Case No: 7RM01607

IN THE ROMFORD COUNTY COURT

Date: 26th October 2007

Before:

HIS HONOUR JUDGE PLATT

A. BANSAL — **Appellant**

and

A.W. MYERS — **Respondent**

JUDGMENT

1. This is an appeal to the county court under section 10(17) of the Party Wall etc Act 1996. It is a tribute to the surveyors profession as a whole and to the members of the Pyramus and Thisbe Club in particular that issues over party walls have generally been resolved by a pragmatic and co-operative approach to the provisions of the Act and consequently appeals to the County Court have been extremely rare.

2, **The Law**

The material parts of Section 10 of the Act are as follows:

10 Resolution of disputes

(1) Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either—

(a) ... or

(b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as "the three surveyors").

.....

(6) If a surveyor—

(a) appointed under paragraph (b) of subsection (1) by a party to the dispute;

...

refuses to act effectively, the surveyor of the other party may proceed to act ex parte and anything so done by him shall be as effectual as if he had been an agreed surveyor.

(7) If a surveyor—

(a) appointed under paragraph (b) of subsection (1) by a party to the dispute; or

(b) appointed under subsection (4) or (5),

neglects to act effectively for a period of ten days beginning with the day on which either party or the surveyor of the other party serves a request on him, the surveyor of the other party may proceed to act ex parte in respect of the subject matter of the request and anything so done by him shall be as effectual as if he had been an agreed surveyor.

...

(10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter—

(a) which is connected with any work to which this Act relates, and

(b) which is in dispute between the building owner and the adjoining owner.

(11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary award.

(12) An award may determine—

(a) the right to execute any work;

(b) the time and manner of executing any work; and

(c) any other matter arising out of or incidental to the dispute including the costs of making the award;

but any period appointed by the award for executing any work shall not unless otherwise agreed between the building owner and the adjoining owner begin to run until after the expiration of the period prescribed by this Act for service of the notice in respect of which the dispute arises or is deemed to have arisen.

(13) The reasonable costs incurred in—

(a) making or obtaining an award under this section;

(b) reasonable inspections of work to which the award relates; and

(c) any other matter arising out of the dispute,

shall be paid by such of the parties as the surveyor or surveyors making the award determine.

(14) Where the surveyors appointed by the parties make an award the surveyors shall serve it forthwith on the parties.

...

(16) The award shall be conclusive and shall not except as provided by this section be questioned in any court.

(17) Either of the parties to the dispute may, within the period of fourteen days beginning with the day on which an award made under this section is served on him, appeal to the county court against the award and the county court may—

(a) rescind the award or modify it in such manner as the court thinks fit; and

(b) make such order as to costs as the court thinks fit.

3. **The nature of the appeal**

There has been much uncertainty whether a party who wishes to challenge the validity of an award should use the appeal procedure under CPR Part 52 or commence proceedings for a declaration that the purported award is a nullity under CPR Part 8. There are respectable arguments for both approaches but the issue has now been decided by the Court of Appeal in the recent case of **Zissis –v- Lukomski and another** [2006] Estates Gazette Law Reports Volume 2 page 61. It is clear from the judgment of this case that the word "award" in section 10(17) includes an award whose validity one party wishes to challenge. Consequently the procedure under CPR Part 52 is to be followed and the appeal will be by way of rehearing. There is clearly scope within the powers conferred on the county court by section 10(17) for an invalid award to be set aside.

4. **The facts**

The facts of this case fall within a fairly narrow and familiar compass. The parties to this appeal faced an issue which engaged the provisions of the Act and decided to follow the procedure laid down by section 10(1)(b) of the Act. Each party appointed his own surveyor and these surveyors then selected a third surveyor. The surveyor for the Appellant building owner is Mr

G.E.Peachey, the surveyor for the Respondent adjoining owner is Mr P.Antino. The third surveyor selected by them is Mr William Tyzack.

5. Matters proceeded without incident until an award which was published by both surveyors on 19th March 2007. Clause 11 of the award is as follows:

> "That the building owner shall upon service of this award (or as soon thereafter as the cost may be determined) pay the adjoining owner's reasonable costs by way of surveyors fees in connection with the preparation of this award and one subsequent site inspection."

6. Clause 12 of the award set out the usual provision giving the surveyors the right to make and issue further awards.

7. While there was no dispute that the Appellant as the building owner was liable in principle to pay the Respondent's surveyors fees a lively dispute developed as to the reasonableness of the amount claimed.

8. The claim for a fee of £900 plus VAT was first indicated by Mr Antino to Mr Peachey in a detailed letter of 15th February 2007 in which after referring to various technical issues, he states :

> "In respect of my fees as previously advised my fees incurred to date are £900 + VAT and should be inserted into the award, please note that this does not include for any future inspections or dealing with any issues or correspondence which you may produce.
>
> You are also aware that my fees are charged at £160 per hour or part thereof + VAT."

9. The substantive reply to the latter from Mr Peachey to Mr Antino is dated 14th March in which he states

> It seems quite clear to me that your fees are completely unreasonable and it is not possible for me to include them with the Award. The Act clearly states that the building owner is responsible to pay your reasonable costs; clearly you will need to agree with Mr Bansal what is reasonable.

> It is not necessary to include your fees within the award and there is no reason why the award cannot be signed and published before you come to some agreement with Mr Bansal.....

10. On 16th March Mr Antino replied confirming that he had signed the awards and protesting at what he considered to be Mr Peachey's unorthodox approach to dealing with his fees. Mr Peachey did not reply to that letter.

11. On 20th March Mr Antino wrote again to Mr Peachey confirming that the awards had been published without any mention of his fees and again seeking agreement to his fees of £900 + VAT. The letter starts

> "Please find enclosed our 10 day notice in accordance with the above matter following the dispute you have created between ourselves in regards to our fees."

and concludes

> "If you fail to agree and act effectively we will in accordance with the Act as you are well aware pursuant to 10|(6) and (7) proceed ex parte

12. Enclosed with the letter was a formal notice under section 10(7)(a)(b) (*sic*) requesting Mr Peachey to act effectively in determining the dispute. This letter presumably arrived in the ordinary course of post and the 10 day period therefore began to run on 22nd March.

13. Mr Peachey responded on 26th March. The relevant part of the letter is as follows:

> "You are again confusing a dispute with a failure to act: this is an extremely simple party wall matter and I cannot justify your fees to my appointing owner. I am not prepared to agree your fee without sight of a full breakdown of your time. please let me have this as soon as possible and I will again discuss with my appointing owner."

14. On 27th March Mr Antino replied with a full breakdown of his fees which now amounted to £1199 + VAT

15. On 29th March Mr Peachey replied indicating that he would discuss the fee breakdown with his client

16. Having heard nothing further from Mr Peachey, Mr Antino proceeded on 10th April to publish an ex parte award determining his fees at £900 + VAT.

17. Mr Peachey replied on 13th April claiming that the award was invalid. He He also disputed that he had failed to act effectively since he had written twice to Mr Antino since receiving the 10 day notice. He indicated his client's intention to appeal the award and invited Mr Antino to withdraw the ex parte award and refer the matter to the Third Surveyor for resolution. Mr ntino declined to do so.

18. **Was the award of 10th April a valid award ?**

The Appellant's contention is that Mr Peachey did not fail to act effectively and that the award should therefore be set aside, that there was in fact a dispute which should have been referred to the Third Surveyor. The Respondent's contention is that there has been a clear failure to act effectively, that Mr Peachey has followed the wrong procedure initially in suggesting that this was a matter for Mr Antino to negotiate direct with Mr Bansal, that no adequate reasons were given for rejecting the amount claimed for Mr Antino's fees, that Mr Peachey did not request a breakdown of fees until 26th March and that having received that breakdown by return he then remained silent for ten working days before Mr Antino published his award and finally that Mr Peachey never at any time put forward a figure which he was prepared to agree.

19. In my judgement the Respondent is correct. As a matter of law the question of fees is part of the award to be made by the appointed surveyors under section 10(13). It is not a matter for negotiation directly between one surveyor and the other surveyor's client. Such communications would be wholly unprofessional. It was Mr Peachey's responsibility acting jointly with Mr Antino to determine the fee to be awarded. If he was not prepared to accept the global figure proposed he should immediately have requested a

breakdown. The delay between 15th February and 16th March in requesting that breakdown is wholly unexplained.

20. Having received the breakdown Mr Peachey was then under a duty not just to discuss matters with his client but to indicate expeditiously what items were disputed and why and to suggest his own figure. Simply remaining silent for ten working days is not acting effectively. If he had responded with reasoned objections and the two surveyors were unable to resolve the issue, then and only then there would be a dispute to be referred to the Third Surveyor for his determination. It is simply unacceptable for Mr Antino to be left with no more than a bare assertion that his fees were unreasonable. The award is therefore a valid award.

21. **Consequences.** Since I have determined that the award was valid the Appellant has lost his right to have this issue referred to the Third Surveyor for determination as a dispute. But that does not mean that the award is automatically upheld. The initial appeal filed simply invited the court to set aside the award. That appeal has failed. However the real issue between the parties is and always has been over the correct level of fees which the Appellant is bound to pay.

22. That is an issue which the court is still able to determine under its powers to modify the award and it would be wholly disproportionate to require two unrepresented parties to go though the procedural hoops necessary to amend the notice of appeal and require further evidence. Mr Antino has already provided a breakdown of his fees and I am grateful to him for suggesting that I should now determine this real issue by written submissions in a summary manner. Mr Peachey has sent in his written observations on the fee breakdown and I have considered what he has to say. I have also taken account of the submissions made by the Respondent in his reply to the appeal notice. I accept that the work as set out in Mr Antino's breakdown has been reasonably done at the appropriate level, and that the hourly rate is not In my judgment unreasonable. It follows that the fee of £900 +VAT as set out in the award has been properly justified. The appeal is therefore dismissed and that sum is now payable by the Appellant in 14 days.

23. **Costs of the appeal** . Since the Respondent has been entirely successful in resisting this appeal it must follow that he is entitled to his costs as a litigant in person. Subject to what I say below I propose to assess those costs summarily by written submissions reminding the Respondent that as a litigant in person the costs which he wishes to claim for his surveyor attending court must be fees to the surveyor's attendance as a witness and not as an advocate. A surveyor does not have the right to conduct litigation for reward in the county court. The Respondent needs to indicate how many hours he has spent preparing his case and attending court. He is entitled to claim at the rate of £9.25 per hour for this unless he has actually lost wages in preparation or attending court in which case supporting evidence of the amount of net loss of wages is required. The witness expenses should be set out separately for each day.

24. Alternatively in order to avoid what may be a tedious an unfamiliar exercise I would be prepared to take a more broad brush approach and simply order the Appellant to pay a contribution towards the Respondent's costs of £800.

24. The order is attached and judgment will formally be pronounced on Friday 2nd November 2007 at 10 00 a.m. Neither party is required to attend.

26th October 2007

Case No: 7RM01607

IN THE ROMFORD COUNTY COURT

Date: 2nd November 2007

Before:

HIS HONOUR JUDGE PLATT

A. BANSAL **Appellant**

and

A.W. MYERS **Respondent**

Upon hearing the parties in person and considering the documents which have been filed and the written submissions which have been made

IT IS ORDERED THAT

1. The Appeal is dismissed

2. The Respondent may by 4 p.m. Thursday 1st November 2007 elect to accept an order for payment by the Appellant of a contribution of £800 towards his costs of this appeal. In default the following provisions of this order shall have effect.

3. The Appellant do pay the Respondent's costs of this appeal as a litigant in person to be summarily assessed on written submissions if not agreed.

4. The Respondent do lodge with the court a schedule of his costs by 4 p.m. on 9th November 2007 accompanied by any fee notes or supporting documents evidencing any loss of wages and serve a copy on the Appellant.

5. The Appellant do by 4 p.m. on 23rd November lodge any objections which he wishes to make and serve a copy on the Respondent. The claim for costs will then be summarily assessed by the court and added to this order.