Opinion: High Speed 2 - a party wall dispute in waiting

[words] Andrew Thompson & Michael Cooper

In property the most common shared feature is the party wall and across the county differing rules once existed to deal with the administration of these jointly held elements of a building. The attractiveness of having a uniform system of administration for all party walls took a long time to be established as a concept. This did not finally take place across England and Wales until the introduction of the Party Wall etc. Act 1996.

At the heart of the Party Wall etc. Act 1996 is the desire to seek balance in the reasonable rights and expectations of both building and adjoining owner. Both the current and historic London Building legislation seek to ensure fairness and ensure that an adjoining owner is protected from unnecessary inconvenience both as an express term but also in ensuring that a system of warning via notices are given to avoid unwelcome surprises. What reasonable owner would like an army of workman appearing on their land and in their building as a legal right with zero warning or any prior announcement?

Overall, the property rights established under the Party Wall Etc. Act 1996 have remained unchallenged until the needs of major infrastructure projects started to be planned. The Crossrail Act 2008 Schedule 14 Paragraph 17 made the first adjustments to the legislative balance between owners. In this first adjustment the Nominated Undertaker was freed of the obligations of the service of notice, however, in balance no right was granted to override the common law position. The adjustment was minor and limited to three clauses, with the effect of replacing one statutory process with the other when the infrastructure project was the neighbour.

Imbalance created by HS2

Now that the intention to proceed with High Speed Rail 2 has been confirmed, the practical implications of schedule 23 of the High Speed Rail (London – West Midlands) Act 2017 deserves closer examination. A property manager holding an asset likely to be affected by this legislation must grapple with the significant impact this will have on property ownership rights. The usual assumptions that are held under the traditional party wall process has been fundamentally changed as to be almost unrecognisable.

This will impact both the landlord and tenant interests of the asset both as the adjoining owner and occupier. The imbalance within the High Speed Rail legislation and the scale of adjustment of rights towards the nominated undertaker cannot be stressed enough. The administration of the whole process should not be confused with a standard party wall situation.

Property managers should consider taking specialist legal advice and consider appeal to county courts where their clients are likely to be impacted by party wall or excavation works due to High Speed Rail and the reason for this is explained in table one, which sets out some of the fundamental adjustments created by Schedule 23 of the High Speed Rail (London – West Midlands) Act 2017

Party Wall Etc. Act 1996	**Schedule 23 of the High Speed Rail (London – West Midlands) Act 2017**	**Consequence on adjoining owner/occupier**
Rights under section 1(2) for the creation of new party structures on an undeveloped boundary. One month notice of any intended works. Express right to refuse new party structure and force any new wall to be built wholly on land of building owner.	**HS2 Section 2** No obligation to give notice or any warning of works. The legislation is unclear on the administration of rights under PWA section 1(2). The adjustment of PWA section 1(5) appears to create the unrestricted right for the undertaker to build new boundary structures wholly on their own land without regard to any disturbance or making good.	The legislation overrides the adjacent owner rights as it implies that a new party structure – equally astride the boundary – can be imposed against the will of the adjoining owner and without regard to any loss of land of the adjacent owner and the long-term financial obligation to the ongoing maintenance for the new structure. This effectively imposes a shared responsibility for maintenance on the adjacent owner of a wall they may not have wanted.
Control over access (section 8) and damage caused by the exercise of Section 1(5) (section 10)	No obligation to give notice or any warning of works.	Major infrastructure works can commence on the neighbouring land without any warning regardless of impact.
Section 1(6) the right for a developing owner to project footings and foundations onto the neighbour's land in mass concrete where considered necessary	**HS2 Section 3** appears to further extend this right to use the adjoining owners land whilst clarifying that no party wall ownership status is being created.	HS2 has the right to create a projection onto your land and in the future you have zero rights to remove, trim or adjust as necessary for your own future wall or building. Any projection under the HS2 is therefore a blight on your land stopping future development in that zone. Compensation rights for this loss of land and your own future development potential is unclear.
Section 6 right to receive notice and warning of proposed deep excavations.	HS2 Section 5 removes the right to receive notice or warning as envisaged under the PWA and replaces with a more complex system.	Complex and major deep civil engineering excavation can commence next to your property without any review by your own surveyor. The AO has no right to a surveyor. An AO regardless of their skill, knowledge and experience

		(SKE) may be required to procure major engineering design and undertake the contract supervision to ensure all safeguarding, underpinning and protection works to the property are undertaken without the financial support to procure a professional surveyor or designer.
Section 10, The express right of an adjoining owner to be independently advised throughout the process by a surveyor of their own selection.	HS2 Section 7(2) imposes on the AO a single arbitrator who will in the event of the party's failure to concur in an appointment will be imposed by the President of the Institution of Civil Engineers.	This is a system of arbitration and therefore the level of formality and higher procedural obligations of the Arbitration Act 1996 should be assumed. This route is not the same as the traditional agreed surveyor as the name clearly defines an arbitrator function. Owners may need to seek legal advice and may need to be supported by expert witnesses. The single arbitrator has the power to award costs against both or either of the parties.
Section13(1) dealing with the defrayment of specific works undertaken by the building owner from the AO.	HS2 Section 8 appears to flip the logic of the original section and removes [the requirement?] that the work is to be calculated at fair average rates and prices.	This clause creates a nightmare for any adjoining owner who has been forced to spend major sums on safeguarding. Recovery of money cannot be claimed for years after the event potentially, and is subject to the vagueness of building owner's completion date which is not defined. Are completion of works at boundary; on a section project

		programme; or the whole of the HS2 scheme? What is clear in party wall case law is the two months is a strict timeframe and any error would immediately lead to an unrecoverable debt. This obligation would potentially bankrupt a normal homeowner and even in a commercial property context is an unsatisfactory position. In practical terms, the AO is funding the safeguarding of a major infrastructure project delivery for an undefined term.

Complex and confused

The alternative HS2 system is complex, confused and in need of judicial determination to provide clarity. The drafting changes have destroyed the representation and balance within the original legislation. Rather than seeking to balance the reasonable concerns of a property owner finding themselves located next to a major infrastructure projects the focus has been aimed at removing protection and safeguard.

The removal of representation and balance within the HS2 approach is likely to generate increased claims and disputes.

The project will not commence with a jointly agreed schedule of condition prepared by the two surveyors. This will lead to disputes over reinstatement and damages. Owners, rather than seeking experienced chartered building surveyors with a background in party wall matters, are likely to gravitate towards claim management companies. This claim approach will lead to more complex arbitrations, increased costs and greater need for parties to seek the protection of the courts.

Increased risk to adjoining owner

Major excavation works typically require safeguarding and protection works from the building owner. Under the Party Wall etc. Act 1996, that safeguarding cost clearly falls to them to administer the cost in full, both during the primary works but also in the event of movement damage. The shift in emphasis placing this complex procurement decision making of major engineering safeguards on to the adjoining owner is potentially fraught with difficulties. This is the foundation not only of potential dispute but is a fundamental failure in drafting to consider construction safety. CDM 2015 created an industry culture of Skill, Knowledge and Experience (SKE) and Should be adhered too.

Temporary works on this large-scale project are a high-risk element of the project works that the HS2 design team, in seeking this legislative route, cannot ignor.

Interestingly in the adjustment to the original legislative drafting some useful safeguards were maintained. The adjoining owner still has the right to seek security of expenses under section 12(1) and this notice should be served to ensure that any section 13(1) funds are ringfenced at the earliest opportunity. This will also allow the dispute and calculation of safeguarding costs to be had before the expenditure of potentially major sums of adjoining owner capital.

We, the authors, feel that the adjustments to the tried and tested party wall legislation, while favouring the speedy delivery of this major scheme, have overlooked the fundamental principles of the party wall legislation of safeguarding owners and protecting property. Surely the only adjustment required to speed this well-regarded project along would be forethought and planning of the consequences and mitigation measures in the implementation of the design before it approaches the neighbours land and property. There is plenty of time, why the hurry?

Further information on Crossrail 2, land acquisition, compensation and safeguarding can be sourced at https://crossrail2.co.uk/discover/safeguarding/

Michael Cooper FRICS is director, head of neighbourly matters, project and building consultancy at Colliers International

michael@cooperscbs.com

Andrew Thompson FRICS is senior lecturer in building surveying, Department of Built Environment at Anglia Ruskin University

andrew.thompson@anglia.ac.uk