Neutral Citation Number: [2009] EWCA Civ 611

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Case No: B2/2008/2934

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WANDSWORTH COUNTY COURT
HIS HONOUR JUDGE VILJOEN
8WT101145

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th June 2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE MOSES
and
LORD JUSTICE ETHERTON

- -

Between :

Christine Reeves	**Appellant**
- and -	
Beatrice Blake	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr Nicholas Isaac (instructed by **Messrs Penman Johnson Llp**) for the **Appellant**
Mr Stephen Bickford Smith (instructed by **Child & Child**) for the **Respondent**

Hearing date : 16th June 2009

Judgment
As Approved by the Court

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Lord Justice Etherton :

Introduction

1. This is an appeal from a decision of His Honour Judge Viljoen in the Wandsworth County Court on 14 November 2008 concerning an award under the Party Wall etc. Act 1996 ("the 1996 Act"). Lloyd LJ granted permission to appeal limited to the following ground:

> "The learned judge erred in holding that sections 10(12) and/or 10(13) of the Party Walls etc. Act 1996 ("the Act") did not permit surveyors making an award under that Act to provide for the payment of legal costs from one party to the other, in particular advice given and steps taken in contemplation of legal proceedings for an injunction ."

The Facts

2. The facts relevant to the appeal may be briefly stated as follows.

3. The Respondent, Beatrice Blake, purchased 1 Farlow Road, London SW15 1DT ("1 Farlow Road"), an end of terrace house, in 2007. If one faces the front of that house, to the right of the flank wall there is a driveway belonging to the Appellant, Christine Reeves, which forms part of her property at 143 Lower Richmond Road, London SW15 1EZ ("143 Richmond Road"). The driveway gives access to the Appellant's garage on the right hand side of the drive. The Respondent decided to demolish 1 Farlow Road and to replace it with a new building, which would have three flats, one of which was to be a basement flat. Excavations would be required.

4. On 9 August 2007 the Respondent served on the Appellant a notice under the 1996 Act s.1(5) ("the first notice"), and another under s.6(1) ("the second notice"). The first notice was served on the basis that the Respondent proposed to construct a new wall on the boundary with the driveway. The second notice was served because the level of the new basement would be substantially below the level of the foundations of the garage of 143 Lower Richmond Road.

5. The Respondent appointed Ms Sara Burr as her surveyor, and the Appellant appointed Mr Simon Levy as her surveyor. They selected Mr David Maycox as the third surveyor pursuant to s.10(1)(b) of the 1996 Act.

6. There were disputes as to whether the first notice was valid in view of the fact that the Respondent's wall was the wall of a house, and also as to the details of the works, in particular the issues of supporting the excavation and underpinning.

7. In an award made on 20 November 2007 ("the First Award") Mr Maycox determined that the first notice under s.1(5) of the 1996 Act was invalid, but that the second notice under s.6 was valid.

8. The Respondent took the view that the First Award authorised the works in respect of excavations and foundations. She gave instructions for them to be carried out, and

they were begun. The Appellant, on the other hand, did not agree. She considered, correctly, that a further award was necessary before the works could proceed. The Appellant consulted her solicitors, Penman Johnson LLP, who advised her to take High Court proceedings for an injunction. On their instructions, counsel settled draft Particulars of Claim for an injunction and other relief, for issue in the Chancery Division. Draft witness statements of Mr Levy and his assistant were also prepared.

9. On 30 November 2007 Penman Johnson wrote to the Respondent stating that they intended to attend the High Court at 2pm that afternoon unless by that time they had received an undertaking from the Respondent to cease all further work on the boundary with the 143 Richmond Road pending further agreement with the Appellant's surveyor. On receipt of that letter, the Respondent gave an undertaking not to carry out further work to the foundations for the time being. That and subsequent undertakings were accepted, and no proceedings were ever begun. The draft Particulars of Claim and supporting draft witness statements were never issued or served, nor was the Respondent ever given copies of them.

10. On about 10 December 2007 Ms Burr resigned as the Respondent's surveyor for reasons of ill health. The Respondent did not appoint another surveyor in her place. Accordingly, as authorised by the 1996 Act s.10(10), the procedures under the 1996 Act were carried out by Mr Levy and Mr Maycox alone.

11. Mr Levy and Mr Maycox produced an award dated 25 January 2008 ("the Second Award"), which authorised and directed the content, manner and timing of work to be carried out by the Respondent. In a letter sent to the Respondent with the Second Award, Mr Maycox said:

> "It is regrettable that the work progressed without the settlement of an Award thus giving the Adjoining Owner little option other than to take legal advice and with the work continuing, to instigate proceedings to stop the work until such time as an Award had been settled and delivered. Such a set of circumstances involve significant time on the part of both surveyors and solicitors and per the terms of the Award, are recoverable in accordance with Section 10(13) of the Act.
>
> I enclose herewith the various fee accounts referred to in Clause 9 of the Award and would ask that these accounts be discharged directly. My own invoice will be rendered in due course."

12. Paragraph 9 of the Second Award directed that the Respondent forthwith pay the Appellant's "solicitors' and legal fees" of £7, 651.49 plus VAT ("the Legal Costs Direction"). It is conceded, on behalf of the Appellant, that all those costs were in respect of the contemplated proceedings, for which the draft Particulars of Claim and draft witness statements had been prepared, but which were never instituted.

13. On appeal to the Wandsworth County Court pursuant to s. 10(17) of the 1996 Act, Judge Viljoen ordered, so far as relevant to this appeal, that the Second Award be varied by deletion of the Legal Costs Direction.

The 1996 Act

14. The sponsor of the Bill which was to become the 1996 Act, the Earl of Lytton, explained on the second reading of the Bill in the House of Lords that the aims of the Bill were to extend the tried and tested provisions of the London Building Acts to England and Wales: *Zissis v Lukomski* [2006] EWCA Civ 342 at para. [24] (Sir Peter Gibson). The 1996 does not reproduce in identical terms the provisions of the London Building Acts. It contains, for example, new provisions as to costs. Generally, however, it provides procedures, similar to those in the London Building Acts, for authorising property owners to carry out work to an existing party structure or otherwise on or near to the boundary with the adjoining property, but which at the same time protect the legitimate interests of the adjoining owner. They are intended to constitute a means of dispute resolution which avoids recourse to the courts.

15. Broadly, the 1996 Act is intended to apply in three situations: where an owner of land wishes to build on the boundary line with an adjoining property and there is no existing party structure (s.1); where an owner wishes to carry out work to a party structure (ss.2 to 5); and where an owner wishes to carry out certain works of excavation near to a building or structure of an adjoining owner (s.6). Section 10 of the 1996 Act provides for the resolution of disputes by one or more surveyors appointed under its provisions. This appeal is concerned with work within s.6 of the 1996 Act, and with the operation of s.10. The following provisions are particularly relevant.

> 6 – (1) This section applies where –
>
> (a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured horizontally from any part of a building or structure of an adjoining owner; and
>
> (b) any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations of the building or structure of the adjoining owner.
>
> (5) In any case where this section applies the building owner shall, at least one month before beginning to excavate, or excavate for and erect a building or structure, 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 building or structure of the adjoining owner.
>
> (7) If an owner on whom a notice referred to in sub section (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.
>
> 10-(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 -

(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.

(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.

The Appellant's case

16. In the present case, there was a deemed dispute under s.6(7) of the 1996 Act, which was resolved by the Second Award made pursuant to s.10. In supporting the authority of Mr Maycox and Mr Levy to give the Legal Costs Direction in the Second Award, the Appellant relies particularly on the provisions of s.10(12)(c), under which an award may determine "any other matter arising out of or incidental to the dispute", and s.10(13)(c), under which the reasonable costs incurred in "any other matter arising out of the dispute" shall be paid to such of the parties as is determined by the appointed surveyor or surveyors. Mr Nicholas Isaac, counsel for the Appellant, emphasised that these are clear and unambiguous provisions of wide ambit, and, giving them their plain and ordinary meaning, manifestly include legal costs

reasonably incurred. Drawing on the Solicitors Act 1974 s 87, he made a broad distinction between contentious and non-contentious legal costs, and submitted that, whereas the court has exclusive jurisdiction to determine contentious legal costs in party wall disputes, all non-contentious legal costs fall within the determination of the appointed surveyor or surveyors under s.10(12)(c) and (13)(c). He included within the latter category the costs of advice and other work for the purpose of injunctive proceedings which are reasonably contemplated and may be threatened, but are never issued.

17. Mr Isaac reinforced those submissions, and particularly as to the width of the ambit of s.10(12(c) and (13)(c), by reference to the wording of s.10(1) and (10). In particular, he emphasised that under s.10(1) authority is conferred on the appointed surveyor or surveyors 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", and that under s.10(10) the appointed surveyor or surveyors shall settle any matter in dispute "which is connected with any work to which this Act relates" (emphasis added). He submitted that the issue whether the threat by the Appellant of an injunction against the Respondent to prevent unlawful works was justified, and who should bear the costs of the legal work in relation to possible proceedings for such an injunction , and whether those costs were reasonable, were all disputes as to matters "connected with .. work to which [the 1996] Act relates" within s.10(1) and (10).

18. He further submitted that it would be unjust and punishing the Appellant to deprive her of her reasonable costs of the contemplated proceedings, bearing in mind the unchallenged finding in the Second Award that the Respondent had unlawfully commenced building works, and that the threat of proceedings was intended to ensure compliance by the Respondent with her legal obligations. He submitted that, moreover, it would be absurd, and so not within the reasonable contemplation of those who drafted the 1996 Act, that the Appellant should be compelled to institute proceedings merely to establish an entitlement to costs and to recover them. Finally, he pointed out that surveyors are perfectly competent to determine issues about costs, as they regularly do in, for example, arbitrations.

The judgment of HH Judge Viljoen

19. The essence of the reasoning of Judge Viljoen, so far as relevant to this appeal, was that the 1996 Act is concerned only with settling disputes between the parties directly or indirectly related to the contemplated works, and that it does not envisage or provide for litigation between the parties, but rather is intended to avoid such litigation. By contrast, in the present case, the disputed costs relate to proposed proceedings for nuisance, in trespass and in breach of the 1996 Act. He also emphasised that litigation cost is a very specialist subject, and judges make awards of costs based on all the circumstances of the case in the light of all the evidence. Parliament could not have intended through the 1996 Act to give powers and discretions over such costs to a lay person not versed in the relevant rules. He concluded that, although the 1996 Act is phrased in wide terms, it does not go so far as to include the award of costs or potential costs of litigation.

Analysis and conclusion

20. In view of the nature of the disputes referred to surveyors under the 1996 Act, and the wide wording of s.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 s.10 to order payment by one adjoining owner of legal costs reasonably and properly incurred by another. HH Judge Birtles correctly so held in *Onigbanjo v Pearson* [2005] BLR 507, esp. at para. [39]. Mr Stephen Bickford-Smith, counsel for the Respondent, did not contend otherwise. Nor did Judge Viljoen suggest otherwise. That also appears to be the view generally held by practitioners in this field: see "The Party Wall Act Explained" (2nd ed) published by the delightfully named Pyramus & Thisbe Club.

21. The power to order payment of such costs under s.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 s.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 s.1(8) or a deemed dispute under s.4(5) or s.6(7), or a dispute under some other provision, such as s.7(2) (compensation for loss and damage resulting from execution of work executed pursuant to the 1996 Act), s.11(2) (responsibility for the expenses of work), s.11(8) (expenses of making good damage under the 1996 Act) or s.13(2) (objection to building owner's account of expenses). I agree with Judge Viljoen 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: compare *Woodhouse v Consolidated Property Corporation Ltd* [1993] 1 EGLR 174; *Louis v Sadiq* [1977] 1 EGLR 136. 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. It is at this point that Mr. Isaac's analogy with arbitration falls down.

24. Further, in the ordinary way, no costs are recoverable by a party who prepares for litigation which is never instigated. CPR 44.12A 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.

Decision

25. For those reasons I would dismiss this appeal.

Lord Justice Moses

26. I agree.

Lord Justice Mummery

27. I also agree.