CHILD & CHILD

Party Walls: The Basic Fundamentals of Appeals and Injunctions

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The flyer says "basic fundamentals" of appeals and injunctions so this is where I will begin. I will generally avoid quoting legal authorities. This talk is mainly aimed at the non-lawyers amongst you and I doubt that you will want to quote case law in your day to day work.

The flyer refers to a Q&A session at the end but feel free to interrupt me with questions as we go along if any queries arise.

The first basic fundamental so far as appeals are concerned is to decide whether or not it would be a good idea to appeal the award. This involves very much more than simply asking whether the award is in some way wrong; it is all too easy, particularly for lawyers, to find defects in party wall awards and in the procedure leading up to the making of the awards. That is not the point. Rather, the point is whether or not an appeal would pass the file-closing test.

The file-closing test is this: do I predict that, when this file is finally archived away, the client will look back on the process and think that, all things considered, it was a good idea to embark on that piece of litigation? Often, the answer will be yes because there are often occasions where there is no other reasonable course than to assert one's rights. It is not a question of merely finding fault but, rather, a question of deciding how best

to address the particular situation in the light of the client's objectives. Sometimes, situations should be addressed by litigation; sometimes by some other means. The lawyer's job is to reach a satisfactory outcome, not merely to exploit a legal defect. The purpose of the court is not to provide a forum for the satisfaction of the lawyers.

We all know that, if there is to be an appeal, the appellant's notice must be filed within 14 days of service of the award on the appellant but there is a lot of misunderstanding as to when service actually occurs. Many practitioners think that the date of service can be ascertained by the application of deeming provisions such as those in the Civil Procedure Rules but this is wrong as confirmed in the recent Court of Appeal case of *Goulandris v Knight*. That case reinforced the principle, established in other areas of the law, that the concept of service depends ultimately on the question of receipt of the document in question and, very broadly speaking, the date of service is the date when receipt, as a matter of fact, occurred. There are exceptions and subtleties to this which are the province of lawyers to debate but the starting point is to consider when the award was actually received by the appellant and to calculate the 14 days from that date. The first of those 14 days is the day of receipt so, if the award is served on a Wednesday, the last day to appeal will be the following Tuesday week. The appellant might of course have received the award by email and might believe that this would not count as service because no consent to service by email had been given under section 15 (1A). Provided that it can be shown that the appellant received the award in a complete and legible form, however, the date of receipt of the email will generally be treated as the date of service.

There is an important distinction between, on the one hand, awards which are perfectly valid but which are objectionable in some way and, on the other hand, awards which are defective and therefore void and of no effect. As a matter of law, there is no necessity to appeal an award simply on the basis that it is defective and of no effect. Under those circumstances, it is often better simply to take the view that the award is a nullity and is therefore incapable of giving rise to the right to do the work in question or any obligation to pay the awarded sums. A common example of an invalid provision in an award is where the award provides (as they often do) that the building owner must make good any damage caused to the adjoining owner's property arising as a consequence of the work. The reason that this provision is invalid is that the Act itself defines and limits the building owner's obligations so far as making good are concerned: those obligations are set out in various sub-subsections. Significantly, they do not relate to works carried out under section 6. Similarly, party wall awards often make provision for payment by the building owner of "money in lieu of making good" in circumstances where the work does not engage any of those sub-sections. An adjoining owner's entitlement to require money in lieu of making good is limited to those situations where the sub sub-subsections are engaged. Where they are not engaged, the adjoining owner's entitlement is limited to a claim in compensation under section 7 (2) and this compensation must be calculated by reference to the usual legal principles. This is not the same as simply totting up the cost of repair and awarding that cost as compensation, particularly where it is obvious that the adjoining owner would have no intention of spending the compensation on the repairs in question.

The procedure for starting an appeal is quite straightforward. All that is required is the completion on form N161 with grounds of appeal which are often no more than a bare

outline of the facts giving rise to the appeal plus payment of the court fee of £140. The procedure is set out in Part 52 of the Civil Procedure Rules. Those rules are designed primarily to deal with appeals from lower courts and are not well suited for appeals against party wall awards. For this reason, the judge responsible for the appeal will generally make an order for directions soon after the appeal has been issued and those directions will supplant the standard arrangements contemplated by the Civil Procedure Rules. Those standard arrangements require a detailed skeleton argument to be filed within 14 days of the appeal being lodged, which is particularly inappropriate in most party wall appeals because, in party wall appeals, the court will generally expect a much higher degree of factual and expert evidence than was available to the surveyors and the lawyers cannot be expected to prepare comprehensive skeleton arguments until all of the evidence is available. Different judges take different views as to the time when skeleton arguments should be prepared.

An appeal can be either by way of a complete rehearing when the judge will consider the issues afresh with the benefit of new evidence or, less commonly, by way of review which traditionally requires the judge merely to consider the papers which were before the surveyors making the award and to determine the issues without recourse to any fresh evidence. In practice, the court rules are sufficiently flexible to enable the judge to adopt whatever procedure and to consider whatever evidence appears appropriate to the circumstances. The judge's jurisdiction is a very wide one: he has power to rescind the award or to modify it in such manner he thinks fit and, of course, to make such order as to costs as he thinks fit.

As in all litigation, the costs of a party wall appeal vary widely from case to case and can be difficult to predict at the outset. A lot can depend on the degree of cooperation (or lack of it) from the opposing lawyers. It is fair to say that party wall appeals are in danger of becoming a bit of an industry.

It is not uncommon for legal costs to be wasted in appeals on fruitless complaints about the conduct of the surveyors and/or the apparent unjustness of the process leading to the award. In many cases, there is no genuine necessity to ventilate issues such as that because the only relevant question that the judge will ultimately need to answer is the question whether or not the award should be rescinded or modified in some way. If the substance of the award is satisfactory notwithstanding any complaints as to process, the judge will naturally see no need to rescind it or to modify it. Under those circumstances, the costs involved in arguing about the process will have gone to waste. A lot of time and money can be saved by identifying at the outset the issues which will actually affect the outcome for the client and by focusing exclusively on those issues.

The court will always encourage the parties to settle their differences by an alternative means of dispute resolution such as mediation and this is particularly appropriate for disputes between neighbours. The court system is under severe financial pressures which is one of the reasons why judges are keen that disputes be settled by other means. A negotiated settlement has obvious benefits for the parties themselves, in addition: it will spare the costs and risks involved in a contested trial and will avoid the necessity to air their differences in public. In addition, terms which have been agreed voluntarily by way of a negotiated settlement are more likely in practice to be honoured.

If the appeal is not settled, then preparations must be made for a contested trial and those preparations will be much the same as in any piece of litigation. Every case is different but I will use as an example the common situation where an adjoining owner's property is let to a tenant at a suitably generous rent and where the tenant decides not to renew his annual tenancy on account of all the disruption which will arise from the work. The adjoining owner then has to find a new tenant who, understandably, will not be prepared to pay full rent for a property which will be subject to such disruption. The adjoining owner does the best he can to rent it out at a good price but can only find a tenant who is prepared to pay, say, 50% of what the rent would otherwise be. The adjoining owner says that this means that he has suffered a loss as a consequence of the awarded works and that he is therefore entitled to compensation from the building owner under section 7 (2). The building owner, on the other hand, says that the adjoining owner's loss did not arise as a consequence of works which engage the Act because the real reason that the tenant did not renew was that he was unprepared to live next door to a disruptive building site. The fact that some of the works engaged the Act are neither here nor there: the tenant would not have renewed the tenancy in any event. The adjoining owner's response is to say that it was only (or predominantly) the works with the Act which drove the tenant's decision not to renew and that, even if this is wrong, it is undeniable that the duration of the project (and the length of time during which the rent is depressed) was increased as a consequence of the section 6 works and that the losses arising during that period quite clearly *are* attributable to the awarded works. How does the case develop?

A case such as that involves: (i) disputed evidence of fact in relation to what was in the tenant's mind when he decided not to renew and in relation to the steps taken by the

adjoining owner to mitigate the loss; (ii) disputed evidence of opinion as to the diminution in rental value of the property during the period of the works; and (iii) disputed propositions of law as to the principles which should be applied to compensation claims in cases such as this. The judge will need to take a decision on each of those issues in order to form a judgment.

The evidence relating to questions of fact is of course given by witnesses in the usual way; that evidence is prepared in advance in the form of witness statements and the contents of those witness statements will comprise the witness's evidence in chief at trial. In a well-run case, the witness statements will focus exclusively on the evidence that the judge needs to hear in order to enable him to make his findings of fact. The judge will not be interested in any opinions held by the witness. By definition, the witness's task is directed solely to questions of fact.

This is quite different from the role of the expert witness whose job is to apply his expertise in forming an opinion, in this case, an opinion as to what the rental value of the property is under various circumstances. Experts are obliged to give their opinion in an impartial manner without regard for the interests of the instructing party (an obligation, sadly, rarely honoured in practice) and will be required to reach agreement on as many points as possible in advance of trial. The job of the judge (rather like the job of a third surveyor) is to determine the matters which the expert witnesses are unable to agree upon, themselves. This will require the preparation of a schedule listing the disputed matters and explaining each expert's position in respect of those matters.

Once the judge has made his findings on the questions of fact and expert opinion, he must apply the correct legal principles to the situation as defined by those findings. This is a matter of pure law for the lawyers to argue.

Party wall appeals are held in the county court but there is of course a right of appeal to the Court of Appeal. Any such appeal, however, is treated as a second appeal for the purposes of the Civil Procedure Rules and cannot, therefore, be pursued without the permission of the Court of Appeal, itself. The Court of Appeal will not give its position unless it considers that:

(a) the appeal would –

(i) have a real prospect of success; *and*

(ii) raise an important point of principle or practice; or

(b) there is some other compelling reason for the Court of Appeal to hear it.

Many attempted appeals, therefore, get no further than the permission stage. A determination by the county court that an award is invalid, incidentally, does not fall within these rules; an appeal against such a determination is treated as a *first* appeal and the county court judge, rather than the Court of Appeal, can give permission to pursue it.

If an adjoining owner is appealing an award, he will naturally not want the awarded works to proceed until after the appeal has been determined. The Act is silent on the question whether, pending appeal, the award binds the parties or whether it is in effect suspended, so that neither party can act on it but common sense favours the former solution. The purpose of the Act would be defeated if an adjoining owner were able,

without risk, to delay the implementation of an award by the simple expedient of filing an appellant's notice. The better view is that, by analogy with the Civil Procedure Rules, an award shall not operate as a stay. If an adjoining owner wishes to prevent the award from being implemented pending the outcome of the appeal, therefore, he should apply for an interim injunction in the usual way. The effect of an interim injunction will be to halt the works and to preserve the status quo pending the eventual hearing of the appeal.

Suspending the work might of course cause significant loss to the building owner, e.g., in the way of contractual delay costs and funding expenses, and it is only fair that the building owner should be protected in respect of such losses in the event that it is ultimately shown that the appeal was without merit. If an appellant wants an interim injunction, therefore, he will have to provide an undertaking to the court to compensate the building owner in respect of those losses if, at the end of the day, it is determined that the appeal was without merit. This is called the cross-undertaking in damages. An interim injunction is likely to be refused if the appellant is unable to demonstrate that he has sufficient funds to satisfy the undertaking. In many residential cases, the building owner will not suffer much financial loss if the awarded works are delayed pending trial of the appeal; but the position can be very different in the case of a substantial commercial development. In cases such as that, the appellant would be taking a big risk in requiring the project to be suspended pending trial. Where a cross-undertaking in damages is given in those sorts of cases, the court may well order a speedy trial with a view to minimising the losses during the interim period. "Speedy" in the context of court proceedings, however, still usually means a number of months, at least.

If it all goes wrong for the appellant and he is ultimately held to his cross-undertaking in damages, there will need to be an enquiry into the question how much should be paid. That enquiry is, in effect, a new claim which has to be determined in the usual way on the basis of the evidence. Enquiries into damages of this sort can take many months or more to resolve, as occurred in the case of *Elite Town Management Limited v Gray.* The trial of that issue lasted a week and involved lengthy contested factual and expert evidence at considerable expense to the parties.

These notes formed the basis at a seminar arranged by structural engineers Sinclair Johnston & Partners and presented by Andrew Smith. Andrew Smith is Chairman of Child & Child.

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