Neutral Citation Number: [2018] EWCA Civ XXX

Case No: B2/2017/0583

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEWES COUNTY COURT
HIS HONOUR JUDGE COLTART
Claim No C00DA485

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/18

Before :

LORD JUSTICE IRWIN

LORD JUSTICE HICKINBOTTOM
and
SIR JACK BEATSON

- -

Between :

GROUP ONE INVESTMENTS LIMITED
trading as BIRCHFIELD HOMES

Appellant

- and -

(1) PHILIP KEANE
(2) LAURA KEANE

Respondents

Stuart J Frame (instructed under the **Direct Public Access Scheme**) for the **Appellant**
Graeme Sampson (instructed under the **Direct Public Access Scheme**) for the **Respondents**

Hearing date: 24 May 2018

- -

Approved Judgment

DAR Transcript of WordWave International Ltd trading as DTI
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Lord Justice Hickinbottom:

Introduction

1. This appeal raises the short issue of whether a party wall surveyor acting under section 10 of the Party Wall etc Act 1996 ("the 1996 Act") can award an adjoining owner the costs and expenses he has incurred in respect of contemplated but unissued proceedings against a building owner performing works within the scope of the Act to require him to comply with the mandatory statutory notice procedure.

The Law

2. The 1996 Act establishes a statutory procedure intended to identify and then resolve any disputes between neighbours that might arise when someone performs building works on his land that might adversely affect the legitimate interests of an adjacent landowner. The scheme operates outside the common law, the purpose of the 1996 Act being to provide a simple and relatively inexpensive statutory dispute resolution mechanism, which, when the provisions of the Act are operated, supplants the respective common law rights and replaces them with rights under the Act (see Kaye v Lawrence [2010] EWHC 2678 (TCC) at [59] per Ramsey J, and Gray v Elite Town Management Limited [2016] EWCA Civ 1318 at [38] per Jackson LJ). If for any reason the statutory procedure is not followed, then the parties' respective common law rights and obligations continue to apply.

3. The 1996 Act operates by requiring the owner of the land upon which the works are to be performed to give notice to his neighbour where he wishes to (i) build on the boundary line and there is no existing party structure (section 1), (ii) carry out works to a party structure (sections 2 to 5), or (iii) carry out certain excavation works near to a building or structure of an adjoining owner (section 6).

4. This appeal primarily concerns section 6 excavation works, in relation to which, at least one month before beginning such works, the building owner is required to serve on the adjoining owner a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundations of the adjoining owner's building or structure (section 6(5)). The adjoining owner may object to the works being performed without steps being taken to protect his legitimate interests. Furthermore, by section 6(7):

> "If an owner on whom a notice referred to in subsection (5) has been served does not serve a notice indicating his consent to it within the period of fourteen days beginning with the day on which the notice referred to in subsection (5) was served, he shall be deemed to have dissented from the notice and a dispute shall be deemed to have arisen between the parties."

5. I shall return to the definition of "dispute" for the purposes of the 1996 Act shortly; but it has been generally held to mean and to be limited to a dispute under some provision of the Act itself, including a deemed dispute under section 6(7) (see Blake v Reeves [2009] EWCA Civ 611; [2009] 1 WLR 1 at [21] per Etherton LJ, as he then was).

6. Section 10 of the 1996 Act, under the heading "Resolution of Disputes", provides so far as relevant to this appeal as follows.

> "(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) both parties shall concur in the appointment of one surveyor (in this section referred to as an 'agreed surveyor'); 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').
>
> …
>
> (10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter–
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> (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–
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> (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;…
>
> (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.

…

> (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."

7. The jurisdiction of a surveyor to make an award of the legal costs and expenses of litigation in support of the 1996 Act procedures was considered by this court in Blake v Reeves. In that case, the building owner served notice upon an adjoining owner under section 6(5), and a deemed dispute arose because no consent to the proposed works was forthcoming. The validity of the notice was in issue. The party wall surveyors appointed by the parties made an interim award determining that the notice was valid, but did not at that stage authorise works to take place. The building owner nevertheless began the works, in the mistaken belief that the award had authorised them. The adjoining owner instructed Counsel to settle proceedings in trespass and/or nuisance for injunctive relief. Draft proceedings were settled. However, before they were issued, the building owner undertook to suspend works, pending a further award. In a second award, the surveyors not only authorised the works, but directed the building owner to pay the adjoining owner's costs of the contemplated court proceedings. An appeal to the County Court was allowed on the basis that section 10(10) and (13) of the 1996 Act, which (as I have described) empower duly appointed surveyors to make awards, did not permit them to direct the payment of costs incurred in actual or contemplated litigation. The adjoining owner appealed to this court.

8. In dismissing the appeal, Etherton LJ (with whom Mummery and Moses LJJ agreed) said this:

> "20. In view of the nature of the disputes referred to surveyors under the 1996 Act, and the wide wording of section 10(1), (10), (12)(c) and (13)(c), there can be no doubt that there may be circumstances in which appointed surveyors have the power under section 10 to order payment by one adjoining owner of legal costs reasonably and properly incurred by another. Judge Birtles correctly so held in Onigbanjo v Pearson [2008] BLR 507 especially at [39]….
>
> 21. The power to order payment of such costs under section 10 of the 1996 Act is, however, restricted to costs connected with the statutory dispute resolution mechanism. As a matter of interpretation, the 'dispute' mentioned in section 10(1), (10)(b), (12)(c) and (13)(c) is a dispute arising under the provisions of the 1996 Act, whether an actual dispute within section 1(8) or a deemed dispute under section 4(5) or section 6(7), or a dispute under some other provision.... I agree with Judge Viljoen [the judge below] that, by contrast, proceedings in Court to enforce

common law or equitable remedies, such as damages or an injunction for trespass or nuisance or the threat of them, fall wholly outside the 1996 Act. That is equally true of preparations for such proceedings.

22. That conclusion is consistent with practice and policy. The purpose of the 1996 Act is to provide a mechanism for dispute resolution which avoids recourse to the Courts. A power of the appointed surveyors under the 1996 Act to make provision for costs incurred for the purpose of actual or contemplated litigation in Court would be inconsistent with that statutory objective. Such litigation, resulting from non-compliance with the dispute resolution mechanism, falls entirely outside the statutory dispute resolution framework.

23. Further, the appointed surveyors have no power under the 1996 Act to grant common law or equitable relief for causes of action in trespass or nuisance…. Those were the causes of action for the contemplated and threatened proceedings by the appellant. Leaving aside the 1996 Act, neither Counsel could suggest any example of Parliament conferring on one or more persons, whether or not lawyers, power to make orders for payment of the costs of actual or contemplated litigation, where the Court alone or some body other than those persons has the power to determine the substantive dispute and grant the substantive relief claimed. The observations of Judge Viljoen about the complexity of making costs orders are best understood in this context. The discretionary power to make such orders, which must be exercised in the light of all the circumstances, sits comfortably with the Court or other body having the ability and right to adjudicate the causes of action and grant the substantive relief sought. It sits extremely uncomfortably with any other person or persons having no such ability or right, more particularly if they are not even lawyers….

24. Further, in the ordinary way, no costs are recoverable by a party who prepares for litigation which is never instigated. CPR rule 44.12A [now CPR rule 46.14] provides a limited exception where the parties to a dispute have reached agreement on all issues (including which party is to pay the costs), but they have failed to agree the amount of those costs. It is impossible to conceive of any rational policy reason why Parliament should have wished to provide a different and more favourable position for the recovery of the legal costs of an adjoining owner in respect of possible future litigation concerning work falling within the 1996 Act, where proceedings are never in fact instituted. Bearing in mind that the purpose of the 1996 Act is to provide a means for avoiding litigation, any such exception to the general rule would be strange indeed."

9. I pause to note that, as mentioned in paragraph 5 above, Etherton LJ expressly held that "dispute" as used in section 10(10)(b) and (13)(c) of the 1996 Act, which define the jurisdiction of appointed surveyors, means and is limited to a dispute under some provision of the Act itself. Leaving to one side for the moment the case of Onigbanjo, upon which Mr Sampson relies and to which I will return (see paragraph 33 below), there does not appear to be any case which has questioned the general proposition set out in the penultimate sentence of [21] of that judgment, that Court proceedings to enforce common law or equitable remedies fall wholly outside the 1996 Act.

The Factual Background

10. The Appellant ("the Building Owner") is the owner of Gorsewood Farm, Hartley, Kent. The Respondents ("the Adjoining Owners") own and occupy the neighbouring property, Oaklea.

11. In 2014, the Building Owner obtained planning permission to demolish the single detached property at Gorsewood Farm and build two new semi-detached houses in its place. That required the reduction of the level of land by way of excavation, particularly near the boundary with Oaklea. The Building Owner commenced those works without serving any notice under section 6(5) of the 1996 Act.

12. In mid-June 2014, by which time the works were at an advanced stage with the roof being put on the new properties, the Adjoining Owners sought advice from a surveyor, Lester George IEng AMIStructE MFPWS. Mr George advised that, although it was too late for notice under section 6(5) in respect of the original excavation – so that the Adjoining Owners were left to their common law rights and remedies – due to the difference in levels between the properties, a retaining wall would have to be built. That would require further excavation, which would in itself fall within section 6 of the 1996 Act.

13. Following advice from their insurers, on 14 July 2014 the Adjoining Owners instructed different surveyors (the Durrant Vevers Partnership) to prepare a report for the purpose of a contemplated claim for injunctive relief to compel the Building Owner to serve a section 6(5) notice in respect of the excavation for, and building of, the proposed retaining wall. On 27 July 2014, they also instructed Mr Graeme Sampson of Counsel, who has appeared for the Adjoining Owners before us, and who then advised and drafted particulars of claim for the proposed claim. The Building Owners were informed that an injunction was being sought.

14. On 28 July 2014, the Adjoining Owners were informed by email from a surveyor, Nick Lewis MRICS MFPWS MaPS FCIOB of N J Lewis & Associates Limited, that he had been verbally appointed by the Building Owner to act as its party wall surveyor. On 1 August 2014, he confirmed that he had received a written appointment. Because their insurance did not cover the expenditure, on 6 August 2014 the Adjoining Owners appointed Mr George as their party wall surveyor.

15. Mr Lewis and Mr George thereafter liaised with a view to settling an award in relation to the excavation and works required for the retaining wall. A travelling draft award was in circulation from October 2014. However, by May 2015, the award had still not been finalised; and the Adjoining Owners sought further advice from Mr Sampson in

respect of the 1996 Act procedures and particularly on the draft award which presented them with some concerns.

16. On 16 June 2015, an award was made authorising works to excavate for and construct the retaining wall, and requiring the Building Owner to pay Mr George's fees in the sum of £1,550 ("the Principal Award"). The Adjoining Owner instructed both solicitors and Counsel to advise on, amongst other things, an appeal of the Principal Award; but no proceedings were ever issued.

The Costs Proceedings

17. On 23 February 2016, under the provisions of the 1996 Act, because the two surveyors were unable to agree on the issue, liability for payment of the Adjoining Owners' various legal and surveyor costs incurred in the sum of £8,377.25 was referred to a third surveyor, Gerry Poole BSc FRICS MEWI. Mr Lewis contended that the liability should be restricted to £800.

18. On 25 April 2016, Mr Poole produced an award requiring the Building Owner to pay £1,177.25 of the Adjoining Owners' legal and professional costs ("the Costs Award"). That sum comprised (i) the early fees of Mr George within his invoice dated 15 July 2014 (£301.25), (ii) part of the Durrant Vevers fees in their invoice dated 5 August 2014 (£126 of £903.60) and (iii) an invoice for Mr Sampson dated 15 May 2015 in relation to advice given on the 1996 Act procedures (£750). Citing Blake v Reeves, to the effect that the power to order costs under the 1996 Act is restricted to costs connected with the statutory dispute resolution mechanism, Mr Poole concluded that only those costs had been directly incurred in giving advice on, and the operation of, the 1996 Act procedure. The award also required the Adjoining Owner to pay two-thirds of Mr Poole's costs, and the Building Owner to pay the balance.

19. On 10 May 2015, the Adjoining Owners lodged an appeal in the County Court against the Costs Award, under section 10(7) of the 1996 Act. The appeal was heard by His Honour Judge Coltart sitting at Lewes on 14 February 2017.

20. The key paragraph in the judge's judgment is [3]. Given the Building Owner's failure to engage with the 1996 Act procedure, the judge found that it was reasonable for the Adjoining Owners to seek injunctive relief to compel the Building Owner to comply with the Act and issue the appropriate notice. He distinguished Blake v Reeves on the basis that, in that case, a notice under the 1996 Act had been issued, and the relevant costs were in connection with a common law claim for nuisance and trespass; whilst, in this case, "there had been no commencement of the party wall procedure and, indeed, but for the threat of injunction, it seems to me there would not have been". He therefore considered Mr Poole had been wrong to have considered himself proscribed from considering the costs of the proposed injunctive proceedings; and that those costs could and should be allowed, insofar as they were reasonably incurred. He found that the fees of both Durrant Vevers and Mr Sampson in relation to the proposed claim for an injunction were reasonably incurred, and he found that, over and above the award made by Mr Poole, the award should have included (i) the whole of Durrant Vevers' invoice dated 5 August 2014, (ii) Mr Sampson's invoice dated 27 July 2014 (£2,160), and (iii) the invoice of Gullands Solicitors dated 19 August 2015 which concerned advice about a possible appeal against the Principal Award (£1,382.40). As a result, the judge

considered that an additional £4,320 of the Adjoining Owners' legal costs and expenses should be paid.

21. There were other grounds of appeal relating to specific items. He found that the whole of Mr Sampson's invoice of 26 May 2015, which concerned advice on the 1996 Act procedures, the design of the proposed retaining wall and the effectiveness of the award, in the sum of £1,080, was within the scope of the Act and reasonable. The judge's order to vary the award to include that sum is not the subject of any further appeal. The judge declined to interfere with the award in respect of other items, which again are not the subject of any further appeal.

22. The result of the hearing was consequently that the appeal from Mr Poole's Costs award was allowed, and the amount of the award varied to £6,577.25. The judge also ordered the Building Owner to pay the Adjoining Owner's costs of the referral to the third surveyor, namely £310; the entirety of Mr Poole's costs of £1,050 (rather than the original award limited to £330); and the Adjoining Owners' costs of the appeal in a sum he assessed at £7,500.

The Grounds of Appeal

23. The Building Owner appealed to this court on two grounds, for which Henderson LJ gave permission on 22 December 2017

24. I can deal with one of the grounds very shortly. It was submitted that Judge Coltart erred in awarding the sum of £310 for the Adjoining Owners' costs of referring the costs dispute to the third surveyor, Mr Poole, in the absence of any or any sufficient evidential basis as to the amount or by way of proving these costs had in fact been incurred. However, the costs of the referral were, sensibly, conceded by the Appellant Building Owner below (see page 5D of the transcript); and, before us, the Appellant abandoned any appeal on that ground. It was right to do so. There was no force in it.

25. I therefore turn to the main ground of appeal. Counsel for the Building Owner, Mr Stuart Frame, submits that the judge erred in law by failing to apply the ratio of Blake v Reeves, binding upon him, namely that it is outside the jurisdiction of surveyors appointed under the provisions of the 1996 Act to award legal costs and expenses incurred by an adjoining owner in respect of an actual or contemplated common law claim intended to support the statutory mechanism.

26. As I have described, the judge below was persuaded that Blake v Reeves was distinguishable because in that case a section 6(5) notice had been served and so the dispute resolution process established by the 1996 Act was in operation, and the issue related to the legal costs of contemplated proceedings running in parallel with the statutory procedure; whereas in this case, at the relevant time, no notice had been issued. Before us, Mr Sampson submitted that that was a material distinction. He submitted that the only purpose of the contemplated proceedings was to compel the Building Owner to comply with its obligations under the 1996 Act and serve a notice. For the purposes of section 10(10) of the Act, the legal costs sought to be recovered by the Adjoining Owner were therefore both (a) "connected with any work to which this Act relates", and (b) "in dispute between the building owner and the adjoining owner". The dispute under the Act having later arisen, the costs associated with it included those expended on steps reasonably taken to encourage or require the Building Owner to

serve an appropriate initial notice. Mr Poole as the third surveyor therefore had power to settle an award in respect of those costs, as he purported to do.

27. However, I am wholly unpersuaded by Mr Sampson's submission.

28. In Blake v Reeves, this court clearly held that "dispute" for the purposes of the 1996 Act means and is limited to a dispute under some provision of the Act itself. Thus, the court held that the power of surveyors to settle any matter which was "in dispute" between the parties and to determine who should pay the costs incurred in matters arising out of the "dispute" did not give them the power to direct the payment of costs incurred in court litigation, actual or contemplated.

29. Mr Sampson submitted that the penultimate paragraph of paragraph 21 of Etherton LJ's judgment cannot be read literally, but must be read narrowly to restrict it to the facts of the specific case before him. However, that paragraph is clear and unambiguous. Indeed, in my view it could not have been put in clearer terms. The proposition in paragraph 21 is drawn clearly and deliberately wide; and is justified in the ensuing paragraphs 22-24.

30. Paragraph 21 was part of the ratio of the judgment which is binding upon us. However, in addition, in my respectful view, it is obviously right as a matter of construction of section 10 of the 1996 Act, for the reasons given by Etherton LJ.

31. Briefly, as a matter of construction, "dispute" in section 10 refers to, and only to, a dispute arising under the Act, including a deemed dispute under section 6(5). Section 10 generally restricts the scope of any possible award to such disputes. Court proceedings to enforce, not the rights and remedies emanating from the 1996 Act, but those deriving from the common law or equity fall entirely outside the Act. The costs of such proceedings equally fall outside the ambit of the Act. That is true for the cost of actual proceedings, and the preparation for such proceedings. That analysis, set out so clearly by Etherton LJ, is equally applicable, whether the relevant legal costs and expenses were incurred before or after a 1996 Act notice has been served.

32. Mr Sampson's argument therefore fails as a matter of simple construction of the relevant statutory provisions. But the same matters of practice and policy to which Etherton LJ referred in paragraphs 22-24 of his judgment in Blake v Reeves also apply here. I need not refer to them in detail, but, in short, the clear conclusion on the construction point is consistent with (i) the purpose of the 1996 Act, (ii) the general principle that Parliament does not confer the power to make orders for the payment of the costs of actual or contemplated litigation on an outsider where the court alone has jurisdiction to determine the substantive dispute and grant the substantive relief sought, and (iii) the general principle that costs are not recoverable by a party who prepares for contemplated but uninstigated litigation.

33. In my view, Onigbanjo, relied upon by Mr Sampson, does not assist his case. The case was very different on its facts. The building owner served a section 6 notice. The adjoining owner did not dissent. As a result of the works, cracks appeared in the adjoining owner's property. He wanted an award for compensation from the building owner under section 11 of the 1996 Act. The building owner took no part in the award process. An award was made. The building owner appealed to the County Court.

34. Two particular issues arose. First, there being no dissent to the section 6(5) notice, could the section 10 process for resolving "disputes" come into play? Judge Birtles held that it could. Second, could the award cover the barrister's fees that the adjoining owner had incurred? Judge Birtles held that, as matter of principle, an award could cover legal costs – that was the particular proposition approved by Etherton LJ in Blake v Reeves at [21] – and he was satisfied from the solicitor's witness statement that, although it was contended that Counsel's fee note appeared wholly or partly to cover the drafting of court proceedings (see [34]), the relevant fees "were directly incurred only in giving of advice on, and the operation of the procedure under section 10 of the 1996 Act" (see [40]). Judge Birtles did not suggest that the costs of contemplated court could form part of an award. In my view, his judgment is entirely consistent with the ratio of Blake v Reeves. Insofar as there were any inconsistency, Onigbanjo would of course have been overruled by Blake v Reeves.

35. I understand the frustration of the Adjoining Owners, who simply wished the Building Owner to comply with its obligations under the 1996 Act. Judge Coltart found that they had been reasonable in taking steps towards proceedings to injunct the Building Owner performing further works unless and until a section 6(5) notice had been served – in effect forcing the hand of the Building Owner to serve such a notice.

36. However, although Mr Sampson sought to argue that, in a case such as this where injunctive proceedings are reasonably prepared to ensure compliance by a building owner with the provisions of the 1996 Act, the costs of those contemplated proceedings, although not recoverable through the court, may be recoverable by surveyor's award, that was directly dealt with by Etherton LJ in paragraph 24 of his judgment in Blake v Reeves. Mr Sampson submitted that it was the intention of the statute that there should not be a lacuna into which such costs might fall, and so be irrecoverable. But, even on his own submission, there would be a lacuna if the threat of court proceedings encouraged a building owner to serve a notice, to which the adjoining owner did not dissent; because, he accepted that, in those circumstances, there would never be any "dispute" under the 1996 Act that would empower the surveyors for make an award of those costs. In any event, for the reasons Etherton LJ gave at paragraph 24 of his judgment, it is inconceivable that it was the Parliamentary intention behind or within section 10 of the 1996 Act to put an adjoining owner into a more favourable position than other litigants with regard to the recovery of legal costs in respect of uninstituted proceedings. That is so even when the costs are incurred with a view to forcing a building owner to service an appropriate notice, and with success, so that the notice is served and a dispute may then ensue because the adjoining owner dissents from the notice. The costs of the contemplated but unissued proceedings cannot be said to be part of the costs falling within section 10 for the purposes of an award.

Conclusion

37. For those reasons, subject to my Lords, Sir Jack Beatson and Irwin LJ, I would allow this appeal. I would hear submissions on the appropriate form of order.

Sir Jack Beatson:

38. I agree. I would emphasise only that, while of course this court is bound by Blake v Reeves, for the reasons given by my Lord, in my judgment, it would have been clear from a reading of the relevant provisions, sections 10(1) and 10(13)(c), that costs

would be only recoverable in respect of matters arising out of the dispute. It is also clear that, given the definition of "dispute" including deemed dispute in the 1996 Act, they do not arise in respect of costs such as those which are the subject of this appeal.

Lord Justice Irwin:

39. I also agree. For the sake of clarity, I add only this. This case does not determine whether costs of this kind will be recoverable in similar circumstances but where proceedings have in fact been issued rather than merely threatened. Where proceedings are issued, the court will of course have jurisdiction to make an award of costs. Whether or not such costs are recoverable will depend on the facts of the individual case. Such an award is not precluded by this decision.