ABSTRACT

Subterranean Development in high value areas is currently proving economic due to the upward constraints on development in these areas from issues such as rights of light, planning or daylight & sunlight. The overall increase in downward development is such that new friction within the market is starting to show resulting in an increasing trend by Local Authorities to seek to prevent basements via planning policy.

The presentation will therefore look at section 6 of the Party Wall etc Act 1996 when undertaking a Subterranean Development.

KEYWORDS

Party walls, subterranean development, basements, deep excavation

1. INTRODUCTION

The theme of this paper is basements, foundations and reasonable steps with the linkage of topics being the administration of the party wall process. In central London the constraints on higher or lateral extension is now such as to justify the economic costs of subterranean development.

In this paper and the supporting presentation the term of “basement” and “subterranean” will be used interchangeably.

The issues over the justification of subterranean development as sustainable development is a complex augment. The pro lobby argue that the use of
brown field land in our urban centres is the correct intensification of our prime residential areas. The Anti lobby argue that the social impact of the major projects over a long period of time is destroying a generation’s enjoyment of an area with questionable long term benefit.

2. THE ISSUE OF SUBTERRANEAN DEVELOPMENT

The Party Wall etc Act 1996 deals with deep excavation via the provisions of section 6 and has differing rules for works between 0-3m and 3-6m in terms of assessing the potential need to comply with the process. The test is none technical and a property 6.001m away from the hazard works receives no protection or benefit regardless of depth of works, ground conditions or need for safeguarding.

In the context of Central London subterranean development, a technical argument to extend the extreme depth of hazard from 6 to 9 metres can be justified in engineering logic.

In terms of a technical investigation of the topic a good starting point are the two technical study reports prepared by Alan Baxter & Associates LLP and these will form the basis of the presentation. These can be found on the local authority websites and are now the basis for planning policy in those areas on this topic.

- Royal Borough of Kensington and Chelsea (RBKC) Residential Basement Study Report December 2012
- Westminster City Council’s (WCC) Residential Basement Report July 2013

In addition Ove Arup & Partners have prepared Guidance for Subterranean Development for the London Borough of Camden in November 2010.

This paper and supporting presentation will consider the impact of the RBKC Report Section 10 The Party Wall etc Act 1996 in relation to Basement Design and Construction and the WCC Report Section 9 The Party Wall etc Act. When dealing with these reports in the Planning System each is required to stand as an individual item however for my presentation purposes I will deal with the observations raised about the Act as a collective whole.
In order to understand the logic used in the Alan Baxter reports it is necessary for you to refresh yourself with the following two technical reports:

- CIRIA Report C580 Embedded Retaining Walls: Guidance for Economic Design
- BRE Digest 251 Assessment of Damage in Low-rise Buildings

These two reports deal with the technical interpretation of damage to buildings due to ground movement and in structural engineering terms what is considered significant cracking. This distinction is vital as the level of cracking that an Engineer considers structural is when movement generating cracks in excess of 5mm are encountered. Decorative repair claims encountered in the party wall process commence with cracks from 0.1mm.

The issue of decorative repairs needs to be considered in the context of the location. As the value in property price is greater then also the potential items within those properties can in equal measure increase.

Owners may have spent significant sums of money on the decorative finishes and this work may be via known designers/artists who give the work a perception of worth or quality. Spurious claims are those claiming this luxury for standard work but equally complaints have arisen when surveyors have failed to understand or document these arts, special or luxury finishes.

The level of anticipated damage based on the geotechnical risk assessment on some subterranean development projects can be the complete redecoration of the Adjoining Owner’s property.

When this could be required to “Interior Designer” or “Artist” standard the project should be carrying the potential exposure sum in the project appraisal. When potential damage to Artist finishes such as a wall or ceiling mural are identified then a project may need to take specialist insurance or obtain quotes from Fine Art Specialists.

The party wall process is a limited tool and criticism of the Act is focused on two primary areas:
• The Court being the only route of enforcement for non compliance rather than Local Authority Development Control as found under the Building and Planning Acts.
• The legal fine line between development matters under the Act and those issues from the scheme that are outside the process. This is not understood by the public.

An example highlighted by the Ladbroke Association is dirt, dust and rubbish which can spread beyond the pure party wall properties or can be argued as non Act in nature. This combined with noise and general site traffic inconvenience lead to unhappy neighbours who see the party wall process as worthless, not fully understanding the issues that are protected by the Act.

3. TOPICS FROM THE RICS BOUNDARY & PARTY WALL PANEL

The RICS Boundary & Party Wall Panel has created a series of professional guidance notes (Boundaries, Party walls, rights of light and Daylight/Sunlight), public information leaflets and technical articles to support RICS members and the public. An Emergency project that RICS gave the Panel followed requests from Government to support Flood Damage areas with public information on how to reinstate boundary post flood damage.

RICS has run national conference events providing updates and support on all the Panel topics and these have proved popular with Members.

The Panel champions the concept of the Chartered Surveyor as the logical ADR practitioner in neighbour disputes. Therefore a common theme in the Panels work is placing the RICS Member in a proactive and facilitating a solution role within the context of a neighbour dispute.

The Panel currently has a live Working Group considering the 2nd Edition of “Rights of light: Practical guidance for chartered surveyors in England & Wales” which should have a draft for consultation via IConsult in the summer. The aim is to launch the 2nd Edition in October 2015. This new Edition will take account of the Supreme Court case of Coventry v Lawrence and the recent Law Commission Report on rights of light. The Working Group is currently debating the inclusion of new sections dealing with documenting the release, the role of trees in rights of light calculations and the administration of Light Obstruction Notices under the Rights of Light Act 1959.
In December 2014 BBC Radio Four “You & Yours” did a short piece on problem party wall projects. It would be easy to think this as a one off item and not a signal of concern, however, this would be wrong and I have the sad task of warning of a growing media focus on poor practice. I am currently preparing a draft public information leaflet on “Cost Control in Party Wall Projects” in an attempt to deal with some of the common misunderstandings.

One of my tasks for RICS is acting as the Official Media Spokesperson and as such I deal with the print, radio and television media on party wall, boundary and associated neighbourly matters. It is a fair statement based on my media contact that the honeymoon period of the Act is now over. A growing body of public anger is reaching all sections of the media on professional practice.

Some areas of complaint are unfair on the profession and are motivated by “Neighbour from Hell” situations, however three areas keep appearing in the question list from the media of all types:

- “Ambulance Chasing” Planning Application aggressive marketing and misleading statements.
- Cowboy Developers ignoring the Act and seeking to avoid repairs.
- Fees from Building Owner, Adjoining Owner and Third Surveyors not being explained to or understood by the Owners.

Whilst reputable practitioners have nothing to fear it is important that everyone is now under no illusion that the professional practice of party walls surveyors is now in the media spotlight. If you have seen the “Rogue Trader” style hits with hidden camera etc used to target “cowboy builders” this type attention is currently being directed against the party wall sector.

On a happier tone the status of Chartered Surveyors undertaking party wall work is currently very high within political circles. This has resulted in two pieces of potential draft legislation considering adopting the party wall style dispute resolution process and the basis of resolution.

In January 2015 the Ministry of Justice issued “Boundary Disputes: A Scoping Study” to investigate the cross party support growing for the suggested Bill of Charlie Elphicke MP. The proposed Bill is strongly influenced by the party wall process using the Section 10 1996 Act method of dispute resolution.
The issue was also part of a formal debate in the House of Lords on 15th January 2015. The Chairman of the RICS Boundary & Party Wall Panel is The Earl of Lytton BSc FRICS who spoke on this matter and was involved in the background meetings and debates on this issue over the last two years. The question raised was

“To ask Her Majesty’s Government what proposals they have for the settlement of unclear or disputed property boundaries”

The response of Government has not been to totally reject the concept, however the profession of Surveying has a journey before sufficient agreement will be won to generate a change in law. The counter case is not political but from the practitioners of the law. The legal lobby view argues that the determination of a boundary is a matter of legal title (law) rather than physical fact (survey). This is a strong voice in our system.

Change is highly unlikely in the short term however the exercise and the response from both Houses and across all parties is such that a first step on a longer journey has been made.

4 LATEST CASE LAW

Michael David Woodman-Smith v Architects Registration Board [2014] EWHC 3639

This High Court Case was handed down on 7th November 2014. The case is due to an appeal under Section 22(c) of the Architects Act 1997 against the decision of the Professional Conduct Committee (PCC).

The points that can be gathered as learning issues for us all are:

- The standard business obligation upon all professional practitioners to enter into written terms of business with an owner is also subject to the scope of professional regulation.
- Written terms of business are not optional but mandatory.
- The duties of a party wall surveyor in terms of general business administration are subject to professional regulation.

The Judgement states

“In essence, the critically important rationale of paragraph 4.4 of the code is that any person or persons who retain an architect should be
informed about the scope of the work that will be done by the architect, the fee or method of calculating it for which they will be liable, what they will be responsible for and other important matters. This information is of crucial importance to the parties, so that in advance if the engagement of the architect the client knows and agrees to these matters. Indeed these are core obligations.”

“The PCC then concluded that:

“Failure to provide terms and conditions is not a mere technicality. It is the foundation of all that is done by architects for their clients. It is important, and for the benefit of the architect as well as the client””

This point is already covered in RICS GN27/2011 Party wall legislation and procedure 6th Edition, Guidance Note. This document was quoted in detail within the PCC Judgement findings.

5 TOPICS FOR FUTURE DEBATE

The urban myth that CDM2015 would never get the political time before the general election, so would never become law, was dispelled on 29th January 2015 when the regulations were formally laid before the House. This is therefore an important change in our professional culture and will impact all areas of business operation.

Whilst this is a paper on deep excavation and party wall matters rather than purely a safety lecture, the wider impact of this change should be reflected upon by your business.

Historically, Domestic Clients have been exempt many of the formalities of the earlier two versions of the Construction (Design & Management) Regulations however with effect of 6th April 2015 this situation will fundamentally alter. The practical impact of this regulatory change is that from 6th April 2015 any proposed subterranean development or creation of a new basement extension is highly likely to trigger the full formality of CDM2015.

Transitional regulations exist for projects already in the system from 6th April to 6th October 2015; thereafter the new system is fully operational.
The width of this change will impact the nature and style of communication within Design Teams and party wall surveyors are not exempt the obligation to communicate safety issues. Whilst the 1996 Act does not use the word “health & safety” or CDM at any point this does not mean that safety is not a material duty for the appointed surveyors.

This paper is on deep excavation and therefore I will limit my illustration to this one area. Section 6(5) states:

“In any case where this section applies the building owner shall, at least one month before the beginning to excavate for and erect a building or structure, serve on the adjoining owner a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner.”

The communication within the Design Team on the issue of the need to safeguard the adjoining owners building and structure is a clear obligation to consider the hazard potential of the proposed works in terms of potential structural failure.

I therefore believe that as an Adjoining Owner’s Surveyor, you may find yourself as having a direct obligation to communicate technical points that your inspection and knowledge of the building has identified. The most obvious will be in the two “side by side” Development scenario. This would trigger CDM2015 Section 8(4):

“A person with a duty or function under these Regulations must cooperate with any other person working on or in relation to a project, at the same or an adjoining construction site, to the extent necessary to enable any person with a duty or function to fulfil that duty or function.”

My thinking in this area is the appointed surveyors have a vital linkage function to ensure communication between the owners. To meet this duty they may need to list the contact details of the two separate projects key duty holders in a formal exchange between the owners (the Award).

In the party wall community much ink has been spent on whether or not a schedule of condition should be prepared. My contribution to this debate is I believe that Surveyors has a clear obligation to inspect the site/buildings that
is the subject of the Award. In terms of excavation works how else can you
demonstrate that you have considered the need for underpinning or
safeguarding? The Act requires the appointment of a “Surveyor” and the
plain English reading of that term points to a professional person who
inspects land/property. This “site survey” function becomes important for
those seeking to avoid the below:

Section 8(1) & (2) of CDM2015

“A designer (including a principal designer) or a contractor (including a
principal contractor) appointed to work on a project must have the
**skills, knowledge and experience**, and, if they are an organisation,
the organisational capability, necessary to fulfil the role that they are
appointed to undertake, in a manner that secures the health and
safety of any person affected by the project.”

“A designer or contractor must not accept an appointment to a
project unless they fulfil the conditions in paragraph (1).”

The argument is that under the definition of “Construction work” our
technical task is within the scope of a pre works site survey “Schedule of
Condition”. The definition in CDM2015 exempts site survey from the scope
of the regulations. This means we are “Surveyors” and not “Designers”

This is therefore an issue of balance.

Speakers from HSE Inspectors presenting papers at the London Pyramus &
Thisbe Club have strongly expressed the view that they consider Party Wall
Surveyors as Designers under the scope of CDM2007.

Ethically, however I am uncomfortable in seeking to actively read myself out
of any health & safety obligation. The Regulations do not expressly exempt a
party wall surveyor as a designer and if any doubt exists the “precautionary
principle” implies that the safe case should be dominant. In practical terms
being a holder of “**skills, knowledge and experience**” in my technical area I
see nothing in CDM2015 that should need a business to risk manage out the
very limited duties that could be linked to a party wall surveyor under
CDM2015, however I suspect some will take a counter view out of fear rather
than reasonable justification.
6 CONCLUSIONS

The “honeymoon” period of the Act is over. We now have a generation of property owners and developers who have never known a pre Act England and as such do not recognise the benefits of the process. People are calling for change without considering the implications. The two draft Bills that never progressed attempted to build upon the success of the 1996 Act.

Subterranean development has highlighted the ancient nature of the technical thinking behind Section 6 of the Act. Once you again deal with damage outside the Act the great advantage of the process is quickly remembered.

7 REFERENCES


Michael David Woodman-Smith v Architects Registration Board [2014] EWHC 3639

Ministry of Justice, Boundary Disputes: A Scoping Study, January 2015 www.gov.uk/moj


8. Presentation Slides in PowerPoint Handout Format
THE PARTY WALL ETC. ACT 1996

Neighbourly Matters
Presentation to the Five Counties Conference 2015
4th March 2015

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THE PARTY WALL ETC. ACT 1996

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§ Chartered Environmental Surveyor
§ RICS Registered Expert Witness
§ FCinstCES, CEnv, CMIOSH
§ RICS Boundary & Party Wall Panel
§ Chairman of APC Assessors

AIM
The aim of this lecture is as follows:

· Explain the position of neighbourly matters within the wider framework of development – 2 Mins
· Specific focus on Deep Excavation and Basement issues being encountered in Central London – 15 Mins
· Summary of recent case law – 5 Mins
· Update on the activities of the RICS Boundary & Party Wall Panel (BPWP) – 3 Mins
NEIGHBOURLY MATTERS

- Party walls
- Crane/Scaffolding licences
- Access to Neighbouring Land Act 1992
- Ransom strips
- Boundary disputes
- Rights of Way (Public & Private)
- Daylight, Sunlight and Rights of light
- Expert Witness

This topic within the APC

The typical areas that link into the competencies of the APC for a potential Chartered Building Surveyor are:

- Building Pathology – Allegations of potential damage
- Design and Specification – Design Team to review drawings
- Inspection – Schedule of Condition
- Legal/regulatory compliance – Service of Notice/Administration of process

Party Wall etc Act 1996
The Issues

- Anxiety over potential damage
- Potential for soil erosion and interruption of pre-existing surface or sub-soil water flow
- Disruption, noise, damage and loss of privacy during construction
- Financial loss (20% of revenue and capital value)

Lord Selsdon – Subterranean Development Bill: Explanatory Notes

THE PARTY WALL ETC. ACT 1996

Three Metre Notice Diagram

- Building Owner
- Adjoining Owner
- Ground Level
- Building Owners excavation or foundations

THE PARTY WALL ETC. ACT 1996

Six Metre Notice Diagram

- Building Owner
- Adjoining Owner
- Adjoining Owner
- Ground Level
- + 6 metres
Some modern technical problems

- The Subterranean Development Bill called for the introduction of a 9m Notice – Why?
- The Hazard of Excavation creating a risk is not limited to 9m

Party Wall Practice Update March 2015

- Freetown Limited v Aseehold Limited [2012] EWCA civ 1657
- Neilson’s Yard Management co v EazeKea [2013] EWCA civ 235
- Dillard v F&C Commercial Property Holdings Ltd [2014] EWHC 1219 (QB)
- Patel v Peters [2014] EWCA civ 335
- Stratton and Khan-Sherwani v Patel [2014] EWHC 2677 (TCC)
- Yeung v Patel and Summers [2014] EWCA civ 481
- Michael David Woodman-Smith v Architects Registration Board [2014] EWHC 3639

Michael David Woodman-Smith v Architects Registration Board [2014] EWHC 3639

“In essence, the critically important rationale of paragraph 4.4 of the code is that any person or persons who retain an architect should be informed about the scope of the work that will be done by the architect, the fee or method of calculating it for which they will be liable, what they will be responsible for and other important matters. This information is of crucial importance to the parties, so that in advance if the engagement of the architect the client knows and agrees to these matters. Indeed these are core obligations.”

British and Irish Legal Information Institute
Michael David Woodman-Smith v Architects Registration Board [2014] EWHC 3639

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Terms of Business

- Scope of Works
- The fee or the basis of calculating

What has the RICS Boundary & Party Wall Panel been doing on your behalf?
Any questions

Something to look up when back in Office

In the time allocation I will not be able to cover the following however if you have not as yet read these cases they should form part of your private structured reading post this Conference.

CAVEAT

In this section of the presentation I will be taking you through some recent Court activity linked to party wall practice. These cases are the result either of an appeal of the Award or within the case the circumstances have resulted in discussion about the party wall process.

My views and comments are practice based (A Surveyor’s View) and are not intended as a legal commentary.
Freetown Limited v Assethold Limited
[2012] EWCA civ 1657

This case in practice terms confirms the correct method of delivery of Notices and Awards.
Sending by Ordinary Post
Consigned to the post, not when it is received.

Nelson’s Yard Management co v Eziefula
[2013] EWCA civ 235

"It therefore falls to this court to exercise the discretion as to whether to disapply the default rule in CPR Part 38.6(1) and, if so, how to do it. For the reasons I have given, I consider that the failure of the defendant to respond in any way to the four pre-action letters he received for the claimants and the solicitors is, in the circumstances, given the reasonableness of the claimants perception of the danger to their wall and foundations, unreasonable conduct which justifies disapplying the default rule."

Dillard v F&C Commercial Property Holdings Ltd
[2014] EWHC 1219 (QB)

Prior written agreement via a Deed between the parties can override the procedure of Section 10 of the Act.
Whilst not common these have been used in Central London on major projects as part of wider "Neighbourly Matters" deals struck between the parties.
Patel v Peters [2014] EWCA civ 335

- A defaulting surveyor can still act effectively after a 10-day notice under section 10(7).
- This action brings to an end the ability for the other surveyor to act ex-parte.

Section 10(13) "Reasonable costs"
The decision does not
- Require all Adjoining Owner’s Surveyors to work for fixed fees or seek to cap hourly rates at £150.00

Stratton and Khan-Sherwaniv Patel [2014] EWHC 2677 (TCC)

- This case involves a party wall project that resulted in a major fire.
- The case therefore involved Insurance Loss Adjusters and a dispute over the correct level of reinstatement.
- The very long judgement is interesting as it highlights the differing approach of a “Party Wall Surveyor” considering damage under section 11(8) of the Act and the Court’s common law or equitable jurisdiction.
- The Building Owner attempted to avoid liability via claiming no party wall existed. This case highlights the importance of the Notice and Award be correctly grounded in the Act.
Yeung v Potel and Summers [2014] EWCA civ 481

- This is a case around redevelopment access between two flats.
- The Building Owner failed to serve notice under the Act and therefore was exposed to the full scope of a common law claim. The judgement highlights that a horizontal floor does not default mean a “Party Structure” the location of the boundary will be in the detail of the lease wording.
- This lack of Notice under both Act and Lease was also “self-defeating” as access was vital to the success of the project.
- The completion of the project therefore rested on if the access required was within or outside of scope of lease.
- “Renewing” Does not extend to laying new and additional pipes or wires of a different character from the pre-existing ones.
- Access was refused by the Court of Appeal.