SMITH v JONES (TAYLOR intervening)

Party wall award – Fees - Claim by surveyor against Building Owner – Whether surveyors are statutory agents – whether award a contract – Party wall etc. Act 1996, ss. 10(12), 10(13)

Court 7, St Dunstan's House, London
Mr Justice Akenhead

21 July 2010

Michael Jefferis for the "Appellant", Mr Smith
Nick Isaac for the "Respondent", Mr Jones
Laura Collignon for the "Intervener", Mrs Taylor

Instructing Solicitor: Matthew Hearsum

BACKGROUND

Whether a surveyor appointed by an Adjoining Owner under the Party Wall etc. Act 1996 ("the PWeA") can sue a Building Owner directly for his fee is a much debated issue on which there is no clear authority. Given the usually modest sums involved, it is unlikely that such a case will reach an appellate Court.

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

The facts on which the moot are based are entirely fictional, but represent a common situation. 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 fully argued and considered judicial thinking on the issue.

FACTS

A "brief" was prepared for Counsel which contained a set of set of "agreed facts" and example documents. A brief summary of the facts is set out below.

Mr Jones, the Building Owner, wanted to undertake a loft conversion of his semi-detached property in South London. The works required steel beams to be cut into the party wall he shares with the adjoining owner Mrs Taylor.

Mr Jones appointed a surveyor and duly served notice under ss. 2(2)(f), (j), (k) and (n) PWeA.

Mrs Taylor appointed Mr Smith as her surveyor. Mr Smith told Mrs Taylor words to the effect of "Don't worry about my fees, they will be dealt with in the award and Mr Jones will have to pay them". Shortly after the appointed surveyors made an award on standard terms. Clause 11 of that award read:-

> *"11. That the Building Owner [i.e. Mr Jones] shall immediately on the signing of this Award pay the Adjoining Owner's Surveyor's [i.e. Mr Smith's] fees of £1,500 plus VAT in connection with the preparation of this Award, and one subsequent inspection of the works. In the event of damage being caused or other contingencies or variations arising, a further fee shall be payable."*

Mr Jones refused to pay Mr Smith. Mr Smith filed a Complaint in the local Magistrates' Court, and a Summons was issued for Mr Jones. At the hearing Mr Smith's Complaint was dismissed by a District Judge on the ground that, as a matter of law, an Adjoining Owner's Surveyor does not have standing to bring proceedings to recover his fees directly against a Building Owner. Mr Smith

appealed to the High Court by way of case stated.

ARGUMENTS

Each counsel submitted skeleton arguments. In addition, the following oral arguments were made.

Mr Smith

On behalf of Mr Smith it was argued that s. 10(13) PWeA restricts who can be made to pay under an award to "the parties" i.e. the Building Owner and the Adjoining Owner. It does not restrict the class of persons to whom payments are to be made. Given the wide discretion conferred on the surveyors by s. 10(13) PWeA, if Parliament had intended to restrict the class of those entitled to receive payment (and therefore enforce the award) to the Building Owner and the Adjoining Owner, it would have done so in the same was in which it had restricted the class of persons who can be made to pay.

Moreover, s. 10(13) PWeA refers to the costs being "paid by...the parties"; it does not use the words "reimburse", "indemnify" or similar, because that is not what parliament intended to be the case.

In the alternative, it was argued that the surveyors act as statutory agents on behalf of their respective appointing owner. As statutory agents, they enter into a contract to resolve issues in dispute between their principals i.e. the award. That being the case, the surveyor appointed by the Adjoining Owner can enforce a clause for payment by virtue of the Contract (Rights of Third Parties Act) 1999, as it is clearly for his benefit.

Turning to the limited authorities on the issue, it was argued that *Anstey Horne & Co v Phillip Lai* [1], although not binding, is the most helpful authority, as it contains a more detailed discussion of the issue and the learned Judge's reasoning than in other authorities. In *Onigbanjo v Pearson* [2], the learned Judge carefully avoided the question at hand by finding that the award did not require payment to be made directly to the Adjoining Owners surveyor, and if it did, he would have amended the Award. In *Van Maanen v West Greenwich Developments LLP* [3] the point is only very briefly dealt with. *Blake v Reeves* [4] was decided on a different issue i.e. whether the surveyor can award the pre-action costs of an abortive application for an injunction.

Mrs Taylor

On behalf of Mrs Taylor it was argued that Mr Smith must be able to sue Mr Jones, as Mr Smith could not sue Mrs Taylor for her fees. In particular:-

1. There was no clause in the letter of appointment which refers to Mrs Taylor being liable for the fees; and
2. In fact quite the contrary was true, as just before she signed the letter of appointment Mr Smith had told Mrs Taylor that she would not have to pay his fees; and
3. The Award expressly states that Mr Jones is to pay the fees.

As regards the contract argument, In *Norweb plc v Dixon* [5] Mr Justice Dyson (as he then was) held:

> *"...a relationship which results from some degree of legal compulsion is nevertheless regarded as contractual because the parties still have considerable freedom to regulate its incidents."*

That being the case, although the Adjoining Owner may be compelled to appoint a surveyor (or face one being appointed for them), under s. 2 PWeA the surveyors thus appointed have a wide ambit within which to regulate the incidence of the award.

As regards whether Mr Smith has any right under the PWeA to enforce the award, the Court should apply the standard principals of statutory interpretation. In particular the Court:-

1. should construe legislation in favour of a common sense construction and against absurdity; and
2. against unworkable or impractical result; and
3. against an inconvenient result.

In circumstances where an Adjoining Owner effectively has the works imposed on them by the Building Owner, it would be nonsensical to force the Adjoining Owner to pay to instruct a surveyor in the hope that the fees might be recovered from the Building Owner. A far simpler and more workable solution is for the surveyor appointed by the Adjoining Owner to have the right to enforce payment of his fees against the Building Owner.

Mr Jones

On behalf of Mr Jones it was argued that the question of whether Mr Smith can recover his fees from Mrs Taylor is irrelevant to the question of whether Mr Smith has a claim against Mr Jones. It was open to Mr Smith to include provisions as to payment, for example in the form of a client care letter, but he decided not to and that was a commercial decision for him. In any event, Mr Smith may be able to recover his fees on a quantum meruit basis.

The central issue is whether Mr Smith can sue Mr Jones.

Dealing with the contractual argument, there are many examples where an award cannot be said to be contractual; for example, where an award is made by the agreed surveyor or the third surveyor, or where the Adjoining Owner fails to act and the Building Owner makes the appointment is appointed on their behalf. It was inconceivable that it was Parliament's intention for an award to be contractual in some circumstances but not in others.

Moreover, it could not be said be said that an award is a contract in the sense talked about by Dyson J in Norweb, where the parties are free to enter into relationship and free to negotiate the terms of the contract. For example, whilst the list of matters in s.2 PWeA is lengthy, it is not comprehensive, and there are many types of works which may be undertaken that do not fall within that list, and with cannot be dealt with in an award because it would be beyond the surveyors jurisdiction. The freedom to negotiate referred to by Dyson J is not present.

Although the matters an award can deal with under s. 10(12) and (13) PWeA are set out in a reasonably wide way, there are limitations on the surveyors' jurisdiction; for example, in Reeves v Blake the Court of Appeal held that the surveyors' jurisdiction did not extend to awarding pre-action costs. Nor, it was argued, did it extend to conferring a right of action on one or more of the surveyors.

However, if this was wrong and an award was a contract, it seems correct that the Mr Smith would be entitled to enforce the clause in the award in respect of his fees under the Contract (Rights of Third Parties) Act 1999. However, for the reasons above, an award is not a contract, and the argument does not get that far.

[1] unreported, HHJ Elly, Brentford County Court, 21 January 2000
[2] [2008] BLR 507
[3] unreported, DJ Southcombe, Mayor's and City of London Court, 27 November 2009
[4] [2009] EWCA Civ 611, [2010] 1 WLR 1
[5] [1995] 3 All ER 952 at 958

The argument that s. 10(13) PWeA is wide enough to allow Mr Smith to bring the claim against Mr Jones might have some force if that provision were read on it's own, however the Court must consider that provision in the context of s. 10 PWeA in it's entirety. s. 10 PWeA refers to disputes between the two parties (the Building Owner and the Adjoining Owner) and, save for the mechanics of resolving the dispute, it does not involve the surveyors. A further example is the right to bring an appeal under s. 10(17) PWea, which is exclusive to the parties because it is only those parties rights that are affected by the award, and not the surveyors'.

Others

In addition to Counsel, the Judge heard brief submissions from a number of surveyors and lawyers, including Chris Cuthbert, Donald Jessop, Robin Ainsworth, Simon Levy, Andrew Smith, Matthew Hearsum and David Bowden.

DECISION

The "appeal" would be dismissed.

His Lordship said that in his view it is only the Building Owner and the Adjoining Owner who are the parties to an Award, and therefore only they can enforce or appeal the Award.

If Parliament had intended that a surveyor appointed by the Adjoining Owner could enforce an award of his fees, then it would have been a simple matter for Parliament to have spelt it out in the Act. Parliament did not include such a provision for the clear reason that awards under s. 10 PWeA are only enforceable (or appealable) by the parties to it i.e. the Building Owner and Adjoining Owner.

Considering the earlier judgment of His Honour Judge Elly in Anstey Horne & Co v Philip Lai, His Lordship said that he was not convinced the decision was "wrong on the law but right in justice"; if the Act, properly interpreted, did not allow the surveyor appointed by the Adjoining Owner to sue the Building Owner for his fees directly, it would be unjust to permit him to do so.

His Lordship said that the Award could not be a contract, as there is no statutory hint that Parliament intended to impose such a contract. It was not necessary to imagine, imply or impose a contract, because Parliament has provided a statutorily enforceable dispute resolution method.

That being the case, the question stated is answered in the negative. Where an award under the Party Wall etc. Act 1996 provides for the Building Owner to pay the fees of a surveyor appointed by the Adjoining Owner that surveyor does not, as of right, have standing to bring proceedings against the Building Owner.

Reported by: Matthew Hearsum, Solicitor