CHILD & CHILD

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Party wall appeals: How to win in three easy steps

Snooker involves long periods of safety play interspersed with attempts to score points against your opponent through skilful break building and positional play. Litigation is very similar. A skilful lawyer will not just attack at every opportunity but will think carefully from the beginning of each case about how best to set-up a successful outcome by carefully manoeuvring all the resources available to them and carefully weighing up the percentages of success and failure before going for an all-out offensive.

So what can lawyers learn from snooker players? More particularly, how do we win our party wall appeal? I suggest we try to learn from one of snooker's finest exponents, Ronnie O'Sullivan.

Ronnie is something of a maverick but on his day he is literally unbeatable. I took this quote from the BBC sport website following his recent victory at the World Masters Tournament, the fifth Masters title of his career.

"*For most snooker players, breaks represent long hard yomps over dangerous terrain. They overcome obstacles and perform nerve jangling escapes before surveying the landscape under knitted brows and setting off again…when O'Sullivan plays snooker like this, the consensus is that he makes it look like he is playing another game."*

So, how can we emulate Ronnie? How can we simplify the minefield of litigation so that our clients come out on top and we can garner the same praise and adulation as Ronnie in his pomp?

I suggest there are three steps we can follow to help us along the way:

Step 1: Play the right game

Cost/benefit analysis

The first, and probably most important, thing to establish is whether the costs and effort associated with the claim be worthwhile in all the circumstances? Questions we need to ask are:

- How much is at stake?
- How much is the appeal / defence going to cost?
- What are our chances of success?
- What are our strengths and weaknesses?
- Will we be able to enforce?

Is it worth playing the game at all?

Alternative to appeal?

Do we even need to appeal in order to achieve the client's objectives? Are we really arguing that the award is invalid, either in part or in full, because the surveyors who made it went beyond their jurisdiction or made some fundamental procedural error that means the award is a nullity?

Zissis v Lukomski [2006] WLR2779 is authority for the validity of an alternative route to an appeal under Section 10(17) where it can be shown that part or all of the award in question is *ultra vires*. ***Zissis*** suggests that an application to the court for a declaration of invalidity would be a perfectly acceptable way to deal with such arguments.

In some circumstances an appeal may not be necessary although much will depend upon the force of the arguments and it may be safer to lodge the appeal under Section 10(17) without prejudice to our contention that the award is invalid, in order to avoid any claim that we have lost the right to challenge the award.

Service

There is a very strict 14-day time limit for lodging an appeal under Section 10(17). The case of ***Freetown v Assethold Ltd [2010] EWCACIV1657*** has clarified the law on service of awards and when the time limit starts running from. In general terms, an award is now deemed to have been served at the time it would have been received '*in the ordinary course of post'.* The question remains what this actually means in practice but it is generally accepted that 1st class post can be assumed to have been delivered one or two days after posting (ish!).

Whilst ***Freetown*** has clarified the position regarding postal service to some extent, it does leave some difficult questions unanswered, such as what happens when the post goes astray or the award is served by some other medium, such as email or fax.

The current judicial trend is towards ever stricter interpretation of directions and time limits and the only sensible advice to any client who is considering an appeal is to err on the safe side and lodge the appeal well within the 14-day time limit.

Remember, the 14 day time limit *includes* the day of service itself. This means if you are served on a Wednesday you must not leave it to the next but one Wednesday to appeal because you will be out of time by a day since the time limit would expire on the *Tuesday*.

Evidence – Re-hearing v. Review

Try to gain as much evidence as possible at an early stage to help weigh-up whether it is worth bringing or defending the appeal and whether the arguments for and against can be supported.

There is some debate over what the court should be allowed to look at in terms of evidence when deciding the appeal and whether the appeal should be dealt with by way of a *re-hearing* or by way of a *review*. In basic terms, the distinction is that a *re-hearing* would allow further evidence to be put before the court which was not considered by the surveyors when they made the award, whereas a *review* would be limited to consideration of the documents and evidence available to the surveyors when they made their decision.

Again, ***Zissis*** had seemingly resolved this doubt by deciding that the default position in a party wall appeal was that the proceedings would be dealt with as a re-hearing. That authority may no longer be safe to rely upon however, as the relevant practice direction to Part 52 of the Civil Procedure Rules (CPR), which deals with appeals, has recently been amended. The default position as far as the CPR are concerned is that all appeals are now limited to a *review* of the decision below unless the appellant can persuade the court that new evidence should be introduced because it is '*in the interests of justice*' to do so.

In almost every appeal, the question of whether the proceedings will proceed by way of *review* or *re-hearing* could be crucial and it is important to establish exactly what evidence was before the surveyors who made the original decision. If there is a raft of evidence that was not before the surveyors, find out the reasons why that is and question whether, in the circumstances, it is likely that the court can be convinced that it is '*in the interest of justice'* to now have regard to that evidence.

In deciding whether it is in the *interests of justice* to admit fresh evidence the court is likely to apply the test set out in ***Ladd v Marshall [1954] EWCA Civ 1.*** The court in that case decided that, in order to justify the reception of fresh evidence, three conditions must be satisfied:

1. It must be shown that the evidence could not *'with reasonable diligence'* have been obtained for use in the original hearing;

2. the evidence must be such that, if admitted, it would have an *important* (not decisive) influence on the result of the case;

3. the evidence must be *credible*, although it need not be incontrovertible.

In practice, those awards that are non-speaking, i.e. do not include reasons for the decisions or findings they contain, *might* be more likely to be dealt with on the *re-hearing* basis as it *might* be easier to persuade the court that the surveyor has not acted procedurally properly by giving the parties an opportunity to make representations. Much will turn on the facts.

Again, the recent trend is towards stricter compliance with the court rules generally and it may be that the distinction between *reviews* and *re-hearings* becomes more strictly enforced than has previously been the case. This makes it even more important to consider, at an early stage, what evidence is available and whether the surveyors have already seen it as part of the process of making the award now being challenged.

Step 2: Get the referee on-side

Which court?

Section 10(17) states that appeals must be commenced in the county court so that is what you should do.

It may be possible to transfer more complex cases to the High Court (in most cases the Technology and Construction division) under section 42 of the County Courts Act. Mr Justice Ramsay decided this was perfectly reasonable in ***Kaye v Lawrence [2010] EWHC 2678 (TCC)*** although in that case he actually sat as a county court judge under the power of section 5(3) of the County Courts Act 1994, the parties having agreed to transfer the proceedings to the TCC as they involved complex and important arguments relating to security under section 12(1).

Central London cases are usually issued in the Central London County Court TCC section. They have specialist judges who are used to dealing with issues concerning the Act. It may be appropriate to agree to transfer non-London appeals to the CLCTCC to ensure you get a judge who has some experience of the law relating to the Act. Other regional courts also have specialist TCC lists and judges and it would be worth trying to get the appeal dealt with by one of those if possible.

Further information from the Court Service website:

The court centres outside London at which the TCC principally operates are:

- *Birmingham*
- *Bristol*
- *Cardiff*
- *Chester*
- *Exeter*
- *Leeds*
- *Liverpool*
- *Newcastle*
- *Nottingham*
- *Manchester*

At each of these court centres both High Court and county court TCC cases may be issued and tried. There are full time TCC judges at Birmingham, Manchester and Liverpool. At the other court centres TCC judges are available but they devote a substantial amount of their judicial time to non-TCC work. Judges authorised to deal with TCC business are also available at Leicester, Sheffield and Southampton. However, county court claims cannot be issued at those court centres.

Process

The appeal is commenced by filing at court an Appellant's notice in form N161 together with the grounds of appeal setting out the reasons for the challenge to the award and what the court is being asked to do – i.e. rescind or modify the award.

There is a court fee (currently £135) and sufficient copies need to be filed for service.

As noted above it is crucial to lodge the appeal in time. If you are pushed for time it is better to get a badly drafted appeal in to court in time than to have a perfectly drafted appeal and miss the deadline by a day. You can issue at any county court although it is usually the most convenient court for the parties that will end up dealing with the appeal – unless transferred to a court with a specialist TCC list. Again, if pushed for time, it is better to get the appeal lodged and then argue about whether it should be transferred to another court later.

If you lodge the appeal in time but the court doesn't get around to processing it until after the 14 day time limit has passed you are still safe (***Aly v. Aly (1984) 128 SJ 65***). Always try and get a receipt from the court to prove you have filed the papers within the 14 days to avoid any argument.

If the court is shut on the last day to file the appeal (weekend/bank-holiday/force majeure) file it on the next available day and you *should* still be ok (but again, if possible, file it the day *before* the weekend/holiday etc) (***Hodgson v. Armstrong [1967] 1 All ER 307, CA***).

Directions and orders

Once the appeal has been lodged the court will issue and serve it on the parties together with initial directions setting out deadlines for the parties to carry out certain steps.

The appellant is supposed to file its skeleton argument (setting out in more detail the reasons for the appeal) within 14 days of filing the appeal papers and if this has not been done the court will order this as the first direction. There will then be a deadline for the respondent to file a reply and their skeleton arguments in support.

The remaining directions will depend upon what view the court takes of the initial appeal papers and whether it has been convinced to proceed by way of *review* or *re-hearing*. There will be directions relating to exchange of evidence, documents and the agreement of an appeal bundle and it is now common to see orders specifying that if a party wants to rely on any particular oral or expert evidence they will need to apply to court by a certain date setting out why.

The initial directions are usually made before the respondent has had a chance to put in its reply so the respondent might immediately ask for the directions to be amended if it argues they are inappropriate – for instance if the court has ordered a *re-hearing* but the respondent argues fresh evidence should not be allowed.

It has recently become even more important to strictly comply with the court's rules and directions. This is because of the biggest shake up of the civil legal landscape since the CPR were introduced in 1999 following Lord Woolf's recommendations in his A*ccess to Justice Report 1996*.

The recent changes have come about as a result of the review of civil litigation costs carried out by Lord Justice Jackson in 2009, the final report of which was presented in January 2010. Many of the recommendations in Lord Jackson's 557 page report were put into practice last April, with the primary aim of reducing the cost of litigation and increasing the efficiency of the court service generally.

An indication of the court's new attitude towards costs and compliance with court directions generally is the case of ***Mitchell MP v Newsgroup Newspapers [2013] EWCA CIV 1537*.**

This case concerned Andrew Mitchell MP's defamation claim against The Sun newspaper arising out of their reporting of the 'Plebgate' affair. The point under appeal was whether the late filing of a costs budget by Mr Mitchell's lawyers should prevent the court from allowing the costs set out in the budget to be claimed and whether the court was wrong to refuse Mr Mitchell '*relief from sanctions'* in the circumstances of the case.

The result was a resounding defeat for Mr Mitchell and his lawyers and the court took the opportunity to send a clear and unambiguous message that future breaches of the CPR would only be tolerated in '*exceptional circumstances'*.

Lord Dyson MR gave the leading judgment, commenting that:

'*although [the decision] seems harsh in the individual case of Mr Mitchell's claim, if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback*'

and,

'*in the result, we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders*'.

Since ***Mitchell***, there have been a number of other cases in relation to compliance with directions and, as expected, following the '*clear message*' from Lord Dyson, they have been almost universally dismissive of lawyers' attempts to justify their non-compliance.

Lessons:

- Know the rules and comply with the court's directions.
- If for any reason a direction cannot be complied with, make an urgent application to extend time/vary.
- Make any such applications *before* the deadline expires.
- Try to get the other side to agree to an extension. If they do not agree, inform the court immediately of why the direction cannot be met and give a good reason for why further time should be granted.

This all applies to appeals under CPR 52 as much as to any other legal proceedings under the CPR. It applies equally to represented parties and litigants in person although in reality LIP's will probably still be given an easier time.

The old days of ignoring directions or simply making last minute applications on the eve of court, to be dealt with on the first day of the trial to mop-up any outstanding non-compliance with previous orders, are now gone.

Step 3: Know your angles

Further tactics and considerations to bear in mind:

Much depends on the relative strength of your arguments and evidence and every appeal is different.

There are usually ways we can protect our clients and the same tactical considerations generally apply to almost every appeal.

Offers of settlement – CPR Part 36

An early offer of settlement may protect the client's position on costs. If challenging the quantum of an award, consider getting an independent expert report to back up the reasons for the disagreement and place a figure on what *would* be a reasonable sum to pay. Make a sensible settlement proposal based upon that report.

Consider making a formal CPR Part 36 offer to protect the client by ensuring that if the appeal succeeds and the offer is beaten, the opponent pays a higher proportion towards the legal costs plus enhanced interest as an additional penalty for not accepting the offer. This is a powerful tactic and if used correctly can put a lot of pressure on the opposition to compromise at an early stage. There are strict requirements for Part 36 offers – seek professional guidance if necessary.

Offers should be made 'without prejudice save as to costs' so the court is not privy to them until the main issues in the appeal have been decided and it comes to arguing about who has won and who should pay what.

Alternative Dispute Resolution (ADR)

Alternatively (or as well as making sensible offers), consider some form of ADR such as mediation. If there is a prospect of the parties being able to resolve their differences by coming to a reasonable compromise, this should certainly be explored, again at an early stage if appropriate.

The timetable set by the court in most party wall appeals is quite tight and, as noted above, it is not advisable to ignore or delay in complying with directions, even when we can honestly say we did so because we were saving costs whilst progressing genuine attempts at settlement.

On the other hand, if mediation or some other form of ADR is going to be attempted, the court would almost certainly agree to a stay of proceedings to allow this and, again, agreement can be made with the opponent's lawyers (if they have any) and, if necessary, an application can be made to court to vary the directions by consent.

Preliminary issue

Another angle to consider is whether the appeal lends itself to a preliminary issue determination. It may be that there is a procedural or jurisdictional point that, if decided in one of the parties' favour, would decide the appeal and avoid the need to spend time and costs dealing with many of the other issues and evidence.

One of the anomalies with party wall appeals is that the skeleton arguments are usually exchanged before disclosure of evidence, meaning you often don't have all the information you need to fully develop your case at the outset of the proceedings. If however the grounds of appeal (or reply) do include a potential 'knockout' point that, if successful, would avoid the need for further submissions and evidence, the parties can try to agree to deal with this first, with directions to follow if necessary depending on the result of the preliminary issue.

Enforcement

We should have made sure in our initial assessment that our opponent is 'good for the money' so that if we succeed on the appeal we can enforce the entitlements under the award as well as any order for costs.

If the position changes part-way through the appeal, for instance by one of the parties selling their property or otherwise taking steps to dispose of assets in order to defeat any enforcement attempts against them, consider taking protective measures such as applying for a freezing order or security for costs. Again, we should keep this under review at all times as if you win at court and you can't enforce the judgment or award, you still lose.

The result

Depends on:

- Who has the best legal arguments;
- who has used their resources to best effect;
- tactics and safety play;
- luck/fluke?

In the final analysis it might be difficult to figure out who has actually won because quite often a successful appeal can still end up costing both sides more than the amounts at stake in the first place.

Even successful parties who are awarded their costs rarely recover anything near 100% of their outlay, and usually get around 60-70% at best. Again, the prospects and level of recovery can be improved with early and well-judged offers of settlement.

Further appeal?

Finally, in some cases the amounts and principles at stake might mean it is worth taking the matter further even if the original appeal to the county court fails. In those (relatively rare) cases the next step would be an appeal directly to the Court of Appeal.

There are strict limits as to when a second appeal will be allowed and permission will only be granted where the Court of Appeal considers that one of the following criteria is satisfied:

1. The appeal would raise an important point of principle or practice (*CPR 52.13(2)(a)*).
2. There is some other compelling reason for the Court of Appeal to hear it (*CPR 52.13(2)(b)*).

These criteria are applied narrowly and that is another reason why there are so few Court of Appeal authorities on party wall matters, and why so many grey areas of interpretation of the Act still exist.

James Beat
Partner

Child & Child
4 Grosvenor Place
London SW1X 7HJ

DX 38155 Knightsbridge
Direct dial: 020 7201 3553
Fax: 020 7235 9447
E-mail: jamesbeat@childandchild.co.uk
www.childandchild.co.uk