

RECOVERY OF SURVEYORS' FEES

The question of the surveyors' fees frequently arises where there is a dispute in respect of party wall matters. In dealing with such disputes, I have noticed that party wall surveyors frequently go about the collection of their fees in the manner which, from a legal point of view is open to question. In this article, I will refer to the situation where the adjoining owner's fees are payable by the building owner although there are of course occasions when some of the fees are payable by the adjoining owner.

What seems to be the invariable practice is for the adjoining owner's surveyor to regard himself as entitled to collect the fees direct from the building owner. Indeed, in many cases, the adjoining owner's surveyor makes out his invoice to the building owner direct. On the face of it, this seems quite reasonable – if the award states that the adjoining owner's surveyor's fees are to be paid by the building owner then surely the adjoining owner's surveyor must be entitled to rely on it.

When we look at the legal justification for this, however, things become rather more difficult. The fact is that the adjoining owner's surveyor is appointed by the adjoining owner. He is obliged to act impartially but, subject to that, he is acting on the adjoining owner's behalf. He accepts his appointments from the adjoining owner and this gives rise to a contractual relationship between them. He has no contract with the building owner so he clearly cannot recover fees from the building owner under a contract. If he wanted to collect his fees from the building owner direct, he would have to rely on the award itself.

It is when the adjoining owner's surveyor seeks to rely on the award to recover fees direct from the building owner that difficulties are likely to arise. The award imposes rights and obligations on the owners not on third parties such as surveyors. The surveyors were instrumental in the preparation of the award but they are not parties to the award and it is questionable whether there exists a right for an outsider to rely on the award. It is primarily for the benefit of the owners and not for others.

This difficulty was highlighted in the case of *Onigbanjo v. Pearson* [2008] BLR 507. In this case, the award appeared to say that the adjoining owner's fee would be payable direct to the surveyor by the building owner. The building owner's counsel claimed that, to that extent, the award was invalid. The judge agreed that, as a matter of principle, it must be wrong from 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 adjoining owner, rather than to the adjoining 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...

From a legal point of view, an adjoining owner's surveyor could send a bill to his appointing owner and leave his appointing owner to recover the fees under the award from the building owner. Many surveyors will be reluctant to do this, however, particularly if they assured their appointing owner at the outset that there was no need to worry about fees because they would be paid by the building owner. If the adjoining owner's surveyor wants to enforce payment direct against the building owner, what should he do?

The simple answer is for the adjoining owner's surveyor to take an assignment of the adjoining owner's right to recover fees. The right is a "chose in action" in legal terminology and can easily be assigned. Following such assignment, the adjoining owner's surveyor will

stand in the shoes of the adjoining owner and can recover the fees from the building owner direct. He should notify the building owner formally that the debt has been assigned before bringing proceedings for recovery.

Having said that, it is well known that the adjoining owner's surveyors have brought county court proceedings in the past to enforce payment of their fees directly against the building owner and that such proceedings have been successful. In one particular case, both the district judge and the circuit judge on appeal held that the adjoining owner's surveyor was indeed entitled to sue the building owner direct for recovery of the fees under the award. This fact should not, however, be taken as an indication that such proceedings are necessarily well founded in law. Rather, it should be regarded as an example of the county courts striving to achieve a fair result notwithstanding legal difficulties which might otherwise produce an unjust outcome. This is underlined by the fact that the judge concluded his judgment on the appeal with the words "I may be wrong on the law but I know I am right in justice".

If the adjoining owner's surveyor makes out his bill to the building owner, he may encounter difficulties with VAT. The legal position is that a VAT registered supplier is obliged to send a VAT invoice to his client. For these purposes the "client" is the appointing owner. The surveyor's obligation to act impartially makes no difference to this. If the appointing owner is registered for VAT then he will recover the VAT element from HM Revenue & Customs. He will be entitled to recover only the balance (not of VAT) from the building owner. Conversely, if the appointing owner is not registered for VAT, he will be unable to reclaim the VAT element and the building owner is accordingly obliged to pay the full amount of the bill. The building owner will not be entitled to reclaim the VAT element, even if he is registered for VAT – his is only entitled to reclaim VAT in respect of services provided to him. He is not entitled to reclaim VAT in respect of services provided to others even if he is ultimately responsible for payment of the bill. The principle is that the building owner must compensate the adjoining owner for the actual cost incurred by the adjoining owner. If the adjoining owner is not registered for VAT then his actual cost will be increased by the irrecoverable VAT element.

The principal points to remember are that the courts may take the view that the primary obligation to pay an adjoining owner's surveyor's fees rests with his appointing owner and that the obligation of the building owner is to indemnify the adjoining owner for the actual cost incurred by the adjoining owner in paying his surveyor.

Andrew Smith
Child & Child
14 Grosvenor Crescent
London SW1X 7EE
Direct line: 020 7201 3560
E-mail: andrewsmith@childandchild.co.uk