice.page> (accessed 3rd March, 2017).
- (28) The Pyramus & Thisbe Club (2016), 'The Party Wall Act Explained'. 3rd edn. Ibid.
- (29) There never has been a Financial Standards Authority. The Financial Services Authority was effectively replaced by the Financial Conduct Authority in April 2013.
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- (34) *Kaye v Lawrence* [2010] EWHC 2678 (TCC), para. 61.
- (35) Bailey, J., *Bibizadeh v Dodosh* [2015] CLCC Claim No B20CL043, para. 93.
- (36) 'The spirit of the Act' is an expression used by party wall surveyors when explaining why we do not always do strictly what the Act says.
- (37) McCardie, J., *Selby v Whitbread & Co* [1917], 1 KB 736.