CHILD & CHILD

GIVE THE RIGHT DIRECTIONS

Party wall award appeals are governed by Part 52 of the Civil Procedure Rules, but the consequences are not always fully appreciated and things can go wrong. *Andrew Smith* and *Mark Walsh* point out the pitfalls.

Appeals against awards made under the Party Wall etc Act 1996 are statutory appeals. As such, they are governed by the Part 55 procedure of the Civil Procedure Rules (CPR), which has procedural and evidential consequences. Surveyors need to be aware of these and their practical implications.

Two schools of thought

Before the CPR came into force in 1999, such appeals were considered to be re-hearings, with no particular restrictions upon the evidence the parties could call: *Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 14 EG 145.

It is not surprising that, after the introduction of the CPR, many surveyors and solicitors used the Part 8 procedure to appeal against awards. To initiate a Part 8 claim, a party merely has to issue a claim form and serve it with the evidence upon which he seeks to rely. The respondent files and serves an acknowledgement of service and his evidence. Directions may be given and a hearing will take place.

This procedure is relatively simple, is consistent with the pre-CPR approach of determining the issues afresh and is the procedure that the RICS recommended in its guidance note (5th edition 2002) on party wall legislation.

However, some professionals considered Part 52 to be more appropriate, (albeit more complex and legalistic) because it is stated specifically to apply to statutory appeals. In March 2007, the Court of Appeal clarified the situation. It held that appeals against awards pursuant to section 10(17) of the Act are "statutory appeals" and that the Part 52 procedure should be adopted in all such appeals: *Zissis* v *Lukomski* [2006] EWCA Civ 341; [2006] 30 EG 104.

Appeal Process

The principal steps in the process of appealing against an award in accordance with Part 52 include the following:

- The commencement of the appeal process by filing an appellant's notice with the court: the proper notice in form N161, which can be downloaded from www.dea.gov.uk/civil/ procrules_fin /menus/forms.htm.

- The appellant's notice is served, not only on the other party, but also on the surveyor(s) that made the award being appealed (even though the surveyor(s) will not be parties to the appeal and will often have no direct interest in its outcome).

- The appellant's notice should be accompanied by certain documents. These are set out in paragraph 5.6 of the practice direction to Part 52 and include a skeleton argument.

- The respondent may choose to file a respondent's notice. If he does, he must file and serve his skeleton argument either with that notice or within 14 days of filing the notice.

- If he does not file a respondent's notice, any skeleton argument must be filed and served at least seven clear days before the appeal hearing.

- The court will notify the parties if the date set for the hearing of appeal.

The appeal process does not automatically provide for a case-management conference or for the making of directions for the preparation and conduct of the appeal hearing. Such directions would not, in the case of other types of appeal, be necessary because the presumption under the Part 52 procedure is that evidence that was not before the decision maker (in party wall cases this means the surveyor(s) that published the award) will not be admitted *unless* the court directs otherwise.

In other words, under the Part 52 procedure the parties have no automatic right, for example, to give evidence to the court or to place expert evidence before the court that was not before the surveyor(s) when considering what award to make.

It is crucially important to give early consideration to the evidence that will be required for a successful appeal, and what directions will be required to place that evidence before the court. In most cases, the prudent adviser will seek specific directions giving permission to call relevant evidence. However, the window of opportunity in which to obtain such directions will usually be a narrow one – county courts regularly list appeals for hearing within eight to 10 weeks of the appellant's notice being filed.

If the required directions cannot be agreed with the respondent and approved by the court within a relatively short time, it will be necessary to make a prompt application to the court. Failure to do so is likely to result in the court simply listing the appeal without any directions.

In these circumstances, there is a danger that the parties will be forced to proceed with the appeal on the date set without being able to rely upon all the evidence that they would wish to call, or that the hearing date will be used to discuss directions. This could mean that the hearing proper will be delayed, possibly leading to a delay in construction works, with all the attendant financial implications.

The directions that advisers should consider obtaining include directions that provide for the exchange of relevant documents, witness statements, and expert witness reports from, for example, structural engineers or surveyors on construction points.

Time for appealing

The general rule under Part 52 is that an appeal must be brought within 21 days after the date of the decision appealed against. However, in the case of most statutory appeals this rule is modified and the period is extended to 28 days. These general provisions conceal a

potentially disastrous trap for an adviser who is unfamiliar with the Act. The periods set out in Part 52 and referred to above apply only in the absence of rules, enactments or practice directions to the contrary. Section 10(17) of the Act contains just such a contrary provision, namely that a party who wishes to appeal against an award has only 14 days, beginning with the day on which the award is served, in which to file his appellant's notice.

There has been much debate as to whether lodging an appeal operates to stay an award. It would seem that his question has been answered indirectly by *Zissis*: Part 52 provides that unless the appeal court or the lower court (which, for these purposes, includes the surveyors who made the original award) orders otherwise, an appeal will not operate as a stay of any order or decision of the lower court. Since Part 52 applies to appeals against awards, it follows that this specific provision applies and that a building owner will be able to carry on with the works, notwithstanding the fact that an appeal has been lodged, unless and until a stay is granted. It is likely that, when considering whether or not to grant a stay, the courts will approach the application on principles similar to those that apply to the grant of interlocutory injunctions. It would then follow that the price of obtaining a stay pending appeal would probably be a cross undertaking in damages by the party proposing to appeal.

Moreover, an adjoining owner who appeals successfully, but who has not sought a stay of the award pending appeal, will have this failure raised against him should he later try to secure a mandatory injunction to remove any works carried out pending appeal.

Conclusion

The days have long gone when professional could simply lodge a Part 8 claim and append every report, photograph and witness statement to hand. Questions of evidence need to be considered from the outset and appropriate applications for permission then made.

Inevitably, some practitioners will fall foul of the trap referred to above concerning the time periods for lodging appeals.

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