THE SERVICE BY EMAIL OF PARTY WALL NOTICES

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1. In March 2016, I had the great honour of being the quiz master for a couple of rounds of a pub quiz for party wall surveyors. One of my rounds was about the service of documents under the Party Wall etc. Act 1996.

2. That provided us with an opportunity to think about s.15 (being provision in the Act dealing with service). S.15 (as enacted before April 2016) provided that:

> "(1) A notice or other document required or authorised to be served under this Act may be served on a person –
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> (a) by delivering it to him in person[1];
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> (b) by sending it by post to him at his usual or last-known residence or place or business in the United Kingdom[2]; or
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> (c) in the case of a body corporate, by delivering it to the secretary or clerk of the body corporate at its registered or principal office[3] or sending it by post to

[1]This is talking about personal service. That requires the notice to be handed to the recipient personally. In ENER-G Holdings Plc v Hormell [2013] 1 All ER (Comm) 1162 a notice had to be served personally. The process server rang on the bell of the recipient's home address. No-one was home. The process server left the notice in the porch on a table. Later that day, the recipient returned home and found the notice. The Court of Appeal held that the notice had not been personally served. As the Master of the Rolls explained (at para 11): *"The law and common sense both support the notion that if "personal" service or delivery is required, it should be handed to the intended recipient personally"*.

[2] The rules about service by post contained in s.7 of the Interpretation Act 1978 apply: see Freetown v Assethold [2013] 1 WLR 701. That means that a document is treated as being served only at such time as it is proved to have been actually delivered to the recipient (or, in the absence of any evidence about when the document was delivered, when the document would, in the ordinary course of post, have been delivered to the recipient).

[3] This is again talking about personal service.

> the secretary or clerk of that body corporate at that office[4].
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> …
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> (2) In the case of a notice or other document required or authorised to be served under this Act on a person as owner of premises[5], it may alternatively be served by –
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> (a) addressing it "the owner" of the premises (naming them), and
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> (b) delivering it to a person on the premises or, if no person to whom it can be delivered is found there, fixing it to a conspicuous part of the premises."

3. One of my pub quiz questions was about the service by a building owner of a party wall notice on an adjoining owner by email. My question boiled down to this: under the Act, can you serve documents by email?

4. That raised the most fundamental question that you can ask about what s.15 was trying to achieve.

5. It helps to imagine a world in which the Party Wall etc. Act 1996 had been enacted without s.15. In that world, the Act would contain provisions about the service of documents (e.g. s.3 provides that: *"Before exercising any right conferred on him by section 2 a building owner shall serve on any adjoining owner [a "party structure notice"]"*). But, without s.15, we would not be not told what "serving" a document means. We would have to fall back on what is meant, in ordinary English, when it is said that someone has "served" a document on someone else. Basically, that means that the server has caused the document to reach the recipient: see Sun Alliance Co v Hayman [1975] 1 WLR 177, Lord Salmon said (at page 185) (*"According to the ordinary and natural use of English words, giving a*

[4] Again, the rules about service by post contained in s.7 of the Interpretation Act 1978 apply.

[5] Most documents under the Act are required to be served on the "owner of premises". But there are two situations where notices are served on people who are not owners of premises. Namely: (i) when a notice is served under section 8 to exercise rights of entry it must be served on any occupier; and (ii) under section 10(15) a third surveyor who makes an award has the option of serving the award, not on the owners, but, instead, on their surveyors.

notice means causing a notice to be received. Therefore, any requirement in a statute or contract for the giving of a notice can be complied with only by causing the notice to be actually received – unless the context or some statutory or contractual provision otherwise provides").

6. If a statute or a contract contains a provision dealing with service it is doing one of two things. Either, it is a "permissive" service provision which expands the ways in which documents can be served by providing the server with methods of service that will be good service even if they would otherwise not be regarded being good service (i.e. because the document has not reached the recipient). Or, a provision is a "mandatory" service provision which exhaustively identifies the permitted methods of service (which means that any other method of service will be ineffective even if would otherwise be regarded as good service because the document has reached the recipient).

7. So, the answer to the question "Can you serve party wall notices by email?" depended upon whether s.15 was a permissive service provision. Or a mandatory service provision.

8. At the quiz, my answer to the question was that sending a document by email <u>was</u> capable of being good service because s.15 was a permissive provision.

9. At that point, I hadn't given much thought to the issue. But my thinking was that service provisions usually are permissive; s.15 talks about how documents "may" be served (which suggests a choice); and, if a document is emailed to the recipient who then reads the document, it is difficult to understand why he should be able to deny that he has been served.

10. However, one of the surveyors at the pub quiz thought that I had got the answer to this question wrong. And he said so. He thought that s.15

exhaustively prescribed the permitted methods of service, with the result that email service was not allowed.

11. As it happened, a short time later I was instructed to appear in the Court of Appeal in a case called Goulandris v Knight [2018] 1 WLR 3345. In that case, my client (Mr Goulandris) owned a house in Belgravia. His next-door neighbour carried out building work to create a basement. That work damaged my client's property. The third surveyor (Alistair Redler) awarded £55,000 in compensation. My client thought that the award was too low. So he tried to appeal the award. An appeal against a party wall award must be brought within 14 days of the award being served on him. In our case, the award was served only by email. My client brought his appeal more than 14 days after he received the email. That meant that we could establish a right to appeal only if email was not a good method of service under the Act.

12. That meant I was required to argue, contrary to what I have thought when I acted as the quiz master, that email service was not permitted.

13. And, when I now came to take a closer look at the issue, I thought that there were, in fact, very good arguments to support the submission that, contrary to what I had previously thought, s.15 was intended to operate as a mandatory service provision (with the result that email service was not permitted).

14. First, subsection (1) sets outs ways in which documents "may" be served and subsection (2) sets out ways in which documents "may alternatively" be served. That suggests a choice (only) between: (i) the methods of service set out in subsection (1); and (ii) the methods of service set out in subsection (2). If you "may" have cereal for breakfast, or you "may alternatively" have porridge, you may not have bacon and eggs.

15. Secondly, if s.15 is a permissive service provision, it is difficult to understand what subsection (a) is doing there. A permissive service

provision is intended to provide the server with a choice of valid methods of service in addition to the methods of service that, in any event, are regarded as being good service. But personal service (which requires handing the document to the recipient) is always good service. Personal service is a very narrow (and "pure") example of what, as a matter of ordinary English, is regarded as good service. If s.15 is a permissive service provision, there was absolutely no point in including personal service as one of the listed methods of service. That would have achieved nothing.

16. Finally, with effect from 6 April 2016 (which was after the pub quiz and after the email service on Mr Goulandris), s.15 was amended to allow for email service in limited circumstances. S.8 of the Electronic Communications Act 2000 permits a minister to modify any legislation *"for the purpose of authorising or facilitating the use of electronic communications."* In purported exercise of that power, Art.2(1) of the Party Wall etc Act 1996 (Electronic Communications) Order (SI 2016/335) amended s.15 by adding a new subsection (1A):

> "A notice or other document required or authorised to be served under this Act may also be served on a person ("the recipient") by means of an electronic communication, but only if –
> (a) the recipient has stated a willingness to receive the notice or other document by means of an electronic communication,
> (b) the statement has not been withdrawn, and
> (c) the notice or document was transmitted to an electronic address specified by the recipient."

17. The Government amended s.15 to allow electronic service because it believed that s.15 was an exhaustive service provision that allowed documents to be served only in the specified ways. We know that because the 2016 Order was preceded by an impact assessment. The Party Wall etc. Act 1996 (Electronic Communications) Order 2015: Final Impact Assessment stated that the justification for adding subsection (1A) to s.15 was that:

> "…currently the Act does not allow for notices and documents to be served electronically; they can only be delivered in person or by post."

18. Of course, just because a government department thinks that a previously enacted statute has a particular meaning does not means that it does. To say otherwise would be contrary to our constitution. But I submitted to the Court of Appeal that the interpretation of s.15 adopted by the Department of Communities and Local Government, after it had looked into the operation of the Act and consulted with practitioners, was persuasive. Also, I said that the Court should incline towards the view that the law has developed in an orderly and consistent way, rather than having flipped-flopped all over the place as a result of misconceptions about how law operated. Given that there are people out there (including party wall surveyors) are doing their best to figure out what the law is, often in imperfect circumstances, in order to try to conduct themselves in accordance with the law, a Court should be unattracted to a view that the law has developed in a way that is chaotic and illogical.

19. The government had amended s.15 having formed the view (which it publicised) that s.15 was an exhaustive provision. People out there would have taken note of that. And relied on that. I submitted that the Court should be reluctant to overturn that understanding of the law by setting the clock back, legally-speaking, to a year zero.

20. I also submitted that, if s.15 was a permissive service provision, the amendment that added subsection (1A) was ultra vires. S.8 of the Electronic Communications Act 2000 confers power to modify legislation *"for the purposes of authorising or facilitating the use of electronic communication"*. But, if s.15 is a permissive provision, subsection (1A) does not authorise or facilitate the use of electronic communication. It makes it more difficult to serve by email. Before subsection (1A) was enacted, email service was always allowed. After it was enacted, it would be allowed only in limited circumstances.

21. The Court of Appeal rejected those submissions. In essence, the Court did so because many similarly-worded service provisions have, in the past, been interpreted as being permissive. Their Lordships thought that there was simply not enough pointing in the other direction to persuade them to interpret s.15 differently.

22. In relation to the Government's interpretation of s.15 when it enacted subsection (1A), Patten LJ said (at pp.3350-3351):

> "…little or no weight can be attached to the fact that most members of the profession together with the Government itself considered that the valid methods of service for the purposes of the 1996 Act were restricted to those set out under section 15…That is a question of statutory construction on which there is no direct authority and which turns on the wording of section 15 itself looked at in context having regard to the purpose of the provision. The fact that the Government or those advising the minister may have misconstrued the legislation and that they did so in common with the majority of the profession is clearly enough to give the court reason to pause for thought not least because it may give rise to arguments to the effect that the 2016 Order was not only unnecessary but was also ultra vires in so far as it limited the circumstances in which service by electronic means is now permissible. As to that, I express no view. But in itself the position taken by the Government provides no additional authority for treating section 15 as an exhaustive code…".

23. That means that Goulandris v Knight has gone only so far in clarifying the law about the service of party wall documents by email. It has resolved the difficult question of whether s.15 was intended to be a permissive service provision or an exhaustive service provision. But, given that s.15 has been held to be a permissive service provision, the Court has left open the question of whether the attempt to enact subsection (1A) was ultra vires. So we can't be sure whether, in accordance with subsection (1A), email

service is now permitted only with the consent of the recipient. Or whether, as, it turns out, was the case before the enactment of subsection (1A), email service is always allowed.