

No blank cheques

In the first of three articles on developments in party wall issues, Andrew Smith looks at the impact of recent court decisions on fees

Disputes over works conducted under the Party Wall etc. Act 1996 rarely reach the courts. The procedure for dealing with works under the Act is generally administered by surveyors rather than by lawyers and (where the surveyors are acting sensibly) this tends to encourage a practical and non-confrontational approach.

Any disputes that do find their way to court are dealt with initially at county court level and only a few cases are appealed to the higher courts. While county court judgements do not create binding precedents, the recent reforms of the court system have meant that important and complex cases are frequently dealt with at this level. Accordingly, county court judgements (rare as they are) are a useful source of guidance.

The question whether legal fees are intended also to be included in the scope of section 10(13) is particularly contentious

As may be expected, the question of the professional fees incurred in the process of obtaining an award under the Act can be a contentious area, particularly where an attempt is made to include provision for lawyers' fees.

Section 10(13) of the Act provides that the reasonable costs incurred in making or obtaining an award or any matter arising out of the dispute, shall be paid by those parties as determined by the surveyor(s) making the award. Views differ as to how far these words are intended to go. There has never been any difficulty in including surveyors' and structural engineers' fees of course, but the question as to whether legal fees are intended to be also included in the scope of section 10(13) is particularly contentious.

The better view appears to be that, 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. This is borne out by the judgement of Birtles J in *Onigbanjo v Pearson* [2008] (unreported):

"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."

As a county court decision this is not binding, but was cited with approval by the Court of Appeal in *Blake v Reeves* below.

But this is not a blank cheque for solicitors and barristers to become unnecessarily or unreasonably involved in the process. It must be remembered that the process under the Act is traditionally administered by surveyors and not by lawyers, and that the surveyors practising in this field would be expected to have a sufficient grasp of the principles to enable them to discharge their duties without frequent recourse to legal advice. Just as the necessity for advice from a structural engineer may sometimes be required, advice from lawyers may equally be obtained – but only where the circumstances warrant it.

The question as to whether litigation costs or the costs of threatened litigation would be recoverable through the medium of an award has recently been clarified in *Blake v Reeves* [2009] EWCA Civ 611.

In that case, the adjoining owner's solicitor, counsel and party wall surveyor all spent a considerable amount of time and ran up large fees in dealing with a proposed application for an injunction to restrain the building owner from carrying out works allegedly in contravention of the Act.

In the event, court proceedings were not formally instituted because the building owner ultimately furnished satisfactory undertakings to avoid the need for an injunction, and an award was made which provided that the building owner should pay the professional fees incurred in the process. Both the county court and the Court of Appeal held that such fees were not recoverable through the medium of an award.

Etherton LJ commented:

"Proceedings in court to enforce common law or equitable remedies, such as damages or an injunction for trespass nuisance or the threat of them, fall wholly outside the 1996 Act. That is equally true of preparations for such proceedings. That conclusion is consistent with practice and policy. The purpose of the 1996 Act is to provide a mechanism for dispute resolution which avoids recourse to the courts. A power of the appointed surveyors under the 1996 Act to make provision for costs incurred for the purpose of actual or contemplated litigation in court would be inconsistent with that statutory objective." »

Ex parte awards, which provide for payment of the fees of the surveyor making the award, are particularly vulnerable to challenge in practice

» *“Such litigation, resulting from non-compliance with the dispute resolution mechanism, falls entirely outside the statutory dispute resolution framework.”*

Awards often provide that surveyors' fees should be paid to the surveyors themselves, rather than to the owners. Indeed, this is what the award in *Onigbanjo* appeared to say and this is one of the points on which the building owner's counsel claimed that the award was invalid. In that case, 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 (such as the surveyors, themselves); 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. As he commented:

“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.”

A high proportion of awards which are challenged in the county court are awards which have been made *ex parte*, i.e. by one of the surveyors alone under the default provisions of section 11(6) and (7). As may be expected, *ex parte* awards, which provide for payment of the fees of the surveyor making the award, are particularly vulnerable to challenge in practice. One case where an *ex parte* award for the fees of the surveyor making the award was held to be perfectly legitimate, however, is *Bansal v Myers* [2007], another unreported case in the county court, where the adjoining owner's surveyor made an award, *ex parte*, for payment of his own fees.

In that case, it was clear that the building owner's surveyor had failed to engage in a serious dialogue about the calculation of the adjoining owner's surveyor's fees. In particular, he failed to comment on a breakdown of those fees and failed to respond to a notice under section 10(7). An *ex parte* award was made accordingly.

The judge rejected the appeal against this award, commenting that the building owner's surveyor had been under a duty to indicate expeditiously what items in the breakdown is disputed and why, and

to suggest his own figure. In other words, to engage effectively in the process. The lesson is always to furnish a proper critique of the fees claimed and to suggest an alternative figure, rather than simply to allege that the fees are too high and decline to engage further. This will not be considered good enough should the matter go to court.

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 the solicitors expect in litigation and, as a matter of law, is not objectionable. This is borne out by another county court judgement in *Dust v Marioni, Greenaway and McNulty* [2004] (unreported). 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 awarded by the party wall surveyors, he may be in difficulty. The principle is that a surveyor may quite properly look to the appointing owner for payment of fees to the extent that such fees are not recovered from the building owner, but will need very strong grounds to support a claim for a figure in excess of the sum awarded.

The lesson which emerges from these cases is that surveyors are increasingly expected to adopt a principled view towards the question of fees and, where in doubt, take advice at an early stage. It is very much to be hoped that the recent spate of cases dealing with surveying and legal fees in connection with awards is not an indication of a trend towards litigation. Traditionally, party wall surveyors have approached their duties in a spirit of co-operation compromise. As in all other walks of life, litigation should only be contemplated as a last resort.

Andrew Smith is Property Litigation Partner with solicitors Child & Child
andrewsmith@childandchild.co.uk



Related competencies include: M006, T051