Payments under Section 11(11) of the Party Wall etc. Act 1996

Mikael Rust
Received: 30th September, 2015
Mikael Rust and Company Ltd, 33, Mount Ephraim, Tunbridge Wells, TN4 8AA, UK;
Tel: +44 (0)20 8133 6122; E-mail: mr@mikaelrust.co.uk

Mikael Rust has been dealing with party wall matters under the 1939 provisions and the Party Wall etc Act 1996 since graduating with commendation from Leicester Polytechnic in 1977. A proud member of The Pyramus & Thistle Club since 1978 he has also served on the Building Surveyors Divisional Council and various sub-committees at RICS before resigning in 2011. A consultant with Botley Byrne Chartered Surveyors in Hanover Square, he now lives in Sweden but travels frequently to London where he is still an active ‘party wall surveyor’ and has been known to give the occasional talk on the subject.

ABSTRACT
It is generally known and accepted that under the Party Wall etc. Act 1996 when ‘building owners’ make use of building works carried out previously by their neighbours, the ‘adjoining owners’, they will have to pay a ‘due proportion of the expenses incurred by (the neighbour) in carrying out that work’. This seems to be perfectly reasonable but complications can arise when there has been a change in ownership and where there is more than one owner under the Act of the property in respect of which the work was carried out. Some surveyors apply the principle that unless the current adjoining owner actually incurred expenses in carrying out that work no payment is due under 11(11). Others believe that if building owners wish to enclose on a party wall built as part of the original building they must pay the due proportion under 11(11). A typical example is when a building owner wishes to extend into the space beside the ‘back addition’ and make use of the type ‘a’ party wall that is the external wall of the neighbour’s ‘back addition’. Neither of the established references on the workings of the Act have much to say on the matter, which may suggest that any complications are more to do with surveyors than the law itself.1 The position turns out to be relatively straightforward and is summarised in the comment on the sub-section in both editions of The Pyramus & Thistle Club’s ‘The Green Book’.2

Keywords: party walls, section 11(11), due proportion, enclosure costs, Stone and Hastie, Mason v Fulham Corporation, Party Wall etc Act

INTRODUCTION
Party wall surveyors are familiar with the requirement under Section 11(11) of the Party Wall etc. Act 1996 (the 1996 Act) for building owners to pay a contribution to their neighbours when making greater use of an existing party structure as part of their works. The Act says that this contribution should be ‘a due proportion of the expenses incurred by the building owner in carrying out that work’ the building owner here now being the adjoining owner as the positions are reversed.

As might be expected there is a wide divergence of views among surveyors as to the circumstances in which a due proportion is payable and the two legal authorities
decided under the London Building Act 1898 (the 1898 Act) are variously and selectively quoted to support different positions.

This paper undertakes a careful consideration of the judgments in *Re Stone and Hasstie* [1903] 2 KB 463 and *Mason v Fulham Corporation* [1910] 1 KB 631 and a review of the three manifestations of the statutory codes of 1898, 1939 and 1996 in an attempt to reach a clear conclusion as to how 11(11) should be applied fairly having due regard to statute and precedent.

**SECTION 11(11) AND ITS PREDECESSORS**

As this paper is concerned with the application of Section 11(11) of the 1996 Act it may be helpful to set it out in full before considering the historic precedents:

(11) Where use is subsequently made by the adjoining owner of work carried out solely at the expense of the building owner the adjoining owner shall pay a due proportion of the expenses incurred by the building owner in carrying out that work; and for this purpose he shall be taken to have incurred expenses calculated by reference to what the cost of the work would be if it were carried out at the time when that subsequent use is made.

This is arguably less clear than the provisions of Part VI of the London Building Acts (Amendment) Act 1939 (the 1939 Act) that it replaced. The relevant section of the 1939 Act is 56 which states:

(4) If at any time during the execution or after completion of works carried out in the exercise of the rights conferred by paragraphs ... of this Act any use of those works or any part thereof is made by the adjoining owner additional to the use thereof made by him at the time when the works began a due proportion of the expenses incurred by the building owner shall be defrayed by the adjoining owner.

Perhaps unsurprisingly the 1898 Act, under which the two authorities were decided, uses more complicated language in Part VIII Section 95 — Rules — as to expenses in respect of party structures:

(2) As to expenses to be borne by the building owner:

If at any time the adjoining owner makes use of any party structure or external wall (or any part thereof) raised or underpinned as aforesaid or of any party fence wall pulled down and built as a party wall (or any part thereof) beyond the use thereof made by him before the alteration there shall be borne by the adjoining owner from time to time a due proportion of the expenses (having regard to the use that the adjoining owners may make thereof):

of raising or underpinning such party structure or external wall and of making good all such damage occasioned thereby to the adjoining owner and of carrying up to the requisite height all such flues and chimney stacks belonging to the adjoining owner on or against any such party structure or external wall as are by this part of this Act required to be made good and carried up;

of pulling down and building such party fence wall as a party wall.

The language of the 1898 Act is very specific in restricting the requirement for an adjoining owner on user to pay a due proportion of the cost of alterations to existing party structures. It clearly does not contemplate requiring a payment where the adjoining owner is merely making greater use of an original party structure.

The 1939 Act is similarly specific in requiring a payment where subsequent use is made of works carried out in the exercise of
particular rights conferred by the Act. It is only the 1996 Act that seems to drop these restrictions, referring simply to ‘work carried out solely at the expense of the building owner’. The question, then, must be whether it was the intention of parliament to break with the established code of nearly 100 years and require an adjoining owner to pay a due proportion of the cost of any work carried out solely at the expense of the building owner whether in pursuance of the Act and its predecessors or not. In the words of Mathew LJ (completely out of context from his judgment in Re Stone and Hastie) ‘a result which would seem altogether unreasonable’.

RE STONE AND HASTIE [1903] 2 KB 463

This is a decision of the Court of Appeal and a judgment by none other than the Master of the Rolls himself, Lord Collins.

Hastie had a 21-year lease on a house in Mayfair. His landlord, also a lessee but on a long lease, had carried out alterations that included raising the party wall before the granting of Hastie’s lease. The freehold owner does not feature in the action. Stone acquired a lease on the adjoining property which he then demolished and rebuilt enclosing on the party wall raised earlier by Hastie’s landlord. Surveyors were duly appointed under the 1898 Act and they made an award under which Stone was to pay a due proportion of the expenses of raising the wall to Hastie. The award was not appealed but payment was not made. This appeal followed Hastie’s action to recover his due proportion from Stone:

Held, that the appellant was not, as tenant of the first mentioned house, entitled to any such payment, and that the arbitrators, in awarding such a payment, had acted beyond their jurisdiction, and consequently pro tanto their award was invalid.

In the course of his judgment, Collins MR made a number of statements that are helpful to us now, but there seems no getting away from the fact that the relatively short term of Hastie’s lease is often referred to in the report and is considered by some surveyors to be significant.

Nevertheless, the Master of the Rolls says:

I think it is obvious when this code is looked at that it provides for the recoupment of the owner at whose expense the wall was raised and not of any one else. A tenant like the applicant might, as it appears to me, just as well claim a right to a share of the money expended in building the old party wall as a right to a share of the money expended in raising it.

Matthews LJ says later ‘assuming that there would be a right upon user to compensation in the owner, the statute contains no provision transferring the whole or any part of the right to the tenant’. ‘According to the argument this right would be possessed by any tenant who held for more than a year — a result which would seem to be altogether unreasonable.’

The landlord in this case, who actually expended the money in raising the party wall, was also a tenant, although under a long lease, the term of which is not referred to in the report. Neither is there any indication as to whether or not the landlord was served with notice under the Act. Matthews LJ ponders the possibility that the landlord may be entitled to compensation in this regard but seems to conclude that as the landlord was not in possession, compensation was not due. At several points the report refers to the fact that Hastie’s landlords were trustees without making clear whether or not that is actually relevant. It occurs to the writer that Hastie might have been the beneficiary of the trust in question, which might explain some of the confusing aspects of this case.
Clearly the issue cannot simply be that a leaseholder is not entitled to payment while a freeholder is, as both adjoining owners in this case were leaseholders. The difference is that one had incurred expense in raising the wall and the other had not. Both were still owners for the purposes of the Act. Mathew LJ observed that 'Now it may be questioned whether the trustees are entitled to any compensation from Stone', then went on to assume that there 'would be a right upon user to compensation in the owner' without actually expanding on the point. This case is not, therefore, a ruling on whether the lessee who incurred the expense but is not in possession is entitled to payment, but a ruling to the effect that a sub-lessee in possession who did not incur the expense is not entitled to payment. Although the relatively short term of Hastie's lease was referred to several times it does not seem to be a point on which the case turned.

MASON V FULHAM CORPORATION
[1910] 1 KB 631

This judgment of the High Court came seven years after the superior Court of Appeal decision in Re Hastie and Stone and the circumstances are very different.

In 1895 Mason gave notice under the 1894 Act and rebuilt to a greater height the party wall on the line of junction between his property in Fulham Road and the garden of the Fulham Free Library. By an agreement, and it is not clear whether that was in the way of an award by surveyors appointed under the Act, the library could make use of the wall in the future on payment of a contribution of 'one moiety' of the cost of building the wall. It was held that this agreement determined the due proportion so as to avoid it becoming a matter for arbitration in the future.

Mason sold his house to Slater who later sold to Sir E. Galsworthy in 1899. In 1908 Fulham Corporation, who were then owners under the Act of the library, served notice on Galsworthy of its intention to make use of the wall. There are no tenancies involved or, if there are, they are not disclosed in the report, so it may be assumed that any such were not relevant to the arguments.

The amount due was duly calculated by surveyors appointed under the Act and awarded to be paid by the Corporation to Galsworthy. Mason then appeared and claimed that as he was the owner who had incurred the expense of building the wall it was he who should receive the due proportion awarded.

Although Galsworthy had clearly not incurred any expense in the actual building of the wall the County Court Judge held that he was indeed 'the building owner at whose expense the same was built' within the meaning of Section 99 of the 1894 Act. The wording of Section 99 is important because it seems to go to the root of both decisions and is inconsistent with current law following the Law of Property Act 1925. It says:

99 Where the adjoining owner is liable to contribute to the expenses of building any party structure, then until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure.

It seems to be the ownership of the wall that is crucial in this case. In his judgment Phillimore J says 'It was a party wall, built partly on the plaintiff's land and partly on that of the commissioners, and the plaintiff and the commissioners were in the position of tenants in common of that wall', 'and it was that tenancy in common of the whole that passed by the conveyance to Slater and from Slater to Galsworthy'.

The problem for Mason was that although he had incurred the expense he was no longer the owner of any part of the property.
and so could not possibly 'stand possessed of the sole property' in the party wall.

Phillimore J again: 'The words "the building owner at whose expense the same was built" must be taken to mean the person who at the material time happens to be the owner of the plot whether there has in the interval been a change of ownership or not.'

Bucknill J, in agreeing with Phillimore J, expands on this, saying:

whereas but for that section (99) Galsworthy and the defendants would be tenants in common and nothing more, with no liability on the defendants to make any contribution to the expense of raising the wall, upon their making use of the wall, and not until then, there arose an immediate liability to pay the contribution to the person who was then in the position of the building owner and that person in this case happened to be, not the original building owner who raised the wall, but his successor in title.

Section 99 of the 1894 Act has not been carried over into the 1996 Act and neither do its provisions appear in the 1939 Act, which is consistent with the change in the law brought about by the Law of Property Act 1925.

**LAW OF PROPERTY ACT 1925**

It is significant that both these cases predate the Law of Property Act 1925 (the 1925 Act) which effectively changed the nature of the ownership of party walls. Section 34 essentially prevents the creation of new tenancies in common stating that any transfer of land purporting to create an undivided tenancy (tenancy in common) would operate to create a joint tenancy. The difference is that joint tenants are regarded in law as together being the single owner of a piece of land, whereas each tenant in common has a separate interest but it is not possible to say who owns what piece of the land.

In the case of a party wall standing on the lands of different owners a joint tenancy is clearly unworkable and Section 38 clarifies the position by determining that a party wall 'shall be and remain severed vertically as between the respective owners, and the owner of each part shall have such rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created'.

This means that there is now the possibility of two alternative forms of title in a party wall. If there has been no change of ownership since 1925 then a 'tenancy in common' may still remain and in that regard the ratio in *Re Stone and Hastie* and *Mason v Fulham Corporation* will still apply. Where there is no tenancy in common and the parties each own their part of the wall severed vertically with reciprocal rights over the other, then clearly neither party can 'stand possessed of the sole property' in the party wall.

**ORIGINAL PARTY STRUCTURES**

A party structure forming an original part of properties built before 1925 is likely to be owned as a tenancy in common until such time after 1925 as one or other property changes hands. The decision in *Watson v Gray* [1880] 2 KB 463 (referred to in *Mason v Fulham Corporation*) was based on the fact that the term 'party wall' had by then acquired the *prima facie* meaning of a wall held in common even if, as Phillimore J says in his judgment, it was 'built partly on the plaintiff's land and partly on that of the commissioners'. As Bucknill J observed it is only by virtue of Section 99 of the 1894 Act that one party becomes possessed of the sole property in the party wall as the result of the other party becoming 'liable to contribute to the expenses of building any party structure'.

There will be odd exceptions but in most cases neighbouring owners or their prede-
cessors in title will have each paid for their 'undivided tenancy' in the party wall and could make whatever use of it they choose subject, of course, to whatever statutory code is in force at the time. Under the 1898 Act, and following the judgments discussed above, it is only when one party incurs expenses in adding to or modifying a party structure that the other party can acquire a liability to contribute to those expenses.

Post 1925 a party wall shall be and remain severed vertically as between the respective owners, and the owner of each part shall have such rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created. It is difficult to see how either party can have incurred expenses more than the other in the construction of such a wall even if one is using it to enclose his kitchen and back bedroom while the other is using it to enclose his garden. It is quite simply 'severed vertically as between the respective owners'. Under the specific wording of the 1939 Act and the rather looser wording of the 1996 Act it must still follow that it is only when one party incurs expenses in adding to or modifying a party structure that the other party can acquire a liability to contribute to those expenses.

CONCLUSION

It would appear that the principles set out in the judgments in Re Stone and Hastie and Mason v Fulham Corporation do readily apply in the context of the 1996 Act and that those principles are:

(1) A party wall forming part of the original structure is owned 'severed vertically as between the respective owners' or in rare cases still owned in undivided shares under a tenancy in common. Whatever use the parties make of it is immaterial. They have each paid for their 'half' together with the 'rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created'. There is no question of 'work carried out solely at the expense of' either owner and so no question of a due proportion being payable. In this context, therefore, the concern raised earlier over the apparently unrestricted wording of 11(11) is unfounded.

(2) Once a building owner does incur expenses in carrying out work that is capable of being used subsequently by an adjoining owner, then the adjoining owner will be liable to pay a due proportion of those expenses at the time that use is made. It is difficult to construe what that work might be other than work to or the building of a party structure.

(3) The right to receive and the obligation to pay a due proportion under Section 11(11) passes with the title of the original owners so 'the payment will be to the present freeholder of the building of whose wall use is now being made, or to the successor under the same lease of the leasehold owner who carried out the work'.

(4) Where a lease is granted rather than assigned by the building owner who incurred the expense the right to receive a payment under 11(11) does not pass to the sub-lessee.

'The Green Book' actually says in full in its comment on Section 11(11), 'Unless a lease or conveyance specifically states otherwise, the payment will be to the present freeholder of the building of whose wall use is now being made, or to the successor under the same lease of the leasehold owner who carried out the work.' Mathew LJ in Re Stone and Hastie observes that the 1898 Act 'contains no provision transferring the whole or any part of the right to his tenant' and this was one of the grounds for determining that
the surveyors were acting beyond their authority in awarding a payment to Stone as a due proportion of the expense of raising the wall. On the reading of the judgment, surveyors should note that even if a lease does 'specifically state otherwise' that might be a matter for the parties to deal with falling outside the statutory jurisdiction of the surveyors under the Act. But that, as they say, is a subject for another day.

Returning to the typical scenario set out at the beginning of this paper it is clear that when a building owner wishes to extend into the space between the 'back addition' and that of the adjoining owner, thus making greater use of the original type 'a' party wall that is the external wall of the neighbour's 'back addition', no payment is due under 11(11).

REFERENCES
(2) The Pyramus and Thisbe Club, now accorded 'Learned Society' status, was founded in 1974 as a forum for discussion on all matters relating to the provisions of Part VI of the London Building Acts (Amendment) Act 1939 and subsequently the Party Wall etc. Act 1996 which replaced it. It is widely regarded as the leading authority on the application of the Act and has received favourable comment in many leading judgments.