

PARTY WALL

SURVEYORS & ADJUDICATORS

The Party Wall etc. Act 1996

The Party Wall Act covers three distinct types of work, alterations to a shared (party) wall, the construction of new walls on the boundary and excavation work close to neighbouring properties. The third category is often overlooked by owners planning to extend their property.

Where work falls within the scope of the Act it is necessary for a Building Owner to serve notice and obtain the affected Adjoining Owner's consent; if that consent is not forthcoming the parties are deemed to be 'in dispute' under the Act and surveyors must be appointed so that the dispute can be resolved by way of a Party Wall Agreement (technically called an 'Award').

Adjoining Owners

Often an Adjoining Owner only becomes aware of their neighbour's plans to extend when a Party Wall Notice lands on their doormat. An Adjoining Owner has the option to either consent or dissent to a notice – if no response is made within 14 days the parties are deemed to be in dispute under the Act. Where a dispute arises each Owner must appoint a surveyor so that a Party Wall Award can be agreed.

Although not stated in the Act, the surveyors will usually Award that their reasonable fees must be paid by the Owner undertaking the works.

Building Owner

An Owner planning to undertake works that fall within the scope of the Act should start planning early; notice periods are either 1 or 2 months

depending upon the type of work but where complex works are to be undertaken it can take longer than that for an Award to be agreed.

We always advise Building Owners to speak to their neighbours before serving the formal notice. Neighbours that feel they are being kept informed are far less likely to immediately appoint a surveyor when a formal notice is served and, often unnecessarily, run up a large bill for surveyor's fees.

We recommend that Building Owners have their plans checked over by an experienced party wall surveyor to confirm whether the works come within the scope of the Act and if necessary draft the required notice(s).

The Act allows for the same surveyor to be appointed by each of the Owners; in that scenario the surveyor will act as 'Agreed' and impartially regulate matters affecting both owners. By having a surveyor draft the notice a Building Owner can increase their chances of having that surveyor adopted as 'Agreed' which will help to keep the costs down on small projects.

Schedules of Condition

A schedule of condition is a survey which simply records the condition of a property at a particular point in time. It should be undertaken in advance of work being undertaken at an adjoining property so that any damage which occurs can be easily attributed & additionally any spurious claims made by all adjoining owners can be identified by the surveyors.



Construction adjudication

Adjudication is conducted by an Adjudicator, who should be a professionally qualified expert in their field. Most Construction Disputes relate ultimately to money thus the selected Adjudicator should always be a legally trained and experienced in the subject matter.

Adjudication has become a practical commercial process and has become powerful thanks to Statute Law backing the process. On 1st May 1998, the **Housing, Grants, Construction and Regeneration Act 1996 (Part II)**, (The Construction Act) came into force and changed the UK Construction Industry forever. It became a statutory right, as defined by the HGCR Act 1996, for parties to contracts operating in the construction industry, to adjudicate their issues. The HGCR Act 1996 was then importantly updated and amended by the **The Local Democracy, Economic Development, and Construction Act 2009 (Part 8)** (The New Construction Act), which came into force for all contracts formed on or after 1st October 2011.

Construction Contracts for the purposes of Adjudication legally can be divided into TWO categories:

(1). Commercial Construction Contracts – (Building Employers, Builders and Sub Contractors are the parties)

(2). Householder Construction Contracts – (Builder and homeowner are the parties)

Commercial Contracts are subject to the Construction Acts and must comply with the Statutes including giving the Legal Statutory Right to Adjudicate at any time; Household / Consumers are excluded from the legislation. Therefore if you are having a house built, refurbished or extended for your personal use, there is no Statutory right to adjudicate or to other contract provisions laid down by the Construction Acts. This is an example of the intention to protect Consumers from what is an onerous commercial process, however in our opinion it is the Consumer that often falls foul of the cowboy builder, thus the right to adjudicate consumer construction contracts would be very useful. You can include an adjudication clause in your contract and it will give you the right to refer any dispute to adjudication at any time.

In essence:

If you are a Commercial contracting party subject to the conditions set out in the Construction Acts, you have the right to adjudicate irrespective of whether there is an oral (New Act only) or written contract or absence of an adjudication clause. If the contract does not provide a relevant clause that complies with the Construction Act, the relevant part of the Scheme for Construction Contracts (England & Wales) Regulations 1998 as amended in 2011 will be implied into the contract. This applies to both the Right to Adjudication and to Payment Provision and Arrangements.

Mediation

The Benefits of Mediation

Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

- Mediation is voluntary, but refusal to mediate can give rise to cost sanctions in court proceedings.
- Courts actively encourage parties to consider mediation.
- Parties can mediate at any stage before or during proceedings.
- Mediation is confidential and 'without prejudice' (nothing said in the mediation is admissible as evidence in legal proceedings) should the parties not reach agreement during mediation
- Any settlement reached is legally binding once put into writing and signed by the parties.
- Successful – over 70 per cent of cases referred to CEDR Solve settle.
- Quick – most mediations are arranged within a few weeks (and can be arranged even more quickly) and the formal mediation session usually lasts for one or two days only.
- Cost effective – compared with litigation and arbitration processes, mediation is a less expensive route to resolving disputes.
- Gives parties control over the process and the outcome.
- Mediation can run alongside litigation or arbitration or you may prefer to put the litigation or arbitration process 'on hold' while you mediate.
- Mediation can maintain business relationships far more effectively than adversarial processes.
- A wide variety of settlement options can be achieved in mediation over and above monetary settlements.
- Informal and flexible – the process to suit clients' needs.
- Mediation is an effective tool for tackling a wide range of property and construction related issues. It involves the facilitative role of a trained third party neutral to assist parties in themselves coming to and managing the settlement of their dispute.
- A mediator helps to clarify and prioritise issues, crystallise needs, reality check and assist parties in searching for solutions. They are facilitators who guide and manage the parties through a process of controlled negotiations, so as to avoid escalation of conflict.

Mediation has a number of advantages over litigation and arbitration processes:

Steve Campbell Associates will not offer any evaluation of the parties' positions or opinion

unless all parties expressly agree to seek it; nor advise on the merits of any settlement. We will chair and manage the mediation appointment and oversee and manage at our discretion the negotiation between the parties.

As a neutral third party, We bring a new energy to stalled negotiations, and explore how parties are willing to move from entrenched positions by identifying the real issues between them, their concerns, and needs.

Mediation endorsement

The use of mediation is growing as a method by which disputes amongst two or more parties can be resolved quickly and at low cost. Mediation allows the parties to secure an agreement which is not necessarily dictated by legal matters, but can offer a practical and commercial solution, including maintaining, and in some cases enhancing the relationships of the parties involved.

QS

As a quantity surveyor Steve Campbell would manage all costs relating to building and civil engineering projects, from the initial calculations to the final figures. We seek to minimise the costs of a project and enhance value for money, while still achieving the required standards and quality.

The Quantity Surveyor is the person responsible for figuring out just what a building is going to cost and in some cases for making sure that construction costs and production are managed as efficiently as possible. In some of today's projects there may be many millions of pounds involved.

A Quantity Surveyor can identify and collate the costs involved in order to develop an overall budget for any project. They can then undertake cost planning which aims to help all members of the design team arrive at practical solutions and stay within the project budget. It is the final detailed

estimate prepared by the Quantity Surveyors, in consultation with a project architect, which forms a basis on which subsequent tenders can be evaluated. Schedules of quantities translate the drawing, plans and specifications produced by the design team to enable each contractor to calculate tender prices fairly, on exactly the same basis as the competitors.

Once tenders have been accepted, the Quantity Surveyor can provide cash flow data to enable a client to programme his resources adequately to meet contract commitments. In other words, the Quantity Surveyor decides how much of a job should be paid for at any one time.

In most construction contracts, the contractor is paid monthly and the Quantity Surveyor can value the work carried out each month submitting a recommendation for certified payment.

The Quantity Surveyor can also be called on to assess cost effects when changes occur and agree on variation with contractors.

Following completion of a contract, the Quantity Surveyor prepares a statement of final account, summarising the cost charges that have occurred and arriving at a final contract sum.

Expert determination

The term 'expert determination' describes a process whereby the parties agree that a third party (the expert), who is independent of the parties, is to be engaged to answer a particular question or determine a particular dispute and that the parties are to be bound by that expert's decision. The expert determination process should therefore result in a fast, binding and final resolution of the dispute referred to the expert.

The key distinguishing feature of expert determination is that in general, the expert is free to use his own knowledge, expertise and experience to investigate the question that has been referred to

him, taking account of the submissions of the parties as he sees fit, whereas judges and arbitrators are required to decide on the basis of the submissions and evidence made by the parties. This is one of the greatest strengths of expert determination, particularly when the nature of the issue to be decided is technical, as the expert will have been carefully selected because of his relevant expertise. Therefore, the expert is not just appointed to hear the parties' various contentions and to select between them, but to investigate the facts and to apply his knowledge and expertise to decide the answer to the question that has been referred to him.

Expert determination is also very flexible. As it is based entirely upon an agreement between the parties, they have an opportunity to control and tailor the process to suit their own particular circumstances or the facts and matters of the particular dispute. This flexibility allows expert determination to be used in a very broad range of matters, sometimes to avoid lengthy and complex disputes from arising and at other times to resolve disputes quickly and cheaply. It is not uncommon for parties to agree that the whole process shall be concluded in a matter of days after an expert has been appointed.

Types of dispute suitable for expert determination

Although parties may decide that any dispute arising out of a project should be determined by an expert, it is more usual for the parties to identify in their contract defined questions, issues or subject areas about which a reference to an expert can be made. Since one of the most significant benefits of expert determination is that an appropriately qualified and respected expert will be engaged to answer a question within his field of expertise, it can easily be understood why this is the case. It may be relatively easy for parties to agree, for example, that questions over whether a complex piece of engineering equipment should be accepted as complete could be resolved by an expert practising

in the particular field in question. However, it is quite another thing for the parties to agree that every other potential dispute including, for example, a dispute over the liability for and consequences of delayed delivery should also be resolved by the same individual.

For these reasons, expert determination is usually considered most appropriate when narrow questions can be referred to an appropriate expert be that an engineer, an accountant, a surveyor or a lawyer. Some such issues can easily be identified at the time that a contract is drafted. For example, it may be foreseeable that there could be a dispute over whether a project had progressed to the point where a completion certificate was due to an engineering contractor, or over the appropriate price for a variation, or deciding whether remedial work is required to building works, or the appropriate accounting principles applicable to a valuation exercise. By considering these issues pre-contract and by including appropriate terms in the contract, both parties can enter into the contract with the confidence of knowing that if certain disputes arise they have the right to resolve those disputes through a swift, relatively cheap and binding process, and that concerns over lengthy and expensive litigation or arbitration can be put to one side.

Expert Witnesses

Expert witnesses assist the courts and various other tribunals in a variety of contexts, including criminal trials, civil and family hearings, planning tribunals, copyright disputes, as well as in the more familiar areas of construction and engineering hearings before Technology and Construction Court (TCC) Judges and construction industry arbitrators.

In these various forums experts have an important role to play. In 2002 the Court of Appeal Judge, Dame Elizabeth Butler-Sloss, writing about expert medical witnesses, described them as "a crucial resource. Without them we [the Judges] could

not do our job". The importance of the expert witness function applies equally in the construction engineering field, where, save for a few cases which depend upon, say, the interpretation of the contract, disputes invariably involve experts opining upon professional negligence, programming, extensions of time, and the like.

However, it is precisely because tribunals, whether court or arbitration, can often be dependent upon expert evidence in reaching the proper outcome that inappropriate behaviour by experts is fiercely condemned, and why a steady stream of more and more detailed procedures have been introduced to control and regulate those who hold themselves out as experts in the forensic arena. Certainly, when an expert is perceived to have behaved inappropriately the consequences can be far reaching. In mid-2005 Sir Roy Meadow, who had given evidence in the Sally Clark trial, was castigated by the media. He was the paediatrician whose evidence contributed to the wrongful conviction of a mother for the murder of her two babies. Although it was accepted that Professor Meadows did not intend to mislead the court, in a subsequent disciplinary hearing by the General Medical Council he was found guilty of serious professional misconduct for giving erroneous and misleading evidence. It was said that statistical evidence he gave in court was outside his expertise as a consultant paediatrician. Although the General Medical Council's decision was subsequently overturned by the Court of Appeal, the damage to Sir Roy Meadow's reputation had already been done.

Steve Campbell Associates provide pragmatic, commercial advice that delivers the best outcome for our clients on building and construction disputes.

We act on behalf of a variety of clients including main contractors, sub-contractors, house builders, individuals, owners/developers, surveyors, architects, engineers, insurers, solicitors and barristers and we

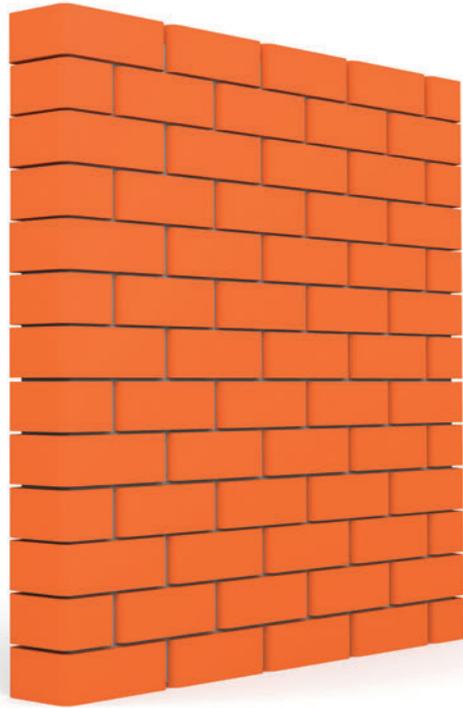
can advise on all types of building and construction disputes, including:

- Claims for extensions of time
- Claims for associated loss and expense caused by delay or disruption to a building project
- Claims for outstanding payments
- Claims relating to defective workmanship
- Claims for liquidated damages
- Claims relating to the cost of carrying out additional works or variations under a contract
- General property damage claims
- Disputes over interim and final accounts and/or certification
- Enforcement of adjudicator's decisions
- Professional negligence claims against building professional such as architects, surveyors, engineers, etc

Whatever the nature of your dispute, we will take the course of action that fits in with your commercial objectives. This does not necessarily mean resorting to litigation through the Courts, as we can also provide advice and assistance in respect of the following alternative dispute resolution services.

Adjudication

Adjudication is usually a very quick procedure which can be concluded within 28 days of referring a dispute to the adjudicator. The idea is that it helps protect cash flow during the construction process. The adjudicator's decision is binding on the parties unless, and until, the dispute is determined by litigation, arbitration or agreement.



Arbitration

An alternative to litigation which is more formal than adjudication but more flexible than court proceedings. The arbitrator is often someone with a construction background and his decision will be final and binding on the parties. Unlike in court proceedings, the parties are subject to duties of confidentiality.

Expert Determination

This involves the appointment of an expert who is familiar with the technical issues in a dispute. He is jointly instructed by the parties to determine the dispute between them, often on the basis of written submissions only. His decision is legally binding on the parties. The process is very informal and is usually a lot cheaper and quicker than other forms of litigation.

Early Neutral Evaluation

A non-binding process in which an independent 3rd party, appointed by the parties, gives an independent assessment of the merits of the claim. There is no power to impose a settlement on the parties but the evaluation can often facilitate settlement discussions.

Mediation

This process involves the appointment of an independent 3rd party who assist the parties with negotiating their own settlement. The process is private and confidential and any settlement agreed as a result will be binding on the parties.

Other forms of ADR

Other methods of resolving disputes include without prejudice negotiations which can take place either at a meeting or by correspondence.

We know that in the building and construction industry, cracks can sometimes appear in business relationships.

If a building or construction dispute is inevitable, Steve Campbell Associates will work with you to ensure that it is resolved quickly and efficiently.

Arbitration/Adjudication/Mediation/Conciliation

Acting as Arbitrator/Adjudication/Mediation/Conciliation

Acting as Representative

Acting as Expert Witness

Extensions of Time

Claims preparation;

Forensic planning and retrospective delay analysis.

Expert Witness including:

Time Slice (also known as Time Impacted) Analysis.

Window Analysis

Collapsed As-Built (also known as 'As-Built But For' method)

Impacted-As-Planned

As-Planned vs As-Built

Loss & Expense

Claims preparation including cause and effect

Expert Witness

Projects and Construction Management

Advice on contractual issues at project initiation/set up

Tender process matters

Procurement/regulatory issues

Drafting and advising on building contracts, advisers agreements, collateral warranties, bonds, parent company guarantees and the suite of contract documentation required for any given project

Advice on PFI and drafting contract documentation

Insolvency advice

Advising on contractual issues generally

Dispute resolution including adjudication (and enforcement), mediation, arbitration and litigation

Advice on project management issues

Contracts

Choosing, drafting and/or amending;

Tendering processes;

Interpretation of clauses and provisions;

Reconciling ambiguities and inconsistencies;

Identifying circumstances where time and/or damages have been rendered 'at large';

Valuation mechanisms and where quantum merit can be sought as an alternative



Member

CI Arb



Party duties

Neil J Dransfield former President of CIAT examines the circumstances of serving a Party Wall notice...

The Party Wall etc Act 1996 (the Act) is applicable to England and Wales and must be followed in certain narrowly defined circumstances. They are basically where planned building work is close to a structure that belongs to a neighbour. Its requirements are quite separate to those of Planning and Building Regulations.

The purpose of the Act is to confer rights on the building owner (the person intending to carry out building work) in exchange for obligations and duties. The Act's overall objective is to bring certainty to both the building owner and the adjoining owner.

Designers, especially Chartered Architects, Chartered Architectural Technologists and Chartered Surveyors, will have a duty to inform their clients about the requirement of the Act.

Where the Act applies

The following are examples of where a building owner is required to serve a formal notice on adjoining owners (notices must be in writing, must show relevant details and are only valid for one year):

- When building work is planned on a boundary with a neighbouring property – Examples are building a garden wall, or the outside wall of a new building or extension, at the boundary. Section 1 of the Act applies and a "Line of Junction Notice" must be served at least one month in advance of the work;
- When work is planned directly to an existing wall or other structure which is shared with another property – This includes party walls, and can include the outside wall of a neighbour's building, but also covers separating floors between flats and garden walls built astride the boundary. Examples are underpinning or thickening, repair, inserting a damp proof course or flashing, cutting off projections, strengthening and opening up and exposing the structure. Section 2 of the Act applies and a "Party Structure Notice" must be served under Section 3 of the Act at least two months in advance. These notices frequently occur in roof space conversions, building in (or removing) beams, removing chimney breasts, altering chimneys, roofs or floors, demolitions, and sometimes in extensions;
- When an excavation is planned within 3 metres of a neighbour's building or other structure, where it will be to a lower level than the underside of the neighbour's foundation – Examples are foundations to a building or extension, but also includes excavations for drain or services trenches within 3 metres. Section 6(1) of the Act applies: An "Adjacent Excavation and Construction Notice" must be served at least 1 month in advance. These types of notice frequently occur in new building work and in extensions, but can apply to structural alterations;
- When an excavation is planned within 6 metres of a neighbour's building or other structure, where that excavation would cut a line drawn downwards at 45° from the underside of the neighbour's foundation – Examples are especially deep foundations or drains within 6 metres. Section 6(2) of the Act applies: An "Adjacent Excavation and Construction Notice" must be served, again at least 1 month in advance. Again, these types of notice frequently occur in new building work, extensions and structural alterations.



Disputes under the Act

Agreeing to a notice in writing allows the work to proceed. However, if a neighbour does not agree (or even does not reply within 14 days) a dispute arises. Section 10 of the Act (Resolution of disputes) applies. The building owner and adjoining owner must then either:

- a) Agree to appoint one surveyor (an "agreed surveyor"), or;
- b) Each appoints their own surveyor. (Those 2 surveyors then select a third surveyor.)

The dispute procedure under Section 10 may well be longer than the period required for the notice, and in complex cases can be several months.

An Award

The dispute is resolved by the surveyors on behalf of the owners, and the result is the service of an "Award" for each dispute. An Award is a legal document describing when, where and how the work subject to the Act is to be carried out. An Award cannot deal with matters outside the Act, and therefore cannot deal with other work on site.

Once served, both the building owner and the adjoining owner each have a right to appeal the Award in the county court, but only for a period of 14 days. After that the Award is totally binding and shall not be questioned in any court. This is a very powerful provision – it brings certainty to the building work.

Other Items

The Act cannot be used to resolve boundary disputes, and neighbours cannot use it to prevent approved work from being carried out.

The Act deals with many matters not covered above and only the Act should be relied on for the scope and meaning of any item. There are many guides available relating to the Act, but even they should not be relied on in preference to the Act.

A surveyor under the Act would be a professionally competent person and can be the designer, so long as he or she is not a party to the dispute. The surveyor must however be a person, not a firm, with obvious PII implications.

References:

The Party Wall etc Act 1996 (published by HMSO, ISBN 0-10-544096-5)
<http://www.legislation.gov.uk/ukpga/1996/40/contents>

The Party Wall etc Act 1996 Explanatory Booklet (published by the Department for Communities and Local Government)
<https://www.gov.uk/party-wall-etc-act-1996-guidance>

**Neil J Dransfield PPBIAT MCIAT MCIArb FCIOB
 Chartered Architectural Technologist and
 former President of CIAT (Chartered
 Institute of Architectural Technologists)**
 Tel: 020 7278 2206
info@ciat.org.uk
www.ciat.org.uk

Steve Campbell Associates
Chartered Building Consultancy

For a FREE initial consultation
call us on 01442 450360,
email info@SteveCampbellAssociates.com