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Impartiality and the Party Wall Surveyor

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Introduction

The party wall surveyor has been known to Londoners since 1724¹. However it was not until the enactment of the Party Wall etc Act 1996 over 250 years later that this statutory role became incorporated into national legislation affecting the whole of England and Wales.

This new legislation regulates a variety of construction operations, including work to party walls, where these are carried out in close proximity to neighbouring properties. The Act makes provision for the service of notices before such work is undertaken, and for the appointment of surveyors to settle any disputes that subsequently arise.

The role of surveyors appointed in this context has been the subject of much debate since the Act was introduced². There is a general understanding that surveyors perform a statutory function rather than acting as agents for those who appoint them. There is however considerable uncertainty surrounding the precise nature of the surveyors' duties and over the related question of who these duties are owed to.

The conventional view, which is supported by leading practitioners under the former London Building Acts (Amendment) Act 1939, is that surveyors should act impartially in their dealings between the parties to a dispute. The lack of any clear authority for this view coupled with commercial pressures on surveyors to respond to the expectations of their appointing owners has ensured that, in practice, the situation has remained ambiguous. The extension of the surveyors' role to geographical locations with no established professional culture in this field has further eroded the emphasis given to impartiality.

This article examines the nature of the surveyors' role under the legislation. It explores its legal basis and attempts to explain the precise nature of the surveyors' duties. In particular the article seeks to clarify the question of whether surveyors are under a duty to represent the interests of those who appoint them or to act impartially towards each party to the dispute.

The Tribunal of Surveyors

Role of the Tribunal

The words of the statute provide very little indication as to the precise nature of the surveyors' role. The Act makes provision for the appointment of a tribunal of surveyors (s.10(1)) to settle by award any matter which is in dispute between the parties which is also connected with work to which the Act relates (s. 10(10)).

This tends to suggest a role for the tribunal similar to that of an arbitrator or independent expert whereby defined issues are put to it by the parties for determination on a quasi-judicial basis. The nature of the task actually performed by the surveyors is, in reality, very different from this and such an interpretation also fails to take account of the tribunal's significance within the overall scheme of the legislation.

The purpose of the legislation is to facilitate construction operations in the vicinity of property boundaries. One way in which this is achieved is by granting rights to property owners to undertake work to land or structures on their neighbour's side of the boundary line. Under the Act owners are, for example, entitled to place projecting foundations on neighbouring land, to cut a flashing into a neighbour's building and to underpin their neighbour's side of a party wall.

The tribunal's role, and the nature of the disputes that it is empowered to settle, must be viewed in this context. In permitting work on a neighbour's land Parliament has taken the unusual step of authorising an interference with private property rights. Within the English legal tradition this can only be justified by the grant of some reciprocal safeguard for those whose rights are being affected. This safeguard takes the form of the appointment of the tribunal of surveyors to watch over the process of the offending works.

Safeguarding the Adjoining Owner's Rights

This interpretation of the tribunal's role has received judicial support in a number of reported decisions under the earlier London legislation. In *Gyle-Thompson v Wall Street (Properties) Ltd*³ Brightman J noted that:

".....the Act.... give[s] 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."

A more precise definition of the tribunal's obligations is provided by McCardie J in the earlier case of *Selby v Whitbread & Co*⁴:

".....the primary function of the [surveyors] is to safeguard the interests of the adjoining owner; although they must, of course, consider the rights and interests of the building owner and follow the provisions of the Act....."

Whilst the tribunal's function is therefore to provide the necessary legislative safeguard for the adjoining owner its duties extend to both parties within the context of the regime laid down by the Act.

An essential feature of this regime is that a building owner has an absolute right to undertake the work referred to in the legislation. Although the exercise of this right will invariably result in some inconvenience to adjoining owners the Act makes 'unnecessary inconvenience' unlawful (s.7(1)). The tribunal's task is therefore to balance the building owner's absolute right to undertake the work against the adjoining owner's absolute right not to be subjected to unnecessary inconvenience.

The nature of this task was summarised by Lord Justice Fletcher Moulton in *Adams v Marylebone Borough Council*⁵:

"In my opinion.....[the Act].....provide[s] the practical machinery for working out the policy of the Legislature with regard to the rights given to adjoining owners by the Act. It providesfor the work being carried out in such a manner and at such a time as not to cause unnecessary inconvenience to the adjoining owner or, in other words, that the building owner shall use his rights reasonably so as not to cause unnecessary damage to the adjoining owner. That provision clearly opens up the question as to what is unnecessary inconvenience in each particular case, and the Legislature has constituted a practical tribunal for deciding such questions."

The Practical Tribunal

Whilst the tribunal is charged with the task of balancing the competing rights of the parties, it is therefore the practical consequences of these rights that concern the surveyors rather than abstract legal concepts.

According to Brightman J in *Gyle Thompson*⁶, the tribunal's power under section 10(12)(a) to determine "the right to execute any work" is not therefore to be taken literally. In accordance with the tribunal's practical role the power is limited to the task of determining the existence of a factual situation capable of providing the required precondition for the exercise of one of the statutory rights. Apart from this the tribunal's award will be concerned overwhelmingly with regulating the practical aspects of "the time and manner of executing the work" and with other matters "arising out of or incidental to the dispute" in accordance with sections 10(12)(b) and (c).

In view of this practical function in regulating construction operations for the mutual benefit of the parties, references in the legislation to the surveyors "resolving disputes" can be misleading. The reality is that, in most cases, the "dispute" which forms the basis of the tribunal's jurisdiction is simply a statutory construct which arises automatically from one party's failure to provide a formal written consent to a statutory notice within a fourteen day period (ss. 5 & 6(7)). Although this "deemed dispute" certainly reflects the absence of a written agreement between the parties it has little in common with the more usual understanding of the term where the parties have already adopted defined, and opposing positions on a particular issue.

Indeed, once the tribunal's jurisdiction has arisen it is empowered to resolve the various issues that may arise throughout the continuance of the works without the requirement that further "disputes" should arise between the parties. Referring to this ongoing aspect of the surveyors' jurisdiction in *Selby v Whitbread & Co*⁷ McCardie J noted:

"Their jurisdiction is, I think, continuous and exclusive....It remains unimpaired until the final adjustment of all questions in difference between the building owners who

gave the notice and the adjoining owner who received the notice, and until the operations involved in the notice are concluded."

Duties Owed by the Tribunal

Nature of the Duties

The tribunal's primary role is therefore to regulate the conduct of the works throughout the construction project in such a way that the parties' conflicting rights under the legislation are equitably balanced. The successful performance of this role requires the tribunal to diligently apply its specialist construction knowledge to the circumstances before it and to do so even-handedly between the parties. It is submitted therefore that the three principal duties of the tribunal can be described in terms of those identified by Mustill & Boyd⁸ as being owed by an arbitral tribunal, namely, to take care, to proceed diligently and to act impartially.

These similarities between the two tribunals suggest that comparisons with the law of arbitration may assist in clarifying the nature of the surveyors' duties. Nevertheless, the lack of a single defined dispute for the surveyors to resolve and the clear requirement that they apply their own expert knowledge rather than performing a judicial function convince most commentators⁹ that they are not strictly arbitrators. Indeed, in *Chartered Society of Physiotherapy v Simmonds Church Smiles*¹⁰ Judge Humphrey Lloyd QC expressed the view that:

"An award under the Act is, in my judgement, *sui generis* and is more in the nature of an expert determination."

Whilst it is probably unwise to conclude that the tribunal is necessarily performing the role of independent expert any more than it is acting as an arbitrator, the law relating to expert determination may also prove useful in helping to define the surveyors' duties in this context.

Returning to the three principal duties, the precise legal status of these duties is difficult to state with certainty and each will therefore now be examined in more detail.

Duties of Care and Diligence

The members of the tribunal clearly have a moral duty to take care and to proceed diligently with their task but to have any legal significance this must, of course, be reflected in the contractual or tortious relationships between the parties. Within the context of the laws of arbitration and expert determination the most widely accepted analysis suggests that a trilateral contract exists between the tribunal and each of the disputing parties.¹¹

If this interpretation is correct then the surveyors will collectively owe these duties to each of the parties as contractual obligations, subject only to the question of their possible immunity from suit. Additionally, and again subject to the question of immunity, it is also likely that the surveyors owe a collective duty of care to the parties in tort under the principle established in *Hedley Byrne & Co Ltd v Heller & Partners*.¹²

If the surveyors act as arbitrators then, to the extent that they are not guilty of "bad faith", they will be immune from liability for a breach of any of these duties.¹³ In the event, as seems most likely, that they act in some other capacity then an entitlement to immunity would traditionally have arisen if they could properly be described as "quasi-arbitrators".

Despite various references to the surveyors in these terms¹⁴ the courts are unlikely to be sympathetic to this interpretation. Since the cases of *Sutcliffe v Thakrah*¹⁵ and *Arenson v*

*Casson Beckman Rutley & Co*¹⁶ they have shown a reluctance to extend immunity beyond those performing a strictly judicial function. The term "quasi-arbitrator" is now thought to be obsolete¹⁷ and, deprived of any possibility of immunity, the most likely interpretation is therefore that the surveyors are indeed collectively subject to legally enforceable duties of care and of diligence to each of the parties.

On this basis a breach of these duties would, in appropriate circumstances, entitle the parties to claim damages against the surveyors. However, by analogy with the law relating to expert determination¹⁸, it is unlikely that it would justify the courts in setting aside the tribunal's award.

Duty of Impartiality

The duty of impartiality is fundamental to the task which the statute has empowered the surveyors' tribunal to perform. Although the existence of this duty is not expressly stated within the legislation it is well established that such duties are owed by arbitrators¹⁹ and by independent experts.²⁰ The nature of the tribunal's task is such that professional guidance to surveyors in this context invariably assumes the existence of such a duty.²¹

On the basis that the tribunal is not performing an arbitral function the duty of impartiality is probably not synonymous with the rules of natural justice and there will therefore be no requirement for the surveyors to allow each party to present its case to the tribunal. The duty probably extends simply to the requirement that the tribunal should avoid bias, favouritism or prejudice in respect of either the issues under consideration or between the appointing parties.

Although most appointed surveyors will be subject to additional professional duties regarding independence and conflicts of interest a breach of the legal duty of impartiality probably requires proof of actual bias or a real danger of bias: *R v Gough*.²²

A lack of impartiality could then amount to a "serious irregularity" justifying the court in setting aside an arbitration award²³ and an expert's determination can also be set aside on this basis.²⁴ By analogy the court is likely to take the same view of a surveyors' award which is similarly tainted.

Liability for Lack of Impartiality

In contrast to the position where duties of care and diligence are breached, it is unclear whether the members of the tribunal might also be liable in damages for breach of the duty of impartiality.

Mustill & Boyd²⁵ suggest that an arbitrator will be liable in circumstances where his conduct includes an element of dishonesty or collusion with one of the parties to the dispute. They draw a distinction between these circumstances and those where the arbitrator has no ill intent in which case no liability would arise.

Whilst this may provide a possible analogy for the position of the surveyors' tribunal the distinction may simply reflect the circumstances in which the arbitrator will be entitled to statutory immunity from suit rather than the nature of the liability *per se*. This suspicion is confirmed by Sutton *et al*²⁶ who suggest that the arbitrator's statutory immunity will provide a complete defence for a claim for damages for lack of impartiality but only, in line with the statutory provision²⁷, "in the absence of some element of personal or deliberate misbehaviour as evidence of bad faith".

If the partial arbitrator who acts in good faith is only excused from liability by virtue of his statutory immunity, those independent experts and others who lack this shield must presumably expect partial behaviour to lead to liability. Despite the lack of direct authority on

the issue Kendall²⁸ concludes that independent experts will be so liable and there seems no logical reason why the same conclusion should not also extend collectively to the appointed surveyors.

The Solitary Surveyor

Agreed Surveyor

The development of the general legal principles so far discussed has been influenced by the tendency in England to appoint tribunals consisting of a single expert or arbitrator. In these circumstances the roles and duties of the tribunal are, of course, synonymous with those of the individual who has been appointed.

In the present context the Party Wall etc Act 1996 makes provision for the appointment of an "agreed surveyor" by the parties who then becomes solely responsible for performing the tribunal's tasks under the legislation (s.10(1)(a)). As the sole member of the tribunal the agreed surveyor will also become entirely responsible for discharging its duties of care, diligence and impartiality to each of the appointing parties.

Third Surveyor

As an alternative to appointing an agreed surveyor the Act provides that the parties may each appoint a surveyor and that the two appointed surveyors shall then each select a "third surveyor" (s.10(1)(b)). The tribunal would thus consist of three surveyors although in practice most cases are determined jointly by the two party-appointed surveyors without any intervention by the third surveyor.

The third surveyor may however be called upon at any time by either of the parties or their surveyors to assist in the determination. In exceptional circumstances he may join the tribunal as chairman and produce a majority award with one of the other surveyors (s.10(10)). More usually his role will be that of umpire and he will make the award himself in a situation where the two party-appointed surveyors have failed to agree (s.10(11))

Once called upon to intervene the role and duties of a third surveyor must arguably be the same as those of a third surveyor, notwithstanding the differing circumstances surrounding his appointment. His appointment displaces the rights of the party-appointed surveyors to make an agreed award and the tribunal's authority and responsibilities become vested solely in him. His task is then not simply to adjudicate on the issues in dispute between the surveyors but to "determine [all] the disputed matters" between the parties (s.10(11)). This role is closely related to that of an umpire in arbitration proceedings as described by Mustill & Boyd²⁹:

"Once the arbitrators have disagreed, and the umpire has entered upon the reference, he becomes seized of all the disputes in the case, and must deal in his award with all of them, even though there were some on which the arbitrators did not disagree."

In assuming responsibility for all the matters referred to the tribunal, he must, like the agreed surveyor, also become entirely responsible for discharging its three duties of care, diligence and impartiality.

The Party-appointed Surveyor

A Duty of Impartiality?

The position of the party-appointed surveyor, where no reference has yet been made to the third surveyor, is not so easily resolved. It has been suggested that each surveyor owes an

individual duty of impartiality to each of the appointing parties and that this must take priority to the interests of their own appointing client.³⁰

Although few surveyors would openly challenge this principle of impartiality, some may feel that it bears little relevance to the commercial realities of the professional role which they actually undertake. Each party understandably expects their own appointed surveyor to represent their interests and this is generally reflected in the surveyors' approach to negotiations. This approach usually produces an acceptable compromise which will then be reflected in the tribunal's award.

Although these procedures work well in practice the lack of impartiality by individual surveyors may nevertheless run contrary to the requirements of the legislation. Whilst the 1996 Act contains no clear guidance on this issue there are parallels within the law of arbitration.

London Arbitration

Although tribunals of three arbitrators are quite common in other jurisdictions they are comparatively rare in England. They are however found in trade, insurance, shipping and commodity arbitrations within the City of London. This custom of "London arbitration" involves the appointment of an arbitrator by each of the parties to jointly determine the dispute or to refer the matter to an umpire in the event of disagreement. In producing their joint determination it has long been suggested that the party-appointed arbitrators should behave impartially rather than favouring the position of their appointing party. Writing in 1849, Russell³¹ argued that:

"The arbitrators so selected [ie one by each side] are not to consider themselves the agents or advocates of the party who appoints them. When once nominated, they are

to perform the duty of deciding impartially between the parties, and they will be looked on as acting corruptly if they act as agents or take instructions from either side."

Although this view reflects what Mustill & Boyd³² refer to as "the orthodox law of arbitration" London arbitration is far from orthodox in its customary requirement that each party-appointed arbitrator performs a dual role of arbitrator/advocate. In conventional arbitration practice the role of the party-appointed arbitrators ends once the dispute is referred to the umpire. In a London arbitration their role changes at this point to that of advocate for their appointing party and they are then required to argue that party's case before the umpire.

The dual nature of this role suggests that there may be some tension between the arbitrators' duties of impartiality and their obligations to appointing parties during the period preceding a reference to the umpire. Mustill & Boyd³³ describe the nature of the arbitrator's role at this stage in the following terms:

"....each member of the tribunal addresses the other, discussing with his colleague the favourable aspects of his party's case. This involves no compromise of the arbitrator's impartiality, for he is not making a case, so much as testing and discussing it."

This fine distinction between making a case and testing and discussing it may be more imagined than real. As with the party-appointed surveyor's position many arbitrator/advocates in practice perform a negotiating role with their opposite number on behalf of their appointing party. Mustill & Boyd³⁴ suggest that the reality of this situation may be gaining acceptance with the judiciary:

"There are, however some indications in the reported cases that the Court may be prepared to tolerate a more far-reaching departure from orthodoxy. The arbitrator has

been described as a 'negotiating advocate', the inference being that it is his task to strive for the best compromise result for the party who appointed him. It is undeniable that many arbitrators do indeed act in this way."

The Negotiating Advocate

It is likely that this notion of the negotiating advocate may have been in the minds of the legislators when they created the role of party wall surveyor in its current form.

Surveyors have traditionally undertaken negotiating roles on behalf of clients in property and construction contexts. The statutory role of party wall surveyor, which first appeared under the 1724 London legislation³⁵, originally involved no suggestion of impartiality. Surveyors were appointed by neighbouring owners and were required to represent their client's interests before the justices in the event of their failure to negotiate an agreement.

The role did not take its current form until the Metropolitan Building Act 1855 which granted the surveyors award-making powers and also made provision for the appointment of a third surveyor. The local practice of London arbitration seems to have been commonplace by this stage³⁶ and would have provided a useful model for a statutory code based on the surveyor's traditional role.

If, as seems likely, Parliament's intention was simply to incorporate the surveyor's traditional professional role into a statutory code then references to a duty of impartiality appear to be misplaced. The limits of the surveyor's obligations in this context must be limited to his general duty to maintain independence in exercising his professional judgement.

This interpretation, based on the concept of the professional negotiating advocate, is certainly consistent with the experiences of most party wall surveyors. It was also clearly the view of

Judge Humphrey Lloyd QC in *Chartered Society of Physiotherapy v Simmonds Church Smiles*³⁷ when he observed that:

"....a party-appointed surveyor while no doubt retaining his professional independence is not obliged to act without regard to the interests of the party who appointed him. In practice matters in difference are regularly resolved by agreement between the two party-appointed surveyors without the need for the intervention of the third surveyor."

Other Duties

The lack of a duty of impartiality by party-appointed surveyors would have implications for the nature of their other duties. It would suggest that the surveyors' primary duties are owed to their appointing owners rather than to the parties equally.

Their duty of care to their appointing owners would therefore be similar to the duties owed by surveyors to their clients in other areas of their practice. It is likely however that a lesser duty would also be owed to the other appointing owner in respect of the general conduct of the tribunal's work.

This lesser duty of care would overlap with the duty of diligence in administering the provisions of the legislation which would be owed to both parties equally. A failure by surveyors to deal promptly with matters arising under the legislation, possibly even in response to express instructions from their appointing owner, would therefore result in a potential liability to the other appointing owner.

Conclusion

The tribunal established by the Party Wall etc Act 1996 has been shown to differ from those undertaking arbitrations or expert determinations although there are parallels with each of them. This "practical tribunal" is primarily responsible for safeguarding the interests of adjoining owners where a building owner undertakes work which has been sanctioned by the Act and which interferes with property rights. The tribunal must regulate the construction operations so that the building owner is able to carry out the work in such a way that unnecessary inconvenience is avoided.

By analogy with the laws of arbitration and expert determination it is suggested that the tribunal owes duties of care and of diligence to the parties as well as being subject to an obligation to act impartially between them. Where an appointed surveyor acts in the capacity of agreed surveyor or third surveyor he will be responsible for discharging these duties in their entirety.

In situations where party-appointed surveyors are appointed the tribunal itself will continue to owe these duties to the parties but the individual surveyors will perform a different function. Based on the concept of the negotiating advocate within London arbitrations it appears that the surveyors' statutory role requires them to negotiate an acceptable compromise on behalf of their appointing owners. This is then given statutory effect by being incorporated into the tribunal's award.

Both parties are protected by being separately represented on the tribunal and by their ultimate entitlement to call upon the third surveyor to discharge the tribunal's functions. The surveyors remain subject to duties of care and diligence and these also ensure that the parties can rely on the effective operation of the tribunal's machinery for the purpose intended by the

statute. In this way the tribunal discharges its own statutory duty of impartiality without requiring the individual surveyors to compromise the interests of their own appointing parties.

In conclusion, this analysis suggests that party-appointed surveyors are primarily responsible to their own appointing owners. Unlike the agreed surveyor and the third surveyor they do not therefore appear, as individuals, to be subject to an obligation to act impartially between the parties.

¹ The role first appeared in one of the early London Building Acts in 1724: *An Act for the better regulating of Buildings, and to prevent Mischiefs that may happen by Fire within the weekly Bills of Mortality, and other Places therein mentioned* [10 Geo. I. c. 28]

² See, for example, the archives of the Party Wall Practitioners' Discussion Forum [online]. Available from <http://www.mailbase.ac.uk/lists/partywalls/files/archive.html> [Accessed 4 Feb. 2000]

³ [1974] 1 All ER 295 at 302

⁴ [1917] 1 KB 736 at 744

⁵ [1907] 2 KB 822 at 840

⁶ [1974] 1 All ER 295 at 302

⁷ [1917] 1 KB 736 at 742

⁸ Mustill, M. J. & Boyd, S. C., *Law and Practice of Commercial Arbitration in England*, Butterworths 1989, p. 224

⁹ See, for example, Bickford-Smith, S & Sydenham, C., *Party Walls: The New Law*, Jordans 1997, p. 51 and Jones, D., 'The Surveyor: Agent, Agitator or Arbitrator?' in *The Collected Papers of the Pyramus & Thisbe Club, Volume 1 - 1974 - 1989*, p. 9

¹⁰ [1995] 1 EGLR 155

¹¹ Murdoch, J. & Murrells, P., *Law of Surveys and Valuations*, Estates Gazette, 1995, p. 14

¹² [1963] 2 All ER 575

¹³ Arbitration Act 1996, s.29(1)

¹⁴ The Earl of Lytton, who sponsored the Party Wall Bill in the House of Lords, described the role of surveyors as "quasi-arbitral" during its Second Reading, Hansard, HL Debates, 31 January 1996, p. 1535. See also the professional guidance produced by the RICS and the RIBA which both refer to the surveyor as a "quasi-arbitrator": RICS, *Party Wall Legislation and Procedure: A Guidance Note*, RICS 1996, p. 9 and Cox, S. & Hamilton, A., *Architect's Guide to Job Administration: The Party Wall etc Act 1996*, RIBA Publications 1997, p.17

¹⁵ [1974] AC 727

¹⁶ [1977] AC 405

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- ¹⁷ Kendall, J., *Expert Determination*, FT Law & Tax 1996, p. 179
- ¹⁸ *ibid*, p. 147
- ¹⁹ Arbitration Act 1996, s. 33(1)(a)
- ²⁰ Kendall, J., *op cit*, p. 194
- ²¹ See, for example, RICS, *op cit*, p. 11 and Pyramus & Thisbe Club, *Code of Protocol*, [online]. Available from: <http://www.mailbase.ac.uk/lists/partywalls/files/protocol.doc> [Accessed 4 Feb. 2000]
- ²² [1993] AC 646
- ²³ Arbitration Act 1996, s. 68(2)(a)
- ²⁴ Kendall, J., *op cit*, p. 148
- ²⁵ Mustill, M. J. & Boyd, S. C., *op cit*, p. 232
- ²⁶ Sutton, D. St. J., Kendall, J. & Gill, J., *Russell on Arbitration*, Twenty First Edition, Sweet & Maxwell 1997, p. 170
- ²⁷ Arbitration Act 1996, s. 29(1)
- ²⁸ Kendall, J., *op cit*, p. 194
- ²⁹ Mustill, M. J. & Boyd, S. C., *op cit*, p. 262
- ³⁰ Anstey, J., *Party walls and what to do with them*, RICS Books 1996, p. 15. See also Anstey, J., *Trouble with the Neighbours*, College of Estate Management 1983, p. 21
- ³¹ Russell, F., *On the Law of Arbitration*, 1849, p. 206 - 7, quoted in Sutton, D. *et al*, *op cit*, p. 164
- ³² Mustill, M. J. & Boyd, S. C., *op cit*, p. 258
- ³³ *ibid*, p. 258
- ³⁴ *ibid*, p. 261
- ³⁵ See note 1 above
- ³⁶ See, for example, Mustill, M. J. & Boyd, S. C., *op cit*, p. 257 and Kendall, J., *op cit*, p. 100
- ³⁷ [1995] 1 EGLR 155