

Easements – Adjoining properties and party walls

Christopher Cant

An interesting area with regard to party walls is the relationship between awards under the Party Wall etc Act 1996 and the general law applicable to such walls. This is emphasised by section 9 which seeks to prevent any conflict between the operation of the 1996 Act and matters such as easements and common law rights.

1 Section 9

“9 Easements

Nothing in this Act shall—

- (a) authorise any interference with an easement of light or other easements in or relating to a party wall; or
- (b) prejudicially affect any right of any person to preserve or restore any right or other thing in or connected with a party wall in case of the party wall being pulled down or rebuilt.”

On the face of it the operation of this section could undo the intended effect of the 1996 Act because the existing easements and rights could override the provisions of any award under the 1996 Act. This is clearly not the intention. Equally it cannot have been intended that this section would have no effect. The relationship between existing easements and the operation of the statutes leading up to and including the 1996 Act has never been comprehensively analysed and understood. The section cannot operate without qualification.

It has been recognised that a predecessor statute, the London Buildings Acts (Amendments) Act 1939, gave “a building owner a statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests. The position of the adjoining owner whose proprietary rights are being compulsorily affected, is intended to be safeguarded by the surveyors appointed pursuant to the procedure laid down by the Act. Those surveyors are in a quasi-judicial position with statutory powers and responsibilities.” (Brightman J. in *Gyle-Thompson v Wall St. (Properties) Limited* [1974] 1 WLR 123 at page 130).

To consider how this section operates it is first necessary to identify what easements and rights there are under the general law and then to see how the making of awards has affected such easements and rights.

2 Rights under general law – party walls may be subject to a number of easements and rights. There is not a comprehensive statement as to what exactly these comprise. In *Jones v Pritchard* [1908] 1 Ch. 630 Parker J. stated at page 636 that in relation to each such wall there will be such “easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall” and this will vary according to the particular circumstances. In that case a flank wall had been constructed with chimneys and flues in place for an adjoining building were one to be constructed which it later was. Smoke came through cracks from use of the chimneys by the new house and damaged furniture and decorations. It was held that the Defendant had a right to use the Plaintiff’s chimneys in this way.

What possible easements and rights will be within this wide statement?

2.1 Support – there are two different types of right to support. There is the natural right to support of the land which is an inherent part of the ownership of land and is not strictly an easement. This does not cover buildings but only land. Separate from this is the easement of support which can be created either by grant or prescription and can be provided by land or land and any building on it. Such a right can be impliedly granted or reserved on the basis of intended use or mutual easements (Morgan J in *Walby v Walby* [2012] EWHC 3089). Twenty or more years of support to a building will result in an easement by prescription. The unusual feature of this easement is that it is not possible to prevent the acquisition of the easement.

In *Dalton v Angus* (1881) 6 App. Case 740 two independently constructed buildings adjoining each other had stood together for over twenty years. One had been converted to a coach factory more than twenty years before and the conversion had increased the lateral support provided by the soil of the adjoining house. The owner of the adjoining property demolished it and excavated the earth with the result that the stack of the factory sunk and the factory collapsed. The House of Lords held that as the conversion of the building to a coach factory had been known to the adjoining land owner and more than twenty years had passed the factory had the benefit of a prescriptive easement of support which vertical and lateral support imposes a positive and constant burden necessary for the safety and stability of the factory.

Attempts have been made in some cases to distinguish between different types of support. For example at first instance in *Rees v Skerret* [2001] 3 EGLR 1 the judge at first instance drew a distinction between weight support and wind support but this was rejected on appeal. In the *Rees* case one of a 100 year old

terrace of houses had been taken down after service of a dangerous structure notice leaving a common wall with the adjoining house in place. This wall was too high and heavy to stand without support. It meant that it was unstable and the effect of the wind was to manifest and increase the instability. Lloyd J. stated that wind support was an aspect of the support the two adjoining properties provided to one another. He then went on to consider whether there was a separate right to have the wall rendered (see section 1.2.3 below).

Mere failure to repair traditionally did not constitute a wrongful interference with the easement of support. In *Sack v Jones* [1925] Ch 235 one of two adjoining houses suffered from subsidence which caused the party wall to be dragged over and damaged the adjoining house. The owner claimed damages and failed as there was no obligation on the defendant to keep his house in good repair and the defendant had done nothing to cause the damage. What an owner cannot do is unilaterally remove the support without replacing it with an equivalent (Sir Wilfred Greene MR in *Bond v Nottingham Corp* [1940] Ch. 429 at page 439). However, since 1980 the Courts have developed a measured duty of care which may now be relevant (see section 5.4 below).

2.2 Right to Use - the use of the chimneys for taking up the smoke in *Jones v Pritchard* supra is one example. Another is *Upjohn v Seymour Estates Limited* [1938] 1 AER 614 which concerned the demolition of one of two 80 year old adjoining buildings. This step was taken by the Defendant before the party wall award was signed by the surveyors. This caused a serious bulge in the party wall which led to the collapse of the Defendant's half of the wall exposing apertures in the Plaintiff's half to the elements. It was held that the demolished building not only provided support but also protection to the use of the Plaintiff's apertures

because the Plaintiff had a right of user as well as support. The Defendant was in consequence liable for damage to the Plaintiff's stock.

2.3 Weather protection – there is no easement to be protected from the weather as illustrated by *Phipps v Pears* [1965] 1 QB 76. In that case one of two adjoining houses was pulled down which exposed the unrendered wall to weather. This allowed the rain to get in and freeze resulting in cracks. It was held that there was no liability on the part of the adjoining land owner as there is no easement which had been interfered with and so no absolute duty to provide weathering. The outcome may well be different now on the basis of the measured duty of care that has been developed (see section 5.4 below). For example in *Rees v Skerret* supra the Defendant was held liable by the Court of Appeal for the loss resulting from absence of rendering as distinct from cracks due to loss of support. The surveyors have power in a Party Wall award to impose an obligation to maintain an exposed face of a party wall in a weatherproof condition (*Marchant v Capital & Counties plc* [1983] 2 EGLR 156).

2.4 Light – almost inevitably with such walls consideration will have to be given as to whether there is in existence a right to light and if there is whether it will be infringed by the proposed work. The right does not arise from the existence of the party wall but independently by grant or prescription. It will, however, be inextricably bound up with the wall and will have to be carefully considered in framing any award which involves the wall.

2.5 Drainage rights – similarly to rights of support rights of drainage may be created by implied grant as being necessary for the mutual enjoyment of the adjoining properties (*Pyer v Carter* (1857) 1 H & N 915 but this will depend very

much on the particular circumstances. Contrast that case with *Walby v Walby* supra where a claim to an implied drainage right was rejected). As with rights to light a right of drainage may arise independently from the wall but may have to be taken into account, for example, if it runs through or along the wall as in *Arena Property Services Limited v Europa 2000 Limited* [2003] EWCA. These also will have to be considered very carefully when settling an award.

2.6 Repair and Ancillary rights -

(a) **Servient tenement** – traditionally the owner of the servient tenement, the land subject to the easement, is not obliged to keep the servient tenement in good repair subject to special local custom or contract (*Sachs v Jones* supra and *Jones v Pritchard* supra). This is now subject to the possible application of the measured duty of care (see section 5.4).

(b) **Dominant tenement** - the owner of the dominant tenement having the benefit of the easement is entitled but not obliged to repair the servient tenement and for that purpose has the right to enter on to the servient tenement. It was confirmed in *Jones v Pritchard* supra that the person entitled to an easement is entitled to do on the servient tenement what is necessary to ensure the continued enjoyment of the easement such as the repair of the other half of the wall. It may even be that if the particular easement involves taking items on to the servient tenement then there is an obligation to repair placed on the person entitled to the easement. For example, a right to pass water through pipes may impose an obligation to repair the pipes and consequently a liability if they leak.

In the event that the person entitled to the easement carries out repairs on the servient tenement then the costs are borne fully by that person and there will be

no ability to recoup a contribution towards the costs of the remedial work from the owner of the servient tenement (*Border v Saillard* (1876) 2 Ch. 692). This will be subject to any contractual arrangement or the terms of any grant. This is the case if the matter is one exclusively concerned with the law of easements. However, if the matter has reached the stage that there is a need to remedy a nuisance then the costs may have to be shared under the operation of the measured duty of care (see section 5.4.5 below). The common law has also begun to develop a regime for costs sharing in respect of the structure which benefits more than one person (see *Abbahall v Smee* [2003] 2 EGLR 66 – section 5.4.5 below). The law of easement no longer exclusively governs relationships between adjoining properties (whether abutting horizontally or vertically).

3 Operation of Party Wall awards

3.1 Framing award – when formulating an award it will be necessary to take account of the existing easements. Often this will not be a simple exercise. For example, in most cases it will be necessary to consider whether there is in existence a right to light and if there is whether what is proposed will be an interference. Both of these issues are difficult and will require investigation and deliberate thought.

The objective with the award should be to ensure that when completed the works will not interfere with existing rights. The danger is that if there is an interference then the part of the award relating to the interference will be ultra vires. The consequences of such a successful argument have not been analysed by the Courts.

As well as existing rights there is also a need to consider what other steps need to be taken to avoid damage such as weatherproofing.

3.2 Authorised Interference - section 2 of the 1996 Act authorises the carrying out of the types of work specified in that section subject to the making good of all damage. What is the extent of this authorisation?

3.2.1 Temporary - in order to carry out the works authorised in accordance with the 1996 Act there will inevitably be a temporary interference with existing rights. This interference is clearly not prohibited. On the contrary additional rights are conferred by section 8 which allows the land or premises of the adjoining owner to be entered for the purpose of carrying out such authorised work and the removal of “any furniture and fittings” and the taking of “any other action necessary for that purpose” (sub-section(1)). Notice complying with section 8 must be given but if it has been then if the premises are closed force may be used to gain entry provided accompanied by a policeman (sub-section (2)).

When carrying out excavation works on the building owner’s land covered by section 6 there is no such protection because sub-section (6) provides that a building owner is not relieved from “any liability to which he would otherwise be subject for injury to any adjoining owner or any adjoining occupier by reason of any work executed by him.”

3.2.2 Permanent –completed works which interfere with an existing right may be actionable regardless of the award under the 1996 Act. In *Crofts v Haldane* (1867) LR 2 QB 194 a party wall was raised pursuant to the Metropolitan Building Act 1855 (which had no equivalent to section 9 of the 1996 Act) and thereby had the effect of obstructing a right to light. Lush J. held that there was no intention

that the operation of that Act should entitle such an obstruction. Under the 1996 Act the inclusion of section 9 strengthens this outcome.

Will this always be the case due to section 9? The answer has to be no otherwise the 1996 becomes inoperable. Apart from the right to light the easement most likely to be affected by an award is the right to support. The operation of the 1996 clearly does affect existing rights of support and this is illustrated by a comparison of two cases.

(i) **Support** -In *Louis v Sadiq* (1996) 59 Con LR 127 there were the inevitable two adjoining houses. The Defendant began to demolish and replace his house in stages but did not serve any statutory notices. An injunction was obtained preventing him from carrying out further work unless and until he complied with the 1939 Act. Thereafter awards were made under the 1939 Act and he restarted work. The adjoining owners sued the Defendant in nuisance claiming damages for increased interest they had to pay under their mortgage due to the delay in being able to sell and their increased building costs of new home. The Defendant claimed that he was protected by the Act and there was no claim for breach of statutory duty. The Court held the Defendant to be liable in nuisance. If he had followed the procedure in 1939 Act at the start and carried out what was required then he would have been protected from the nuisance claim. However, his failure to invoke the statutory procedure prevented reliance on its protection. Until he has authorisation the building owner is committing a nuisance by carrying out the works and not by failing to serve a notice. It was material that the loss being claimed for was financial loss and not physical loss. Had it been the latter then it might not have been possible to pursue the claim (see *Rodrigues v Sokal* in (iii) below). It seems to me that if the Defendant had complied with the award but there still had been a

failure of support then although not liable in nuisance he would have been liable under what is now section 7 of the 1996 Act.

(ii) **Selby v Whitebread** - In contrast once the statutory procedure is invoked the common law duties are replaced by the statutory regime as in Selby v Whitbread [1917] 1 KB 736. Yet again there were old adjoining houses separated by a party wall. The Defendants wanted to rebuild their house and served notice under the London Building Act 1894. The new house was to be set back 13 feet from the old one which would leave the Plaintiff's house unsafe due to the absence of support on that stretch. An award was made requiring a pillar of support to be erected at the edge of the strip. The strip was transferred to the County Council and it dedicated the strip to the public. It was held that

(a) the County Council took subject to the Plaintiff's statutory rights under the 1894 Act; and

(b) the statutory rights superseded the Plaintiff's common law rights and accordingly the common law right of support was replaced by the new easement of support. This may not be a case of extinguishing the original common law right of support but rather that the right has been continued but discharged in a different manner authorised by the award. However, the situation is analysed the support to the Plaintiff's house had to continue in contrast with the loss in Crofts v Haldane supra.

(iii) **Rodrigues v Sokal** - The significance of this case and Louis v Sadiq was considered by Judge Toulmin CMG QC in Rodrigues v Sokal [2008] EWNC 2005 which concerned a semi-detached property which the Defendant started to convert into four self-contained flats without serving notice under the 1996 Act. The owners of the next door semi commenced proceedings in May 2005 even though a party wall

notice was served. These included claims relating to alleged damage to the structural integrity of the building including removal of internal walls, chimney breasts and windows. The proceedings were stayed because the issues were identical to those to be determined in the Party Wall procedure. There were a number of awards under that procedure and after the last a preliminary issue was heard as to whether the Claimants were able to pursue certain of their claims in the light of the awards and section 10(16) 1996 Act which provides that “the award shall be conclusive and shall not except as provided by this section be questioned in any court”. The judge held that the Claimants could not pursue these matters as the surveyor’s awards were conclusive on the claims and the facts. After reviewing the judgment of Evans LJ in *Louis v Sadiq* he stated at para. 57 he stated:-

“My understanding of the law is that until such time as the Party Wall etc Act 1996 is invoked and either the building owner has obtained consent or acquires a statutory authority under the s 10 procedure, the building owner cannot rely upon a statutory defence under procedures with which “*ex hypothesi*” he has failed to comply. If the building owner subsequently obtains authority for building works which were started without authority, that authority abates the common law rights from the time of the subsequent consent or when the Party Wall etc Act procedure was successfully invoked. If the works were never or would never subsequently have been authorised, the common law rights continue.” The common law will only continue to apply if no notice is served or no subsequent authorisation is given.

(iv) **Arena Property Services v Europa 2000** - there has been very little consideration of this aspect of the 1996 Act but the Court of Appeal in *Arena Property Services limited v Europa 2000 Limited* supra discussed it without having to reach any decision. In that case the Claimant failed to establish the easement to drain on which the claim was based. At first instance the judge considered that if there were an existing easement then

(a) it would have been extinguished by the award because it was not an easement within section 9 1996 Act; and

(b) the Plaintiff would not have been entitled to compensation under section 7(2) as a loss resulting “by reason of any work executed in pursuance of

this Act” because the easement had been extinguished by the award which was earlier than that the cutting off of the pipe.

Although there was no need to decide these points Arden LJ indicated that she considered both to be wrong.

(I) Extinguishment - the award would not have extinguished the easement if it had existed because it only authorised work to be carried out by the building owner and extinguishment operates as regards the whole world. In her view extinguishment would have operated only when the pipe was cut off so that no use could be made of it. A further passage from her judgment in paragraph 32 indicates that she was not deciding that this type of easement would actually be extinguished when the work was carried out but rather that extinguishment could not occur before that time.

(II) Easement covered by section 9 - in paragraph 32 she stated it was not necessary to express a view on the effect of section 9 1996 Act. She rejected the argument that the easement was not within section 9 because it related to the wall.

(III) Relationship section 9 and award - she then went on to say that a “difficult and important question arises as to the relationship between this section and section 2 of the 1939 Act but following *Selby v Whitbread supra* and the note in *Gale on Easements* “it would seem that section 9 is subject to the decision in that case.” However, she did not state that the effect of this would have been to permit the award to extinguish the easement subject only to a right to compensation.

(IV) Ultra vires argument - she also left over the related point that had been argued that if the award had provided for the removal rather than the substitution of the easement then it would have been ultra vires the 1996 Act. Such an argument has yet to be considered and will pose difficult questions and in particular raise issues as to the extent that the award is unenforceable. How much unwinding will be required?

(V) Single easement - one point that was argued and decided in the decision was the argument that in fact the right comprised not one easement but a number. It passed through the party wall twice and ran along the wall. The defendant sought to divide this into a number of separate easements so that not all would be within section 9 but this argument was rejected. Arden LJ stated that it could not be split into a number of separate easements (para. 32).

This judgment leaves open many difficult issues relating to this topic. It adopts a wide construction as regards the easements covered by the section but then leaves wholly open the scope of the operation of that section.

4 Conclusion - My tentative conclusion as regards the operation of section 9 is that:-

1. Existing easements need to be ascertained as part of the process of framing an award;
2. Account has to be taken of the easements;
3. Such easements will not prevent the carrying out of works authorised by the award

4. But there is no power to extinguish the easements. The manner in which the easement is discharged can be changed. This may be a power to substitute the formulation of the easement but it cannot be wholly removed.
5. Any loss caused by the works can be recovered as compensation even if authorised by the award (Arden LJ at para. 29 in the Arena Property Services Limited case).
6. Disputes over the formulation of the award as regards the easement and issues as to compensation may be within the exclusive jurisdiction of the surveyors with a right of appeal limited by section 10(16) 1996 Act. This point was left open by Arden LJ in Arena Property Services (para. 33).

5 Works prior to award –

5.1 Absence of statutory protection - there will be no protection from the Act as illustrated by *Upjohn v Seymour Estates Limited* supra and *Louis v Sadiq* supra. In such circumstances the building owner will be exposed to the risk of claims for nuisance, negligence, trespass and wrongful interference an easement or right. In *Crowley Civil Engineers v Rushmoor BC* [2009] EWHC 2237 paving works resulted in the collapse of an adjoining house. It was held that all those claims were not affected by the 1996 Act even if a statutory notice had been given which it was not. There will not, however, be a claim for breach of statutory duty (*Hough v Annear* (2007) 119 Con LR 57) which means that damages cannot be measured by the increase in value of the defendant's land.

As well as damages for such claims the defendant builder/landowner may be liable for damages under section 1 Protection from Harassment Act 1997. In

Jones v Ruth [2011] EWCA Civ 804 the defendant landowner took over four years to gut, extend and rebuild a terraced house. As a result of the manner in which this was carried out the defendant was liable to pay nearly £200,000 in damages comprising £30,000 for loss of amenity; £15,000 in lieu of an injunction; £115,000 loss of future earnings; and £28,750 for personal injury arising from anxiety. The defendant also faced the prospect of potential further damages following the taking of an enquiry.

In rare cases it is even possible that a Court will order the defendant to demolish work carried out “in flagrant defiance” of the statutory requirements (London & Manchester Assurance Co. v O & H Construction Limited [1989] 2 EGLR 185. This was the case in which Harman J also granted an interlocutory injunction to prevent a crane oversailing the Claimant’s land).

5.2 Causation – failure to serve notice under the 1996 Act denies the building owner the opportunity to appoint a surveyor to carry out a pre-works survey and to be present when work is actually carried out. Chadwick LJ in Roadrunner Properties Limited v Dean [2003] EWCA Civ 1816 stated that the failure to serve such a notice should not confer a forensic advantage. At para. 29 he stated that:-

“In such circumstances, as it seems to me, a court should be prepared to take a reasonably robust approach to causation. If it can be shown that the damage which has occurred is the sort of damage which one might expect to occur from the nature of the works that have been carried out, the court must recognise that the inability to provide any greater proof of the necessary causative link is an inability which results from the building owner's failure to comply with its statutory

obligations. In those circumstances, as it seems to me, the court should be slow to accept hypothetical and theoretical reasoning in relation to causation advanced by the building owner after the event. It is within the building owner's power to ensure that proper evidence is or could be available; and if the conduct of the building owner has chosen to deny the adjoining owner the opportunity to obtain evidence, then the court should be slow to accept ex post facto and hypothetical reasoning and theory. The essential requirement, of course, is that the claimant proves the causal link which he or it asserts; but, as I have said, if there is material from which such a causal link can properly be established, I think a court, in those circumstances, should be slow to discard common sense in favour of expert hypothesis.”

In that case unusually a Kango 950 Combination Hammer Drill had been used to cut out a channel near to the bottom of an internal party wall to take pipe work for a radiator. Cracks and splits had appeared in the adjoining property and surprisingly the trial judge had accepted that the use of the Kango and the occurrence of damage was a coincidence and that the real cause was the absorption of moisture from the atmosphere. This was set aside on appeal.

5.3 Surveyors appointed under 1996 Act – in the event that the statutory procedure is invoked after work has been carried out causing damage the surveyors will not have any jurisdiction to grant common law or equitable relief for the earlier trespass or nuisance (Reeves v Blake [2009] EWCA Civ 611). Their jurisdiction is limited to whether to authorise future works and the terms and conditions applicable to those works. A finding in an award by an umpire under the Act that the Defendant’s works prior to invoking the Act had been the principal cause of damage to the Plaintiff’s timber shed could not be the basis for a claim for

summary judgment by the Plaintiff (Woodhouse v Consolidated Property Corporation Limited [1993] 1 EGLR 174). Similarly the surveyors do not have jurisdiction to award costs relating to matters pre-dating the commencement of the statutory procedure. The making of the awards and compliance with them may cause the Court to stay any proceedings relating to work prior to the awards (see Rodriques v Sokal in section 3.2.2 (iii) above).

5.4 Measured duty of care – the older cases in which the Courts held that there is no liability because there is no duty of repair have to be qualified by the judicial development of a “measured duty of care” imposed on owners and occupiers of land.

5.4.1 Leakey v National Trust [1980] QB 485 – in this case it was established that the occupier of land owes a duty of care to the owner or occupier of adjoining land in relation to hazards occurring on that person’s land whether natural or man-made. The occupier has to take such steps as are reasonable in all the circumstances to prevent or minimise the risk of injury or damage to his neighbour which the occupier knew or ought to have known about. In that case it was an unstable mound which threatened the Plaintiffs’ houses. The NT owned a conical shaped hill composed of Keuper Marl which is peculiarly liable to cracking and slipping due to weathering. The claimants’ houses were at the foot of the mound and slippage had occurred and it was feared that more would occur. The NT claimed that it could not be liable as the cause was nature. This was firmly rejected. There was held to be a duty to do that which is reasonable. At page 521 Megaw LJ stated that the “duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his

property.” In considering this decision Smith LJ in *Holbeck Hall Hotel v Scarborough BC* [2000] QB 836 stated that there is no difference “in principle between a danger due to lack of support and danger due to escape or encroachment of a noxious thing..”

However, it is a measured duty. At page 526 Megaw LJ stated that the “defendant's duty is to do that which it is reasonable for him to do. The criteria of reasonableness include, in respect of a duty of this nature, the factor of what the particular man - not the average man - can be expected to do, having regard, amongst other things, where a serious expenditure of money is required to eliminate or reduce the danger, to his means. Just as, where physical effort is required to avert an immediate danger, the defendant's age and physical condition may be relevant in deciding what is reasonable, so also logic and good sense require that, where the expenditure of money is required, the defendant's capacity to find the money is relevant. But this can only be in the way of a broad, and not a detailed, assessment; and, in arriving at a judgment on reasonableness, a similar broad assessment may be relevant in some cases as to the neighbour's capacity to protect himself from damage, whether by way of some form of barrier on his own land or by way of providing funds for expenditure on agreed works on the land of the defendant.”

In some circumstances even it may be enough to offer the opportunity to the endangered landowner to come on to the land to remove or reduce the risk. This may be the case if the remedial work is substantial and expensive.

5.4.2 Bradburn v Lindsay [1983] 2 EGLR 143 - This new development was applied in *Bradburn v Lindsay* supra where a house owner allowed a house to

fall into disrepair to such an extent that it was demolished after the service of a dangerous building notice. By then dry rot had passed into the adjoining property. The owner knew about the dry rot and could have taken steps to prevent it. In consequence the owner was liable for the spread. She was also held liable for the exposure of the adjoining property's wall which was not weatherproofed. The adjoining owner was entitled to damages equal to the difference between the value of the property with and without an adjoining property.

5.4.3 Cliff erosion - Steps may now be required to be taken by a land owner to prevent cliff erosion (*Bar-Gur v Squire* (1993)) provided that the magnitude of the damage was foreseeable (*Holbeck Hotel v Scarborough BC* supra). In those cases the duty was to prevent damage to neighbours land from lack of support due to natural causes where known or ought to have known that defect or condition of land and reasonably foreseeable that will if not remedied cause damage.

5.4.4 Factors in measuring duty - It is called a measured duty because a number of factors have to be taken into account including knowledge of defect; financial resources of land owner; ease and cost of abatement; ability to abate; and likely damage which will result from defect. It requires a balancing exercise between the cost of the remedial measures as against the likely damage to be suffered.

5.4.5 Operation of duty Therefore, means that it is no longer correct that there is no duty to repair owed to adjoining property owners. There may now be a duty to maintain and continue support. In *Rees v Skerret* supra the demolition of a house in an inconsiderate manner made the building owner liable for leaving the

adjoining property with a flank wall which was not weather-proof. In *Abbahall Limited v Smee* [2003] 2 EGLR 66 failure to repair a roof resulted in liability being owed by the owner of the flying freehold of the first and second floor to the freehold owner of the ground floor shop. The shop owner had obtained an injunctive order permitting it to enter the upper part and carry out the works. It then sought to recoup the cost. At first instance the judge held that one –quarter of the costs could be recovered. On appeal this was increased to one half. A number of points were made by Moby LJ in his judgment:-

(i) There was no difference between a horizontally divided property and vertically divided properties. The measured duty of care applies in both sets of circumstances.

(ii) It reiterates that *Bond v Nottingham Corp supra* and *Phipps v Pears supra* no longer prevent the shop owner from succeeding. Those cases may still hold good in the law of easements but will not bar a claim in nuisance or negligence;

(iii) There was no absolute duty of care imposed on the flying freeholder to prevent the ingress of water but rather “it is a restricted duty to do what is reasonable in all the circumstances.” (para. 26)

(iv) What was reasonable in the circumstances was an obligation to contribute to the cost of the repair work. Unless the claimant is prepared to contribute then the defendant is under no obligation to take any step. If the claimant is prepared to make the correct contribution to the costs of the appropriate work then the defendant is obliged either to carry out the works or contribute to

their cost. Alternatively if the claimant is prepared to carry out the works then the defendant is liable to pay the contribution.

(v) the claimant may seek a mandatory injunction to have the work done but this can only be on the basis of an undertaking to pay the claimant's share. Alternatively an injunction allowing the claimant to enter to carry out the work can be obtained in which event the appropriate contribution can be sought from the defendant.

(vi) the contribution should be fair, just and reasonable (para. 36) and this means "reasonableness between neighbours";

(vii) the costs have to be shared according to benefit on a broad and impressionistic basis. Both the flying freeholder and the shop owner benefit from a roof in good repair. This may require apportionment of the costs by area or floors. In this case the second floor was really roof space and it led the Court of Appeal to decide on an equal division

5.5 Actual Damage – caution has to be exercised when pursuing such claims. Actual damage has to be shown before there is a cause of action. In consequence the costs of premature remedial action cannot be recovered (*Midland Bank v Bardgrove Property Service Limited* [1992] 2 EGLR 168). The Defendant had excavated adjoining land and caused the Plaintiff's land to subside. A retaining wall had been put in but it was assumed that it was inadequate due to likely rotational collapse after ten to twenty years. In consequence the Plaintiff carried out sheet piling works at a cost of £230,000 and sought to recover this from the defendants. It failed on a preliminary issue because there was no cause of action as there had been no damage. A land owner is entitled to excavate his land so long

does so in manner which does not interfere with the adjacent owner's right to enjoy land in natural and undamaged state.

This means that no claim can be successful if there is no actual loss and can only claim for current loss. Future loss will be a separate claim and cannot be tacked on to claim for current loss (*Darley Main Colliery v Mitchell* (1886) 11 App Cas 127). A claim for loss representing a depreciation in the value of the land due to risk of future subsidence caused by excavation on the adjoining property did succeed (*Lamb v Walker* (1878) 3 QBD 389) but has been overruled by *West Leigh Colliery Co v Turncliffe and Hampson Limited* [1908] AC 27 which has been confirmed by the *Midland Bank* case.

It is, however, possible for a land owner in such circumstances to apply for a *quia timet* injunction as in *Redland Bricks Limited v Morris* [1970] AC 652).

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