Party Wall etc. Act 1996 - 'No Notice, No Act'

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The decision of the High Court in *Shah v Power and Kyson* [2022] EWHC 209 (QB) has confirmed that the Party Wall etc. Act 1996 ("the 1996 Act") does not apply in the absence of a relevant notice being served under the 1996 Act ("Notice").

It has often thought that the dispute resolution mechanism within the 1996 Act will be engaged where there is a dispute between two property owners in relation to building work to which the 1996 Act relates; notably where damage has arisen.

However, the decision in *Shah* has clarified when the 1996 Act is not engaged, in circumstances where it might have otherwise been thought. In that case, a building owner carried out 'notifiable' works without serving a Notice on the adjoining owner. The subject works caused damage to the adjoining owner's property, so the adjoining owner appointed a party wall surveyor (Kyson) to determine matters under the 1996 Act. The building owner was invited to appoint a surveyor, but declined, so the adjoining owner's surveyor appointed a surveyor for him (Power) relying on section 10(4)(b) of the 1996 Act. The two surveyors made a purported award ("the Award").

Perhaps unsurprisingly, the building owner appealed the Award, which was held by the county court to be void. The surveyors appealed that decision in the High Court, which dismissed the appeal on the grounds that the provisions of the 1996 Act were not invoked as no notice had been served; 'no notice, no act'. As such, the failure to serve a notice under the 1996 Act meant that the appointment of party wall surveyors to resolve the dispute was unavailable, in the circumstances.

This decision has also reminded surveyors that they do not have jurisdiction to make awards dealing with common law matters, which remains the position where the provisions of the 1996 Act have not been triggered.

What next?

It follows that if a building owner does not wish to be troubled by the service of notice and the cost or delay of involving surveyors, why not ignore the Act altogether?

Whilst the *Shah* decision has the potential to leave unnotified adjoining owners at risk, they are not without legal recourse. In the first instance, a building owner who proceeds with notifiable works without serving notice will lose the benefit of the 1996 Act - including rights of access to perform notifiable works (which would avoid an actionable trespass and/or nuisance) - and may risk exposure to a claim under the common law, which include a potential claim in nuisance, trespass, negligence, and breach of statutory duty (although this remains an area of unsettled law.

Where works are imminent or ongoing, the common remedy for an adjoining owner will be to apply for an injunction to restrain the works. The court may grant an injunction to prohibit the works where the adjoining owner can demonstrate that the building owner's works threaten to adversely affect their rights. However, the adjoining owner will usually need to act quickly, as an injunction is

a discretionary remedy and the court will consider the promptness of any application before granting relief.

The decision in *Shah* may encourage some building owners to proceed with works which are notifiable under the 1996 Act without serving a notice. In such circumstances, the building owner may be on the receiving end of an application for injunction preventing the works and/or an order for damages plus legal costs. Perhaps it is better to avoid such an unwanted distraction and seek the protection of the 1996 Act, which was drafted for the purpose of keeping such disputes out of court.

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