'Security': What is it really all about?

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Abstract

It is becoming increasingly more common for adjoining owners to require security in accordance with section 12(1) of the Party Wall etc. Act 1996, yet its application is often misunderstood. What should be a relatively straightforward process is frequently misused by owners and surveyors. This paper is intended to guide surveyors through the entire process, identifying what security is, when it should be required, how it should be administered, what it can include, the form it can take, how it should be released and illustrating the complexities often encountered.

Keywords: compensation, security, expenses, party wall, damage

MEANING
Section 12(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.'

The terminology of 'security' under section 12(1) of the Party Wall etc. Act 1996 (the Act) is extremely vague and is very much open to interpretation. Generally speaking, the provision thereof gives an adjoining owner reassurance that adequate security shall be readily available in the event of notifiable works being left incomplete, which, in such a state, would require expenses to be incurred to reinstate the status quo.

In an attempt to properly understand the meaning of section 12(1), several key words/phrases stated therein must be carefully dissected.

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'REQUIRING' AND 'RIGHTS CONFERRED BY THIS ACT'

The word 'require' is often misconstrued with the word 'request'.

'Request' implies that while an adjoining owner may indeed claim security, surveyors have the jurisdiction, as necessary, to award that it need not be given and that the amount can be 'NIL'. Whereas, in its context, the word 'require' would appear to advocate that an absolute right to security exists, if only for a nominal amount.

To gauge what is considered to be the correct approach, it is important to assess whether a distinction exists between the phrases 'rights conferred by this Act', being the wording used in section 12(1), as opposed to 'any works executed in pursuance of this Act', as stated in section 7(2).

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If section 12(1) was indeed restricted only to rights conferred — ie works to party walls/party fence walls and party structures as provided by some parts of section 2(2) of the Act, such as underpinning, cutting into or even demolishing and rebuilding a party wall — it would be more plausible that the word 'require' gives an absolute right to security. Clearly in circumstances where such invasive work is undertaken, it would be considered entirely reasonable for an adjoining owner to require security.

Conversely, if section 12(1) is considered to be a 'catch-all' scenario and encompasses 'any rights conferred by this Act' as well as 'any works executed in pursuance of this Act', it should be open to the appointed surveyors, in appropriate cases, to award whatever they consider is appropriate, including that security need not be given.

As an example, it would be absurd for security to be required for excavating and pouring foundations 2.9 metres from, and to a marginal depth below, the foundations of any structure or building situated on an adjoining owner's land, where the risk of causing any loss or damage thereto would be negligible.

Had it been Parliament's intention to create a distinction between the phrases 'rights conferred' and 'works executed in pursuance' of this Act, one would expect the words 'plans and sections' (sections 6(6) and 6(9) relating to 'works in pursuance') to be separated from the word 'particulars' (section 3(1) relating to 'rights conferred').

The fact that the words 'plans, sections and particulars' are instead all grouped within section 7(5) of the Act, which begins with 'Any works executed in pursuance of this Act', reinforces the likelihood Parliament intended such phrases to be indistinguishable.

Furthermore, section 8(1) refers only to works in pursuance of this Act (ie section 6), but it would be difficult to believe Parliament intended that access onto the land of an adjoining owner would only be entitled to facilitate works pursuant to section 6 of this Act and not those works exercised by the rights conferred by this Act (the majority of section 2(2)), as to do so would seem nonsensical.

'SECURITY' OR 'SECURITY FOR EXPENSES'

The word 'expenses' is not explicitly defined in the Act and by virtue of the fact that section 11 is headed 'Expenses' and section 12 flows logically and sequentially thereafter, under the heading of 'Security for Expenses', it would not be an unreasonable assumption for surveyors to believe that 'security' is limited *only* to expenses payable in respect of works referred to within section 11.

Such a limitation would not appear to be the intention of section 12(1), however, as the term used therein is simply 'security' and not 'security for expenses'.

Of equal significance, the phrase 'security for expenses' is *only* mentioned in the contents page and marginal notes, which *do not* form part of the legislation itself, but are merely included to help readers identify pertinent provisions thereof. Their inclusion in this context is thus misleading.

When making his judgment in *Kaye v Lawrence*[1] (referred to later in this paper), His Honour Justice Ramsey quoted the 'plain meaning rule'[2] as follows:

> 'In determining the meaning of any word or phrase in a statute, the first question to always ask is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result, which cannot reasonably be supposed to have been the intention of the legislation, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed

by substituting some other words for the words of the statute.'

Justice Ramsey did not find the meaning of the phrase or wording in section 12(1) to be ambiguous or obscure or that the literal meaning leads to an absurdity. Therefore, insofar as section 12(1) is concerned, reference to the word 'security' and not the phrase 'security for expenses' would be the correct terminology.

WHAT CAN SECURITY ENCOMPASS?

Unfortunately, the Act provides no clear authority and it is therefore very much open to interpretation.

Prior to *Kaye v Lawrence*[3] in 2010, it was generally accepted that security was limited to cover expenses, sufficient to ensure the structural stability of an adjoining owner's property, in the event of a building owner abandoning notifiable works.

The inclusion of security to guard against the ordinary possibility of damage, compensation and costs was not considered appropriate, on the premise that such elements are catered for elsewhere in the Act, and that quantifying damage that has not yet occurred, and might not even do so, is considered to be speculative.

When the Party Wall etc. Act 1996 came into force in 1997, basement conversions/extensions and security claims were few and far between.

Over the last decade or so, however, the construction of basements — some extending two, three and even more storeys below ground level — have dramatically increased in popularity, especially in London, with many having caused, and most having the potential to cause, significant damage to adjoining owners' properties. It is therefore hardly surprising that security claims for substantial sums appear to be synonymous with undertaking such work, not only encompassing expenses for making safe an adjoining owner's property should works be abandoned, but also to account for damage, compensation and costs (surveyors' fees).

KAYE V LAWRENCE [2010] EWHC 2678 (TCC)[4]

The judgment by His Honour Justice Ramsey in this case is often cited as being authority for supporting a wide definition of security and having reference to the paragraphs contained therein below, it is understandable to appreciate why.

- '[…] the carrying out of works within 3 or 6 metres of the boundary would be likely to cause loss or damage so as to justify security, as would further works carried out under section 6(3) or other provisions of the 1996 Act. Further, in cases where work is being carried out under a number of sections of the Act, 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';[5]
- 'I do not consider that it could be argued that security would only apply to work being carried out on the adjoining owner's land';[6]
- 'There is therefore no sensible reason based on a distinction between work on an adjoining owner's land and on the building owner's land for the provisions of security to apply only to sections 1(3), 1(6), 2, 6(3) and 8(1) of the Act and not to section 6(1) and 6(2)';[7]
- 'I therefore consider that … the common law rights are supplanted and substituted by the provisions of the Act and that this applies as much to sections 6(1) and 6(2) as it does to section 6(3) or any other provision of the 1996 Act';[8]
- '[…] given the wide terms of section 10(12)(c) … I see no reason why the award cannot also deal with security

> under that provision and I understand that commonly, as here, such matters as insurance are included under this provision. I consider that this broad power is consistent with section 12(1) applying to all provisions of the Act, including sections 6(1) and 6(2).'[9]

In essence, His Honour Justice Ramsey ignored the distinctions between sections 1, 2 and 6, neither did he see any distinction between the meaning of the phrases 'rights conferred' and 'works pursuant' in the Act. He decided that the common law right for a building owner to excavate on his own land is supplanted by the statutory provision and, having dismissed the arguments to the contrary, he concluded that the adjoining owner was entitled to security in relation to works under section 6 of the Act as well as any other section thereof.

It should be borne in mind that this case was heard in the County Court and is thus not legally binding, nor was the assumption that security is intended to cover the risk of damage to an adjoining owner's property a specific point argued or even addressed before the judge. Nevertheless, the fact that such a case was heard by His Honour Justice Ramsey, an experienced High Court judge and an eminent construction law expert, makes the decision extremely persuasive and should really be regarded as having similar authority as a decision in the High Court.

Surveyors' costs

The judgment within *Chliaifchtein v Wainbridge Estates Belgravia Ltd*[10] offers further weight in favour of damage and professional fees being allowed to form part of security.

COMPARING THE ACTS

Further understanding as to what Parliament intended can be ascertained by comparing the wording of section 12(1) of the current Act with section 57 Part VI of the London Building Act 1939 being the predecessor Act.

- *Section 12(1) – Party Wall etc. Act 1996*: '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';
- *Section 57 Part VI – London Building Act 1939*: 'An adjoining owner may by notice in writing require the building owner before he begins any work in the exercise of the rights conferred by this Part of this Act to give such security as may be agreed between the owners or in the event of dispute determined by a judge of the county court for the payment of all such expenses costs and compensation in respect of the work as may be payable by the building owner.'

With the exception of how disputes are determined (the current Act by the County Court and the predecessor Act in accordance with section 10), there is very little difference between the paragraphs of both Acts; however, the existence of the words 'expenses, costs and compensation' in the former Act, along with the removal thereof in the current Act, emphasises the distinction in meaning between them.

Was it Parliament's aim to deliberately limit security exclusively to expenses relating to those specified in section 11 of the Act?

Alternatively, by omitting the words 'expenses, costs and compensation' from the current Act, was Parliament's objective for security to encompass expenses, compensation, costs and any other loss that can be reasonably foreseen in connection with any work executed under the Act, thus supporting the widest possible definition?

The decision in *Kaye v Lawrence*[11] would certainly support the latter, and is also a view

shared by several leading authorities and recognised experts practising in the field of party wall surveying, as follows:

- *Nick Isaacs (Queens Council), Tanfield Chambers*[12]: Until recently, Nick took the view that loss and damage caused by notifiable works could not form part of a security claim. His reasoning therefor is set out in his book *The Law and Practice of Party Walls*.[13] Nick has, however, since changed his view within his paper published on 1st March, 2017 on LinkedIn.[14] He now believes that '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';
- *Royal Institution of Chartered Surveyors (RICS) guidance note 6th edition*: 'Security might relate, for example, to the cost of remedying works left uncompleted, compensation payable under the Act, or disturbance allowance';[15]
- *Stephen Bickford-Smith, David Nicholls and Andrew Smith (Barrister)*[16]: '[…] the right to claim security is not expressly limited in any way' and '[…] 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 s7(2) and allowance for disturbance under 11(6), or otherwise';
- *Alex Frame (Surveyor), President of the Faculty of Party Wall Surveyors*[17]: 'Security should account for anything that could warrant a legitimate risk to the adjoining owner.'

The following authorities hold a more restrictive and conservative interpretation insofar as security is concerned:

- *Stuart Frame (Barrister), Tanfield Chambers*[18]: Can see the merit of supporting a narrower definition of security and believes that there is scope to suggest that the decision in Kaye v Lawrence[19] was wrongly decided.
- *Department for Communities and Local Government Explanatory Booklet (May 2016)*: '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';
- *Latest Pyramus & Thisbe Green Book*: 'This sub-section is not intended to make security a requisite against the ordinary possibility of damage to fabric or the payment of fees, unless they can be reasonably anticipated';[20]
- *Latest Pyramus & Thisbe Guidance Note (April 2018)*: 'There is a difference of opinion amongst practitioners as to whether security can or should be held for risk of damage. However, in the usual course of events this is not considered appropriate.'[21]

Other renowned experts in their profession share a middle-ground view, as can be inferred from their citations below:

- *Matthew Hearsum (Solicitor), Morrisons Solicitors*[22]: 'The language of section 12 is unhelpfully vague, and open to a wide variety of interpretations. At the more conservative end it could be argued that, where section 11 is entitled "Expenses" and section 12 is entitled "Security for Expenses", Parliament intended security under section 12 to only be available for the expenses listed in section 11. At the more liberal end it could be argued that Parliament deliberately did not limit what security was available for because it was

intended the right to be flexible and left open to the surveyors. I suspect if the matter ever came before the Courts the likely result is somewhere in between';

- *Alistair Redler (Surveyor), Delva Patman Redler*[23]: 'Security for expenses can be held against the risk of damage but only for damage that is reasonably foreseeable from the works and is reasonably likely to result from the works being carried out in accordance with the requirements of the party wall award. Therefore, security cannot be held against a worst-case risk of a contractor ignoring the drawings and method statements or for catastrophic failure. Indeed, if surveyors were to consider that a very high level of security was required, then it raises the question about whether they are failing in their duty to ensure that the works avoid causing unnecessary inconvenience.'

AUTHOR'S VIEW

It is the view of the author that security can certainly include expenses associated with works under section 11 of the Act, but that caution must be exercised when considering the inclusion of compensation and costs. Furthermore, it would be a dangerous philosophy for surveyors to include the provision of predicted damage calculated on a 'worst-case' scenario as a matter of course. This is not to say that compensation for potential damage, or even costs, cannot form part of security, but that practitioners must exercise their own professional judgment by assessing each and every case on its own merits.

FACTORS TO CONSIDER WHETHER SECURITY IS REQUIRED

First and foremost, surveyors should examine the nature, extent and complexity of the works. It would not be unreasonable for security to be required when laying open the premises of an adjoining owner, reconstructing a party wall or undertaking deep excavations for a basement, as such works pose obvious and foreseeable risks to an adjoining owner's property.

Conversely, requiring security merely for trivial works that have little risk of damage would seem inappropriate.

If detailed drawings, method statements, structural impact assessments and soil reports, etc. are available and are to the appointed surveyors' satisfaction, it should inspire a level of confidence that the building owner has properly considered the scheme, thus reducing the requirement for security.

Surveyors do need to tread carefully, however, by not exceeding their jurisdiction under the Act. The assessment of an identifiable risk should be confined to the methodology of the work, and it is not the surveyor's role to exercise control over quality, or to give consideration to the competency of the building owner's designer, supervisory team or his contractor. These are all responsibilities of the building owner and the party wall surveyor may not dictate to that owner as to such matters.

While the status of the building owner is another factor that may influence whether or not security is befitting, it would be extremely difficult, and outside the scope of a party wall surveyor — especially one appointed by an adjoining owner — to actually identify the building owner's financial position.

On the contrary, a building owner who has purchased an off-the-shelf registered company (Special Purchase Vehicle) for a specific project, which can be simply ascertained by performing an on-line search at Companies House, ought to provide security.

The geographical location of a building owner should also be influential as to whether security is necessary, especially considering that residence outside England and Wales may complicate enforcement of an award.

QUANTUM

While there is nothing preventing the owners from agreeing quantum, should they be unable to do so, the appointed surveyors shall be required to determine such a matter in accordance with section 10.

The Act provides no guidance as to how security should be calculated. The appointment of a quantity surveyor to assist in ascertaining quantum may be appropriate if there is a significant disparity between surveyors and if the works are relatively complex, but in most circumstances, establishing a suitable figure should be well within the capabilities of competent chartered building surveyors specialising in party wall matters.

If, for example, a building owner demolished a party fence wall/party wall, common with conventional residential extensions, the adjoining owner needs reassurance that such a wall will be reinstated, should, for whatever reason, the building owner fail to do so, whereby the cost of doing so would provide a fair and reasonable level of security.

Similarly, if one exposes a party wall hitherto enclosed, then the cost of providing temporary means of weathering, usually in the form of polythene sheet/felt and battens, would be considered reasonable, until such time permanent weathering is introduced.

With regard to basement conversions/extensions, calculation of security very much depends on the stage reached. Although the 'worst-case' scenario is often after the basement has been excavated, but prior to permanent support being introduced, a simple calculation to allow for completion of any open pins and back filling open excavations with Type 1 aggregate or similar would generally be acceptable.

Assessing quantum is not a precise science and there is always going to be an element of gazing into a crystal ball, especially when attempting to predict damage that has not happened, and might not ever do so. Provided that damage is foreseeable, however, then security assessments should be relatively straightforward to estimate.

From a practical point of view, most surveyors will have, or should have, considered the risks of the building owner's works when making their awards. Provided that the works are executed in such a manner, which surveyors must believe they will be, the risk of damage arising to an adjoining owner's property should be reduced as much as is reasonably practicable. It therefore follows that the security held in such circumstances should proportionately reflect those risks. If security for damage over and above cosmetic is awarded, which could potentially constitute an unnecessary inconvenience, then surveyors have to question whether they should actually be awarding in the first place.

While of course surveyors must ensure that adjoining owners' properties are adequately safeguarded and consider the provision and quantum of security appropriately, it must be remembered that the Act is enabling, and therefore any amount of security agreed should not be punitive.

METHODS OF PROVIDING SECURITY

The Act does not provide any guidance in relation to the methodology of how security is provided, so it is open to the parties to agree thereon.

Deposit with solicitors

Traditionally, it was common practice for security to be deposited with solicitors. In December 2014, however, the Solicitors Regulation Authority effectively barred solicitors from holding money as security under the Act, unless they are providing legal advice in the subject matter for which they have been appointed.

Escrow account holders

The most common and recognised means of providing security is for a building owner to deposit funds in 'escrow' with a company

regulated by the Financial Conduct Authority, which alleviates the risk of such funds being mismanaged. The security is then released by agreement between the owners or if a dispute has arisen, by the appointed surveyors as per the terms of the award. There are only a limited number of firms offering such a service, each of which charges an administrative fee.

If a dispute arises over security, it is usual practice for the appointed surveyors to include within their award the amount agreed, the terms thereof, the means of release and a clause requesting a letter from the building owner's appointed escrow agent, confirming receipt of irrevocable instructions from the building owner in conformity thereof, prior to the commencement of such work.

It is possible for one of the appointed surveyors to hold security, provided that his firm is regulated by the Royal Institution of Chartered Surveyors (RICS) and has a client account under the RICS regulatory scheme. Such an approach is often resisted by the surveyor's counterpart due to a potential lack of impartiality should a difference in connection with such an issue arise.

Insurance policy

Insurance policies such as 'Contractor's All Risks', Householder's, Public Liability, etc. generally offer protection against negligence, but problems may arise if the building owner's contractor has not been negligent.

Conversely, 'non-negligent' insurance policies often do not pay out because damage was foreseeable.

Many perceive insurance policies as being an unsatisfactory means of providing security as there is always a risk of insurance companies attempting to avoid claims and thus cause potential significant delays in funds being made available.

While specific 'security for expenses' insurance is now being offered by certain companies offering attractive premiums and thus avoiding the need for building owners having to tie up large amounts of money, in practice, such a policy still comes with the usual conditions and exclusions.

It is a matter of statute that if there is a dispute between the appointing owners, it must be resolved by an award prepared by the appointed surveyors. Insurance policies would preclude enforcement of any such award against the insurer. It is only the insured's appointing owner who has a contractual, and not statutory, relationship with the insurer. An aggrieved appointing owner would not be able to make a claim against any such insurance policy and for this reason, insurance policies should not be accepted as suitable security under section 12.

Other forms of security

Other forms of holding security are open to the owners, such as a bank bond, charge over a building owner's property, deposit of a valuable item, etc. but are much less frequently used.

RELEASE OF SECURITY

On the assumption that security had been determined by surveyors and is held in escrow, the only means in which such security can be released is by signatures of two of the three surveyors in accordance with the terms of the award.

All too often, surveyors resist releasing security until many months, and sometimes years, after the notifiable works for which security was initially sought have been completed, simply because they consider that damage might occur. Such a stance would seem to be inequitable and security should be released as soon as possible following completion of the notifiable work and introduction of permanent support, as at such a stage, the risk for which security was initially obtained has been extinguished.

It would therefore be reasonable, and probably desirable in certain situations, for security to be released upon completion of various phases of works, thus allowing building owners to use such money as cash flow to fund the remainder of their project.

It should also be borne in mind that irrespective of what terms of release are stated in an award, if the owners agree for security to be released earlier, a dispute would no longer exist, thus obviating the need for surveyors to become further involved in such an issue.

SECTIONS 12.2 AND 12.3 OF THE ACT

These sections are unfamiliar to many practitioners, because in practice they are rarely applied, but it is important for surveyors to recognise the ramifications thereof as follows:

> '(2) Where —
> (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
> (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 —
> (a) the day on which a notice is served under subsection (2); or
> (b) 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.'

Occasionally, the building owner may require the adjoining owner to give security for the cost of carrying out additional works requested by the adjoining owner — for example, constructing a taller and/or thicker party wall — for the adjoining owner's benefit. In such a situation, the building owner needs to be confident that he will be paid by the adjoining owner for undertaking such work.

What appears to be rather bizarre, however, is that a building owner may also require security from an adjoining owner, merely because the adjoining owner has served such a notice on him, effectively on a 'tit-for-tat' basis. The latest edition of the Pyramus & Thisbe Club Green Book[24] suggests that this is a drafting error, and that it should instead refer to section 4(1) of the Act being a counter notice served by the adjoining owner; however, there does not seem to be any further guidance on this particular point.

Other than serving notice before works commence, there are no apparent penalties for the building owner in respect of security, yet the adjoining owner is punished for remaining silent.

The service of a notice requiring security by a building owner, on a 'tit-for-tat' basis, would seem to be rather illogical and most probably would be viewed as being an abuse of the Act. If such a situation arose, one would imagine that surveyors appointed under section 10 of the Act would be able to dismiss such a claim without too much difficulty. Furthermore, in practice, knowing that such a notice must be served prior to works commencing is likely to deter a building owner from doing so, to avoid delays to his own works.

Nonetheless, surveyors must alert their appointing owners to such potential risks.

PROBLEMS ENCOUNTERED WITH SECURITY

While the majority of surveyors procure the provisions of the Act in a sensible manner, there are unfortunately some that attempt to exploit section 12(1), by making inappropriate and unreasoned claims for large sums of security, sometimes without even consulting their appointing owners, as a means of frustrating the process.

It must be reiterated, that surveyors need only become involved in determining whether security should be provided, or the amount thereof, if the owners cannot agree such issues between themselves.

In cases where multiple adjoining owners of an adjoining block exist and have each appointed different surveyors, it would not be equitable for multiple amounts of security to be provided to cover the same work. To do so would not only create an unnecessary duplication of administration fees but would also increase the amount of security being deposited to cover the same risk. Instead, a separate mandate should be considered, giving each of the adjoining owners rights over the one escrow account. Wording to this effect can be included in the various awards.

Surveyors should be impartial and proactive when dealing with security matters, which will assist in achieving an effective and efficient outcome for both parties. It is therefore incumbent upon surveyors to inform their appointing owners of their right to require security and the implications of doing so from the outset. Failure to do so may potentially expose surveyors to professional indemnity claims for negligence.

There are many occasions where building owners have been tardy to provide information requested, or have simply declined to do so. In such circumstances, it would not be considered unreasonable for surveyors to advise their counterpart that they cannot make an award until such time as the necessary information required to comply with the Act has been provided. Therefore, adjoining owners should be encouraged to make security requests in a timely manner, and equally, building owners should be required to provide adjoining owners with sufficient information to enable them to do so early in the process.

It is a function of an appointed surveyor to address any of the above unreasonable attempts to obstruct the building owner's rights, and the correct application of the Act provides a framework to facilitate this. Usually a prompt referral to the third surveyor will resolve the matter, which in most circumstances results in costs following event, if indeed the amount of security claimed is considerably higher than that ultimately agreed.

CONCLUSION

Unless the courts rule otherwise, it would appear to be the general consensus that security can include expenses, compensation, costs (surveyors' fees) and any other loss that can be reasonably foreseen in connection with any work executed under the Act.

Surveyors have a duty to award works that are appropriate and that are unlikely to cause damage. Therefore, if they use due diligence by undertaking their role as a party wall surveyor effectively, in most cases any risk should be modest, which must ultimately be reflected in the amount of security agreed.

Nonetheless, whether security should be awarded in any given case is a matter of judgment for the appointed surveyors, and it would be wrong to consider that the default position is that security should be given simply because it is claimed.

Surveyors must appreciate that the Act is enabling and permissive and the incorrect application of security not only incurs

considerable financial and time disadvantages for the building owner, but is also inconsistent with the spirit of the Act. It is precisely for this reason why surveyors are appointed under the Act, as they are expected to have the necessary skills and judgment to be able to act pragmatically where the Act is less than precise, and generally, impartially and objectively.

References

(1) *Kaye v Lawrence* [2010] EWHC 2678 (TCC).
(2) Plain Meaning Rule, *Pinner v Everett* [1969] 1 WLR 1266 at 1273.
(3) *Ibid.*, note 1.
(4) *Ibid.*, note 1.
(5) *Ibid.*, note 1, para 63.
(6) *Ibid.*, note 1, para 54.
(7) *Ibid.*, note 1, para 55.
(8) *Ibid.*, note 1, para 61.
(9) *Ibid.*, note 1, para 64.
(10) *Chliaifchtein v Wainbridge Estates Belgravia Ltd* CLCC 26th April, 2018.
(11) *Ibid.*, note 1.
(12) Isaacs, N., Tanfield Chambers, Property & Real Estate Barristers, https://www.tanfieldchambers.co.uk/person/nicholas-isaac/ (accessed 18th June, 2019).
(13) Isaacs, N. (2014), *The Law and Practice of Party Walls*, Property Publishing, London, pp. 138–139.
(14) Isaacs, N. (March 2017), paper published on LinkedIn.
(15) RICS (2011), 'Party wall legislation and procedure, 6th edition, guidance note', available at https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/building-surveying/party-wall-legislation-and-procedure-6th-edition-rics.pdf (accessed 18th June, 2019).
(16) Bickford-Smith, S., Nicholls, D. and Smith, A. (2017), *Party Walls: Law and Practice Fourth Edition*, Jordan Publishing Ltd, Bristol.
(17) Frame, A. (Surveyor), President of the Faculty of Party Wall Surveyors.
(18) Frame, S., Barrister, Tanfield Chambers.
(19) Kaye v Lawrence [2010] EWHC 2678 (TCC)
(20) The Pyramus & Thisbe Club (2016), The Party Wall Act Explained, 3rd Edition.
(21) Pyramus & Thisbe (April 2018), 'Guidance Note: Security for expenses'.
(22) Hearsum. M., Morrisons Solictors, https://www.morrlaw.com/lawyer/matthew-hearsum/ (accessed 18th June, 2019).
(23) Redler, A., Delva Patman Redler, Chartered Surveyors, https://delvapatmanredler.co.uk/about-us/ (accessed 18th June, 2019).
(24) *Ibid.*, note 19.