SMITH v JONES

Party Wall Award – Surveyor's Jurisdiction – Surveyor's Award made without Notices being Served –Trespass – Party Fence Wall - Party Wall etc. Act 1996, s 1, s 3, s 6(5), s 10.

Court 17, Rolls Building, London
Mr Justice Akenhead
6 November 2013

Elizabeth Repper for the "Appellant", Miss Smith
Nick Isaac for the "Respondent", Mr Jones
Stuart Frame for the "Intervener", the Faculty of T & P Surveyors

Instructing Solicitor: **Matthew Hearsum**, Morrisons Solicitors LLP

INTRODUCTION

1. Whether surveyors can make an award without a notice being served first is an issue of much discussion, but on which there are no decided cases that are binding authority.

2. With this in mind, a moot on the issue took place before Mr Justice Akenhead, the Judge in charge of the Technology and Construction Court, to enable arguments to be put by counseland judicially considered.

3. The facts on which the moot are based are entirely fictional and any resemblance to a real case is purely coincidental. In particular, the "Faculty of T & P Surveyors" is an entirely fictional organisation and should not be confused with the Faculty of Party Wall Surveyors or the Pyramus and Thisbie Club ("P & T") who have neither approved nor endorsed the cases put forward in this moot.

4. His Lordship's decision is in no way legally binding, and must not be considered as the giving of legal advice or a legal opinion. It is, however, a useful example of judicial thinking on the issue.

AGREED FACTS

5. Miss Smith is the registered proprietor of the freehold interest in 4 North Street, London. No. 4 is a Victorian semi-detached house adjoining No. 2 North Street. Mr Jones is the registered proprietor of the freehold interest in No. 2

6. Nos. 2 and 4 are separated by a 9" London brick party wall built equally astride the boundary line.

7. At around 08:00 on Saturday 6 July 2013, without serving any notices and without any warning at all, Miss Smith's contractors commenced renovation and construction works at No. 4, including:

    - the replacement of an old timber fence with a new brick party fence wall built astride the boundary line; and
    - Cutting into the party wall between Nos. 2 and 4 at first floor level to insert steel beams bearing on to pad stones in the party wall which would be used to support a dormer loft conversation at No. 4

8. Mr Jones was in bed, and was woken by the sound of Miss Smith's contractors cutting into the party wall that adjoined his bedroom. He put his dressing gown and slippers on, went next door,

and demanded that Miss Smith's contractors stop works. He pointed out that Miss Smith had not served any notice under the Party Wall etc. Act 1996 and so she had no rights to undertake works to the party wall, or indeed to erect the new party fence wall he has just seen in his garden.

9. Miss Smith's contractors initially refused to speak with Mr Jones, but agreed to contact Miss Smith and pass on his complaints. Miss Smith attended site around an hour later. Mr Jones again pointed out that Miss Smith could not undertake the above works without notices being served, surveyors appointed and an award made.

10. Miss Smith said that she knew all about "the Party Walls Regulations" and she did not have to serve notices because the works were within permitted development. She said she had spoken to the planning department at the council who had confirmed this.

11. Mr Jones said that this simply could not be the case and asked Miss Smith to stop works, at least for the weekend, until they could both consult a party wall surveyor. Miss Smith refused and her contractors carried on works.

12. By Sunday afternoon Miss Smith's contactor had:-

    - Completed the cutting into the party wall and insertion of the steel beams, which had caused substantial cracking to Mr Jones' bedroom on the other side of the wall; and
    - Completed the construction of a brick party fence wall equally astride, and down the whole length of, the boundary line

13. On Monday morning Mr Jones telephoned Mr Grey, a Chartered Surveyor specializing in party structure matters and explained the background to him. Mr Grey assured Mr Jones that all was not lost, and the matter could still be dealt with.

14. Mr Grey wrote to Miss Smith on Tuesday 9 June requesting that Miss Smith appoint a surveyor to issue an award, and enclosed a notice under section 10(4) of the 1996 Act signed by Mr Jones.

15. On Tuesday 23 July Miss Smith had not appointed a surveyor. Mr Jones therefore appointed Mr Green under section 10(4) of the 1996 Act on her behalf.

16. Between Tuesday 23 July and Tuesday 6 August 2013 Mr Green unsuccessfully attempted to contact Miss Smith. Miss Smith eventually returned Mr Green's call, and agreed that the surveyors could inspect, but this was without prejudice to her case that she had not appointed Mr Green.

17. On Tuesday 13 August 2013 Mr Grey and Mr Green made an award containing the following provisions:-

    - That within 14 days of the date of this award the Building Owner shall pay to the Adjoining Owner the sum of £3,000 (inclusive of VAT) in respect of the decorative damage to front bedroom of No. 2.
    - That within 28 days of the date of this award the Building Owner shall demolish the party fence wall constructed astride the boundary line and make good any damage to No. 2, including but not limited to the removal of all building materials and reinstatement of the garden to No. 2.
    - That the Building Owner may, but shall be under no obligation to, build a boundary wall wholly on the land belonging to No. 4 at (but not astride) the boundary line provided that the construction of that wall is commenced no later than 12 months from the date of this award and is completed within 28 days.

- The within 14 days of the date of this award the Building Owner must pay the fees of Mr Grey in the sum of £1,500 plus VAT and Mr Green in the sum of £1,500 plus VAT"

18. On Friday 23 August 2013 Miss Smith (acting in person) filed an Appellant's Notice and Grounds of Appeal seeking to set aside the award on the basis that it was made without jurisdiction.

19. Upon hearing about the appeal the Faculty of T & P Surveyors, a collective of surveyors specialising in party wall matters, applied for, and was granted, permission to intervene in the appeal and make submission to the Court.

20. Miss Repper appeared on behalf of Miss Smith who seeks to have the Award set aside on the basis that it was made without jurisdiction.

21. Mr Isaac appeared on behalf of Mr Jones Mr Jones resists the appeal, and seeks to have the Award confirmed.

22. Mr Frame appears on behalf of the Faculty of T & P Surveyors, who seek clarification of the law relation to the surveyors' jurisdiction generally, but specifically a finding that the surveyors' jurisdiction is conditional upon the service of one or more notices.

AKENHEAD J:

23. I think that the Party Wall Act 1996 has deliberately changed the law as it was before. I think that section 55(i) [of the London Building Act (Amendment) Act 1939] was clearly a procedure which envisioned that Act being engaged only after notice had been given under the statute. Now one thing is markedly clear, it seems to me, about the 1996 Act; there is no such express suggestion.

24. Now it does seem to me that there are two types of dispute; there are "disputes" and there are "deemed disputes". The "deemed disputes" arise in a number of places. For instance section 5 talks about where an owner on whom a party structure notice, or a counter-notice, has been served does not serve a notice indicating consent to the notice or counter-notice, and he is deemed to have dissented and a dispute is deemed to have arisen.

25. That of course is not the only way a dispute can arise because there are, so to speak, "default disputes". If one party chooses, or forgets, to comply with the notice provisions he or she is deemed to have dissented and there is a deemed dispute.

26. There are other types of dispute that can arise other than the "deemed" dispute; for example, section 1(8), where any dispute arising under that section between the building owner and the adjoining owner is to be determined in accordance with section 10. Now, it doesn't say "where any dispute arises following the service of a notice by the building owner". In that case the position would be absolutely clear. But it chooses not to. I think that's a factor.

27. I think it is clear that disputes can arise where a notice is served and counter-notice comes back saying "no we don't want that, we want this that and the other" or "we don't want you to do the work at all" or "we want you to do it this way and to give us this" relief or protection or whatever it is. Obviously disputes can arise then because the building owner may say "you are asking for much too much" or "you are asking for the wrong thing" so obviously disputes can arise following the service of a notice or a counter notice.

28. So the question is therefore whether disputes can arise other than following the service of notices. Notices are undoubtedly important. But when you get to section 10(1), and a number people who have spoken today have stated it is expressed quite widely, talks about a dispute arising between building owner and adjoining owner "in respect of nay matter connected with any work to which this Act relates".

29. In this case, Miss Smith now accepts that she wanted to build a party fence wall on the boundary. Now, is that a matter connected to any work to which the Act relates? The answer must be yes.

30. Similarly if a further notice is served in respect of the section 2 works does it relate to something which should have been the subject matter of a party structure notice? Is this connect ted to works to which the act relates? Yes. So, I don't see that there is a real problem as far as section 10(1) is concerned.

31. But the argument is put extremely well by Miss Repper and Mr Frame, that you have got to look at the work to which the Act relates. They say that it is not work to which the act relates if it is done in breach of the statute; it cannot be work to which the Act relates. Now, that is a possibility, but it is a counter-intuitive one.

32. Let's take section 1(2). It imposes a statutory obligation on the building owner to serve a notice. What's happened here - and it may be because Miss Smith is ignorant, or because she has been advised and she is deliberately ignoring the advice , who knows - I don't think it matters because what she wanted to do was to build a party fence wall. She may not have realised it was a party fence wall but that is what she actually desired to build. She was therefore under a statutory duty to serve notice.

33. The Courts these days often apply a purposive approach to statutory interpretation.

34. Of course there is a remedy available to Mr Jones. On the weekend he could ring up a High Court Judge who is on duty 24 hours a day on the weekend and get an injunction. I have granted one or two party wall injunctions on the weekend because a county court judge is not available. I simply give an injunction saying "you will do no work until Tuesday of next week, when you will come back before the Court and we can talk about where we go from here". So there is a remedy available although it is one that many would rather not go down.

35. But, I am of the view that the Act is engaged, and the surveyors as appointed did have jurisdiction to interest themselves in the dispute – and there is a dispute between the parties as to whether the Act is engaged at all.

36. There is always a problem in adjudication, party wall award procedures and arbitration as to whether the tribunal, the surveyors in this case, have jurisdiction. If in fact they don't have jurisdiction it does not matter what they decide, subject to estoppel and waiver arguments which do not arise in this case. If they decide something that they don't have jurisdiction to decide, it's not enforceable, it's pointless; they might as well have been sitting is a pub talking into an empty glass.

37. But if they do have jurisdiction, and one side decides not to participate, well that that is that party's problem. They cannot turn up and say "well we didn't bother to take part because we didn't think they had jurisdiction". That's not an excuse. There is always going to be that problem and there are procedures available to have a declaration, or an appeal accompanied by a declaration application, that there was no jurisdiction so there is protection for a building owner like Miss Smith in certain circumstances like these.

38. I think this Act, although in many respects it follows the procedures laid down in the earlier statute [the London Building Acts (Amendment) Act 1939], extending it nationally, it is one in which this respect shows a marked difference. I think the surveyors have jurisdiction.

39. Now when we come to the award, what has happened in fact is because Miss Smith had not engaged the Act she has committed a trespass in building the wall.

40. I think the slightly odd result of the Court of Appeal's decision on Blake v Reeves, which is a

difficulty Mr Isaac recognises is that, as it turns out, the Surveyors did not have jurisdiction [in respect of Part B of the award] not because there was not a dispute - there was a dispute - but because the surveyors did not have jurisdiction to give an equitable or common law remedy in the nature of an injunction. [Part B of the Award] would therefore not be enforceable and so there is that little difficulty.

41. It would have been different if the surveyors had simply made a declaration that the wall was unlawful and contrary to the Act because Miss Smith had not followed the Act. But as soon as the surveyors decide that wall should be removed (which will be not inexpensive), then I think they exceed the jurisdiction.

42. That can be sorted out, and it may well be, as I have come across one or two cases like this in real life. The adjoining owners would issue separate proceedings [for trespass] to be heard at the same time because the reality is that Miss Smith does not have a leg to stand on.

43. Many judges would think that a blatant failure to comply with the party wall act would bring about a requirement that the wall should come down and something else is built. I take the point that is not really in issue here, but it is a point that was eloquently put from the floor.

44. The provisions of section 1(5) and 1(6), where the building owner wants to build on his or her own land, there is no automatic right to project footings and foundations into your next door neighbour's land. It does say "in so far as they are necessary", and I think that is an important qualification. It may be cheaper to put the footings in the next door neighbours land but it may not be necessary and, of course, it restricts the adjoining owner's right to do things in his or her garden.

45. I think that therefore, so far as "Part C" of the award is concerned, I would have allowed a late application [by Mr Jones] to add an objection [to the Award] as it would have to be qualified with "if and to the extent it was necessary" and if I were reviewing the award, I would set aside C in any event and would say that the building owner, if it so wishes, may follow the procedures sect out in section 1 and see what comes of it - rather than give a blanket permission.

46. I don't pretend that I am 100% sure that I am right on this but would put at least 10p on being right!

47. Anyway, thank you very much indeed. Can I thank on your behalf the three barristers who have given up their time, not just turning up, but in producing their skeleton arguments that are very well researched.

Reported by: Matthew Hearsum, Solicitor