



Legal Update

Lecture notes

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There is one quotation, from Onigbanjo which I come to later, which I should mention now.

It is a tribute to the surveyors profession as a whole and to the members of the Pyramus & Thisbe Club in particular that issues over party walls have generally been resolved by a pragmatic and cooperative approach to the provisions of the Act and consequently appeals to the county court have been extremely rare.

Fees

The first practical question is whether, and if so to what extent, legal fees should be included in an award.

The relevant section is section 10(13) – the reasonable costs incurred in (a) making or obtaining an award under this section; (c) any other matter arising out of the dispute.

Views differ as to how far these words are intended to go. There has never been any difficulty in recovering structural engineer's fees in principle but legal fees are more contentious.

The first limb (incurred in making or obtaining an award) should be quite straightforward. Where legal input is genuinely and reasonably required in order to deal with issues arising

out of the works, then there is no reason in principle why those fees should not be awarded, just as structural engineer's fees are awarded. This is borne out by the judgment in **Onigbanjo v. Pearson** - admittedly only county court.

There can be nothing wrong in principle with the adjoining owners (who are not professionally qualified) using their own surveyors, solicitors and counsel. The limitation in section 10(13) is that costs should be reasonable costs.

So this is not a blank cheque for solicitors and barristers to become unnecessarily or unreasonably involved. Just as the surveyors might disallow a structural engineer's fees in their entirety because his involvement was unnecessary in the circumstances, so may they disallow the fees of a solicitors and barristers.

Awards often provide that fees for surveyors and others be paid to the surveyors rather than to the owners. This is what the award in Onigbanjo appeared to say and this is one of the points on which the buildings owner's counsel claimed that the award was invalid. The judge agreed that, as a matter of principle, it must be wrong for an award to require payment to be made to third parties though, in this case, he decided that the award, properly construed, provided for payment to be made to the building owner, rather than to the building owner's surveyor.

The common sense view is that the appellant would pay the adjoining owners those monies which would then be in due course remitted to their surveyor and barrister.

It is less straightforward to determine the scope of “any other matter arising out of the dispute” in subsection (c). Would that include litigation costs? In **Onigbanjo**, the judge sidestepped that question by making a finding of fact that all of the costs were incurred only in the giving of advice on, and the operation of, the procedure under section 10 so that judgment is of no help on that issue.

In **Blake v. Reeves**, again only county court, the judge was very firmly of the view that litigation costs are outside the jurisdiction of the surveyors.

The Adjoining owners’ solicitor, counsel and party wall surveyor were all involved in an application for an injunction which did not result in court proceedings being issued, although everybody did come to court. The adjoining owner eventually agreed to accept undertakings from the building owner and proceedings were not, therefore, issued.

This will go to the Court of Appeal.

I am normally very nervous about ex parte awards in general and ex parte awards in respect of surveyors’ fees in particular. One case where an ex parte award for the surveyor’s fees was held to be perfectly legitimate, however, is **Bansal v. Myers**.

The main issue in this case was the validity of the ex parte award for the adjoining owners’ surveyor’s fees.

No adequate reasons were given for rejecting the amount claimed for fees, no request for a breakdown of those fees was made for a long time and when, having received the breakdown, there was then a silence for ten working days. At no time was an alternative figure

suggested. Having received the breakdown, the surveyor was then under a duty to indicate expeditiously what items were disputed and why and to suggest his own figure. Simply remaining silent for ten working days is not acting effectively.

At one point, the building owner's surveyor suggested that the adjoining owner should discuss his fees with the building owner direct.

The lesson is always to furnish a proper critique of the fees claimed and to always suggest an alternative figure rather than simply to say that the fees are too high. This is not enough.

Although this was a case purely about the validity of the award, the judge was prepared, having found that the award was valid, to take it upon himself to decide whether or not the fees claimed were reasonable fees, which he said they were.

Many adjoining owners' surveyors will take the view that they expect the adjoining owner to pay out of their own pocket in the event that the fees, or some of them, are not recovered from the building owner. This is closely analogous to what solicitors do in litigation and, as a matter of law, is not objectionable. This is borne out by the judgment in **Andrew Dust v. Marioni, Greenaway and McNulty - 4**

As a matter of pure contract, this equally explains the situation between a party wall surveyor and his appointing owner. However, if a surveyor sues his appointing owner for those fees under those circumstances, he can expect the judge to look at the level of the fees very closely. If the amount claimed from his appointing owner exceeds the amount considered by the surveyors to be reasonable, the surveyor will have some explaining to do. This is what happened in the Dust case and the judge was unimpressed.

“The complaint is that he made a three course banquet out of what should have been a snack and spent many more hours doing the work than was reasonably necessary”.

In that case, the judge awarded Mr. Dust considerably less than the figure which he had claimed. Nevertheless, the principle of looking to your own appointing owner for payment of fees did survive.

So, we have the situation where the court took the view that, as a matter of contract, a surveyor can charge his appointing owner more than what is recovered from the building owner but also a case where a professional institution has considered it improper (in that particular case) to do so. The position is probably that a surveyor may quite properly look to his appointing owner for awarded fees if, for some reason, the building owner does not pay. He would need to be very careful indeed, however, if he tried to recover from his appointing owner fees in excess of the awarded sums. The starting point in that situation must be that the awarded fees are reasonable and that anything more than that would be excessive.

Of course, if an adjoining owner’s surveyor tells his appointing owner that the building owner will be paying all the fees, then this would be an implicit representation that the surveyor will not look to his appointing owner for any excess and this would be a defence to any claim which he may make against his appointing owner.

Retrospective awards

It has long been assumed by surveyors that the old case of *Louis v. Sadiq* is authority for the proposition that there is no jurisdiction for them to make retrospective awards, i.e., to make an award in respect of works carried out before notice was served or before the award was

made. That has always been an erroneous position in my view as borne out in **Rodrigues v. Sokal**.

In this case, the defendant started some substantial works of redevelopment and only later, on 15th May 2004, served the required notice in respect of those works. The adjoining owner claimed that damage was done to the adjoining owner's property by those works. On 1st June 2007, Graham North as third surveyor made an award. He found, broadly speaking, that no damage had been caused to the adjoining owners' property. The adjoining owners claimed that the award could not be conclusive in respect of work carried out before the date of the notice, May 2004 but that contention was not upheld. Graham North had approved the pre-notice works in his award, his conclusion was a reasonable one and the award was accordingly perfectly valid in respect of those earlier works, even though it was retrospective.

The difference between this case and Louis and Sadiq is that in Louis and Sadiq, the works would never have been capable of being approved by the surveyors because they were so clearly unsatisfactory. For example, no shoring was provided when the front wall of the house was removed. The lesson is that retrospective awards are perfectly valid, contrary to common belief.

If the building owner subsequently obtains authority for the 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.

Injunctions

We were reminded in the case of **Udall v. Dutton** – of the principles on which an interim injunction may be granted.

In order to obtain an interim injunction, it is necessary to demonstrate:

- (i) that there is a serious issue to be tried;
- (ii) that the balance of convenience favours the grant of an injunction; and
- (iii) that damages would not be an adequate remedy.

The whole point of the Act is to provide a mechanism by which agreements can be reached or disputes identified and to avoid this sort of sly destruction.

It has long been believed by some surveyors that if consent for the works is given, then it will not be possible to appoint surveyors to deal with any issues that might subsequently arise. This is another misconception which was also dealt with in **Onigbanjo**. The ability to appoint a surveyor is not limited to the situation where there is dissent from a notice. There are a number of other sections which provide specifically that matters may be resolved under section 10 without making any reference to service of a notice. They are:-

- (i) section 7 and especially 7(5);
- (ii) section 11(2) and (8);
- (iii) section 12(1) security for expenses

All of these sections refer to section 10 without making any explicit reference to a dispute. The inference is that notice does not need to be served in order to engage the provisions of section 10.

The received view now seems to be that surveyors can be appointed even if no notice has been served and certainly that the consent to the works in a notice is no bar to the subsequent appointment of a surveyor if a disagreement should later arise.

Miscellaneous

The case of **Manu v. Euroview Estates Limited** – is a mine of useful information. Again, only county court but Judge Hazel Marshall QC is well respected and is head of the Central London Chancery List and the judgment is comprehensive and closely reasoned.

The issues crystallised at trial as:-

1. Was Mr. Kritzler's appointment invalid on the ground that it preceded the notice?
2. Does the word "underpin" in section 2(2)(a) include the excavation works necessary to get at the underpinning?
3. Was the notice invalid with regard to the section 6 works because it did not comply with section 6(6)?
4. Did Mr. Lai's letter 12th January 2006 constitute a "refusal to act effectively"?
5. Was Mr. Kritzler entitled to act ex parte under section 10(6) or does that subsection confer no power on the other surveyor to act alone?
6. Was Mr. Sumner wrong in holding that the building owner was not "responsible" for the defect requiring underpinning of the party wall?
7. Is Mr. Sumner's award challengeable on the grounds of internal inconsistency or of allocating costs illogically.

The trial lasted for four days which is hardly surprising. I will summarise as best I can as follows:-

1. So far as the argument that Mr. Kritzler's appointment was invalid because it preceded the notice was concerned, the judge said:

Given that...the building owner in particular is likely to engage the services of its party wall surveyor before serving a party wall notice, it

would be nonsensical in my judgment, to hold that he could not make a valid appointment until after any difference had actually arisen.

2. The issue, in a nutshell, is the interpretation of section 2(2)(a) and the meaning of the word “underpin”. Mr. Manu’s argument was that underpinning is the installation of the concrete pin itself and that the word is not apt to refer to the “excavation” that it is necessary to do to get to the underpinning.

I have no hesitation in rejecting this argument. It seems to me to be perfectly clear that by “underpinning” section 2(2)(a) contemplates also whatever works are required in order to effect underpinning, including the obvious need to excavate, in order to be able to get at the location for the underpinning.

The judge accordingly found that the section 3 part of the notice was the part which governed those excavations which were necessary to install the underpinning.

3. The judge did find, however, that the section 6 part of the notice (relating to adjacent excavations) was invalid because it failed to comply with section 6(6). This is despite the fact that all parties accepted that they could work out for themselves what was intended by the notice and that no difficulties had arisen as a result of non-compliance.

“In my judgment, even construing this notice benevolently with regard to the fact that it is a instrument intended to take effect between

practical men for a practical purpose, this document cannot fairly be regarded as including the information that section 6(6) requires it to include. The drawings are sloppy in this regard, and the notice was not valid insofar as it related to section 6 works. That, however, is not the end of the matter”.

It is axiomatic that invalid notices lead to invalid awards (*Gyle-Thompson v. Wall Street (Properties) Limited*). This notice, however, was redeemed by the doctrines of waiver and estoppel.

In my judgment, therefore, a party wall surveyor can by his acts or conduct in appropriate circumstances waive a defect in a notice or create an estoppel that would bind his appointing owner by accepting to act as though the notice was valid, notwithstanding.

It does therefore appear that what seems to be a strict rule in *Gyle-Thompson* is capable of being significantly diluted in practice. The lesson is that, if you do want to take points on the validity of notices or of appointments, it is incumbent on you to take those points quickly. The court may take a dim view if you save those points for later ambush.

In that context, any points that are to be taken concerning the alleged inadequacies of a notice served by a party are expected to be taken promptly, as soon as they are apparent. It will not therefore take much for a party to be taken to have waived a right to rely upon some deficiency in the notice.

4. Mr. Lai's refusal to act was said to be his demand that a fresh notice be served in circumstances where (as it was subsequently held) no fresh notice was needed.

By itself, this may not appear to be enough to constitute a “refusal”. Context, however, is everything.

Although the bare refusal contained in the letter might, in a different context, have amounted to no more than a statement of position, given the combined facts that it was raised so late in the day, more as part of a negotiating strategy than for genuinely good reasons and against the background of taking a succession of pedantic and difficult points, I find that, in this situation it did not do so...I therefore hold that Mr. Lai's letter of 12th January 2006 was, in all the circumstances, a refusal to act effectively.

5. There was what appears to have been a rather incoherent argument to the effect that section 10(6) does not permit an appointed surveyor to make an ex parte award without the third surveyor joining in. This argument was not pressed.

6. The award provided that the owners should share the cost of underpinning equally because they were equally responsible for the want of repair. It was argued by Mr. Manu that the condition of the wall arose as a result of matters for which he was not to blame, namely tree roots from next door and that third parties (i.e., the building owner's predecessor) may be responsible. So far as third parties are concerned, the judge said

The 1996 Act is quite clearly contemplating that the question of “responsibility” is decided as between the actual parties to the

procedures, and not with regard to other persons, such as predecessors in title or third parties.

As between the parties themselves, the judge took the view that the Act is not intended to require the surveyors to embark on a legal analysis.

It is not being contemplated that a party wall surveyor who makes an award as an expert should have to investigate, consider or decide the niceties of legal liability as though he were a judge in a court of law. I consider that the word "responsibility" was intended to provide a simple and practical yardstick, capable of being applied in a relatively summary way, as a matter of commonsense impression.

7. It was argued for Mr. Manu that the award should also be set aside because it contained some apparent minor internal inconsistencies and because the costs of the work had been allocated illogically. Those arguments were given short shrift.

I began with a quote and I'll end with one. **Bradford & Bradford v. James & Others.**

There are too many calamitous neighbour disputes in the courts. Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost

by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, or possibly both. The extreme acrimony between these neighbours is nothing new.

NB: Part 52 provides that the appellant's notice should be served on the surveyor.

The above note is based on lecture notes prepared by Andrew Smith to accompany a presentation to a conference of the Pyramus & Thisbe Club

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