B1/2006/0097, Neutral Citation Number: [2006] EWCA Civ 341

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BRENTFORD COUNTY COURT
DISTRICT JUDGE JENKINS

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 5th April, 2006

Hearing date: 1st March 2006

B e f o r e:

LORD JUSTICE BROOKE
VICE–PRESIDENT OF THE COURT OF APPEAL
(CIVIL DIVISION)
LORD JUSTICE WILSON
AND
SIR PETER GIBSON

– – – – – – –

MRS MARIANNE ZISSIS

Claimant/
Appellant

– v –

ANDREW LUKOMSKI (1)
RICHARD CARTER (2)

Defendants/
Respondents

– – – – – – – – –

Stephen Bickford–Smith (instructed by Messrs Prince Evans Solicitors) for the Appellant
Martin Hutchings (instructed by Messrs Kosky Seal & Co) for the First Respondent
Mr Carter appeared in person

J U D G M E N T

Sir Peter Gibson:

On an application for permission to appeal which came before this court on 1st March 2006 we gave permission to appeal and made certain orders. We indicated that we would give our reasons later. In this judgment I set out my reasons for the conclusions which we reached.

The facts

1. The appellant, Mrs Marianne Zissis, sought permission to appeal from parts of the order made by District Judge Jenkins in the Brentford County Court on 1st December 2005. By those parts of that order the District Judge dismissed the claim which Mrs Zissis had brought under CPR Part 8 against the Defendant, Mr Andrew Lukomski, that an addendum award purportedly made by a surveyor appointed under the Party Wall etc Act 1996 ("the Act") be rescinded. He did so on the basis that an appeal against an award under the Act must be brought under CPR Part 52.

2. Mrs Zissis is the owner of a house at 8 Birkdale Road in Acton. Mr Lukomski is the owner of an adjoining house at 10 Birkdale Road. In 2003 she wished to carry out works which came within the provisions of the Act. As the building owner, on 29th May 2003 she served on Mr Lukomski, as the adjoining owner, a notice under section 6(1) of the Act. A dispute as to the works arose. Pursuant to section 10(1)(b) each party appointed a surveyor, Mrs Zissis appointing Mr Michael Bovington and Mr Lukomski appointing Mr Richard Carter, and the two surveyors selected Mr James Cosgrave as the third surveyor. Mr Bovington and Mr Carter could not agree the terms of an award. Mr Cosgrave alone made an award on 12th February 2004, authorising the works subject to various conditions to safeguard Mr Lukomski's property. Mr Cosgrave assessed the costs of making the award in the sum of £810 plus VAT and ordered Mr Lukomski to pay £610 plus VAT and Mrs Zissis to pay £200 plus VAT. He did not deal with Mr Carter's fees.

3. Mr Lukomski, on Mr Carter's advice, sought to appeal against Mr Cosgrave's award and to have it varied so that Mrs Zissis would be ordered to pay Mr Carter's fees and Mr Cosgrave's fees would be disallowed. However, that appeal did not proceed.

4. Mr Bovington and Mr Carter continued to disagree. On 8th September 2004 Mr Cosgrave declared himself "incapable of acting" within section 10(9)(c) of the Act. That day by letter to Mr Lukomski Mr Carter observed that the Act required the other two surveyors to select another surveyor in Mr Cosgrave's place. However that did

not happen. Mr Carter wrote about his own fees to Mr Bovington who had said he would speak to Mrs Zissis about them. Mr Carter continued:

> "Can you please advise me of the present position and let me have your best proposal within ten days of your receipt of this letter."

He said that this was a request in the terms of section 10 of the Act.

5. Section 10(7) of the Act provides (so far as material):

> "If a surveyor ×..
>
> (a) appointed under paragraph (b) of subsection (1) by a party to the dispute ×
>
> neglects to act effectively for a period of ten days beginning with the day on which ×.. 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."

6. When Mr Bovington did not reply, Mr Carter alone made the addendum award purportedly under section 10(17). In it he asserted that Mr Bovington had neglected to act effectively for ten days in response to Mr Carter's request that Mr Bovington make his best offer. He proceeded to award himself £15,825 plus VAT , which he required Mrs Zissis to pay within fourteen days.

7. On 3rd December 2004 Mrs Zissis commenced her Part 8 proceedings in the Brentford County Court against Mr Lukomski. In paragraph 4 of the Particulars of Claim she pleaded:

> "The Addendum Award ought to be rescinded, and the Claimant has by the proceedings herein appealed against the Addendum Award."

In the particulars given of that averment it was pleaded that because another surveyor in place of Mr Cosgrave had not been selected, the addendum award was invalid. It was also pleaded that Mr Bovington did not neglect to act effectively for the purposes of the Act.

8. In paragraph 5 it was pleaded:

> "Further, and in the alternative, and without prejudice to the foregoing , the Addendum Award ought to be modified, and

> the Claimant has by the proceedings herein appealed against the Addendum Award."

This averment was particularised, and among other things complaint was made that Mr Carter's costs were not reasonable.

9. The substantive orders claimed were:

> "(1) An Order under the ×. Act ×.s.10(17) that the Addendum Award be rescinded,
>
> Or, in the alternative:
>
> (2) An Order under the ×.Act ×s.10(17) modifying the Addendum Award."

10. A first hearing of Mrs Zissis' proceedings before the District Judge was fixed for 25th January 2005. On 18th February Mr Lukomski wrote to Mrs Zissis' solicitors, Prince Evans. He had received legal advice that the addendum award was made without jurisdiction. He said that it was fatally flawed, that there was no valid award to appeal and that the award was not enforceable against Mrs Zissis. He also said that he had been advised that Mrs Zissis should have brought her appeal under Part 52. To save costs he proposed that a consent order be agreed between them for the rescission of the addendum award, with no order as to costs. That proposal was overtaken by events.

11. On 22nd February 2005 Mr Carter applied to be substituted as defendant in place of Mr Lukomski, who made an application to the like effect the next day. On 25th February the District Judge adjourned Mr Carter's application and although both Mrs Zissis and Mr Lukomski indicated that they regarded the addendum award as invalid, the District Judge directed that at the adjourned hearing the court would consider whether or not the Part 8 claim should have been brought under Part 52.

12. Mr Carter, through a company controlled by him, Procarson Ltd., sought to enforce the addendum award against Mrs Zissis by obtaining permission on 23rd May 2005 from Brentford County Court to enforce the award in the sum of £19,144.64. Mrs Zissis on 31st May applied to set aside that order.

13. The adjourned hearing ordered by the District Judge was fixed for 7th July 2005. Mr Lukomski continued to press Mrs Zissis for a settlement to avoid this hearing. He proposed a consent order to which they would agree and by which Mrs Zissis' costs would come out of any fees ordered to be paid to Mr Carter, but that, if the order was rejected by the court, he would pay her fees up to 30th June 2005. However that came to nothing, Prince Evans advising that Mr Carter's consent was needed. The hearing on 7th July did not take place by reason of the London bombing, and the District Judge ordered that all outstanding applications in both the Part 8 proceedings and the

enforcement proceedings be adjourned until a further date to be fixed. On 21st November Mr Lukomski made a further application to join Mr Carter as Second Defendant to the Part 8 proceedings as the person responsible for the addendum award who should be responsible for Mr Lukomski's costs. On 26th November Mr Carter gave notice withdrawing his application to be substituted as a party and opposing Mr Lukomski's application.

14. At that further adjourned hearing on 1st December the District Judge heard argument from counsel for Mrs Zissis and counsel for Mr Lukomski and from Mr Carter in person. The District Judge at the end of the hearing gave his decision and indicated that his reasons would follow later.

15. In his judgment of 23rd December the District Judge identified four issues:

> (A) whether the addendum award was valid;
>
> (B) whether Mr Carter should be joined as a Defendant to the Part 8 proceedings;
>
> (C) whether proceedings were properly brought against Mr Lukomski or should have been brought against Mr Carter;
>
> (D) whether proceedings were properly brought under Part 8 or should have been brought under Part 52.

16. The District Judge decided those issues as follows:

> (A) without a third surveyor the panel of surveyors was improperly constituted and accordingly the addendum award was invalid;
>
> (B) it was appropriate for Mr Carter to be joined so as to be bound by the decision and so that his responsibility for costs could be taken into account;
>
> (C) Mr Lukomski, as the adjoining owner, was the correct defendant and Mrs Zissis had no cause of action against Mr Carter;
>
> (D) the appeal by Mrs Zissis was a statutory appeal which should have been brought under Part 52.

17. On issue (D) the District Judge said that whilst it would seem that the present claim was exactly the type of dispute for which Part 8 was designed, he was firmly of the mind that this was a statutory appeal and so should have been commenced under Part 52. He did not accept that any authority which predated the CPR had any bearing on the issue. He considered that the appeal fell within the definition of statutory appeals in paragraph 17.1 of the Part 52 Practice Direction. He referred to the observation

made by Brightman J in Gyle–Thompson v Wall Street (Properties) Ltd [1974] 1 WLR 123 at page 130 that surveyors appointed under the party wall legislation "are in a quasi–judicial position with statutory powers and responsibilities", and the District Judge said that "it clearly follows that the review by the court should be on an appeal basis where the court undertakes a review of the surveyor's award." He found similarity in the process undertaken by the court in an appeal under section 204 of the Housing Act 1996, and said that he saw no difference between the type of appeal under section 204 or section 204A which was brought under Part 52 and an appeal under section 10(17) of the Act. He therefore held that Mrs Zissis had used the wrong procedure and was substantially out of time for bringing an appeal under Part 52.

18. The District Judge made the following orders:

(1) Mr Carter was joined as a defendant;

(2) Mrs Zissis's claim was dismissed;

(3) she was refused permission to appeal;

(4) she was ordered to pay Mr Lukomski's costs on the indemnity basis.

He adjourned an application by Mrs Zissis that Mr Carter pay her costs. That application has not yet been heard, nor has her application to set aside the grant of permission to enforce the addendum award.

The appeal

19. Mrs Zissis sought to appeal to this court against orders (2) and (4). For this she needed the permission of this court. We indicated at the outset of the hearing before us that we granted that permission.

20. Before us Mrs Zissis is represented by Mr Stephen Bickford–Smith and Mr Lukomski by Mr Martin Hutchings. Mr Carter appeared in person. In response to enquiries from the Bench it emerged that Mr Carter, being dissatisfied with the Judge's decision on the validity of the addendum award, has sought to appeal against it to a circuit judge in Brentford County Court. We indicated that that appeal should be transferred to this court and we were prepared to deal with it together with Mrs Zissis' appeal. However, Mr Carter told us that he needed time to prepare his argument for his appeal, and accordingly that matter has been adjourned to come on next term, preferably before the same constitution. We were nevertheless anxious that all matters affecting Mr Lukomski should be disposed of without him having to appear or to be represented at the adjourned hearing at which the only interested parties will be Mrs Zissis and Mr Carter. Orders were made by us accordingly as I shall later describe.

21. Mr Bickford–Smith helpfully identified five issues raised by Mrs Zissis' appeal from the District Judge's order:

> (1) was the District Judge right to hold that the proceedings should have been brought under part 52;
>
> (2) if the District Judge was right on issue (1) was he right to dismiss the Part 8 proceedings even though he had held that the addendum award was invalid;
>
> (3) if the District judge was right on issue (1) should he have exercised his power under CPR rule 3.10 to validate the appeal;
>
> (4) was the District Judge right to order Mrs Zissis to pay Mr Lukomski's costs on the indemnity basis;
>
> (5) should the court grant permission to appeal.

22. Save that in relation to issue (5) I shall indicate, as I go through the earlier issues, why permission was granted, I shall discuss these issues in turn. I shall then give the reasons for the order for costs made in this court as between Mrs Zissis and Mr Lukomski.

Issue (1): Part 52

23. Mr Bickford–Smith submitted that Mrs Zissis correctly brought her appeal against the addendum award under Part 8 and that it was not an appeal to which Part 52 applied. He based his argument on the party wall legislation which preceded the Act and on what was said in authorities relating to that legislation about the nature of the proceedings thereunder. He drew our attention to the statement made by the sponsor of the Bill which was to become the Act, the Earl of Lytton, when on the second reading of the Bill in the House of Lords he said: "The aims of the Bill are to extend the tried and tested provisions of the London Building Acts to England and Wales" (HL Debates Vol 568 31 January 1996 Col 1536). Mr Bickford–Smith relied in particular on the decision of His Honour Judge Humphrey Lloyd QC in Chartered Society of Physiotherapy v Simmonds Church Smiles [1995] 1 EGLR 155. In that case an award was appealed by the building owners to the county court, which transferred the appeal to the High Court as official referees' business. The respondents, the adjoining owners, argued that an appeal to the county court under section 55(n)(i) of the London Building Acts (Amendment) Act 1939 ("the 1939 Act") was limited and that the court's powers on the appeal did not extend to hearing new evidence or conducting its own investigation. Section 55(n)(i) is identical in all material respects to section 10(17). The Judge, in rejecting those arguments, described an award under the legislation as *sui generis* and more in the nature of an expert determination. He said that the award did not have to be a speaking award or to contain findings of fact or conclusions of law. He held that on an appeal against the award the court had jurisdiction to rescind or modify the award in such manner as it thought fit and to receive any evidence of fact or opinion. In arguing against the applicability of Part 52 to an appeal of the type described by Judge Humphrey Lloyd QC, Mr Bickford–Smith pointed to provisions in Part 52 restrictive of the freedom of the appeal court to receive evidence and requiring the appeal to be by way of a review with limited exceptions. He submitted that the appeal was in reality a new action and not a true appeal and that it could be brought by way of a Part 8 claim.

24. Mr Hutchings submitted that the appeal under section 10(17) was "probably a statutory appeal" and he drew attention to the wide powers which the appeal court has under Part 52 to enable it to determine the appeal justly.

25. We were told by Mr Bickford–Smith that there is much uncertainty among practitioners as to whether or not an appeal to the county court against an award under the Act is a statutory appeal governed by Part 52. That is demonstrated by two textbooks to which we were referred. In paragraph 10.2.4 of Bickford–Smith and Sydenham on Party Walls Law and Practice (2nd edition 2004) the learned authors make the tentative suggestion that the better view is that Part 52 does not govern such an appeal. In paragraph 11–24 of Gale on Easements (17th edition 2002) it is stated that it can be contended that such proceedings are governed by Part 52. The Royal Institution of Chartered Surveyors in paragraph 9.3 of the 5th Edition (2002) of its guidance note, Party Wall Legislation and Procedure, states firmly that an appeal is made by claim under Part 8. It is important that the correct procedure for appeals under section 10(17) is made clear for the benefit of the profession. For this reason

permission to appeal on this point was given, even though, for reasons which I shall later explain, this is a second appeal.

26. I pay tribute to Mr Bickford–Smith's industry and learning in putting before us the predecessor legislation and the authorities under it, but I prefer to start my consideration of the appropriate procedure for an appeal under section 10(17) with the provisions of the Act and the current procedural rules under the CPR. There are dangers in seeking to apply directly to cases governed by the Act statements in cases decided under the earlier legislation. Thus the provisions of the 1939 Act which were considered in the Chartered Society of Physiotherapy case are not identical in all respects to the provisions of the Act. In particular Judge Humphrey Lloyd QC placed reliance on the provisions of Section 55(n)(ii) and (o) of the 1939 Act which permitted an appellant against an award to bring an action in the High Court to be tried in accordance with the rules of court. There are no corresponding provisions in the Act.

27. Under section 10(16) of the Act the award made pursuant to the Act is expressed to be conclusive and not to be questioned in any court except as provided by section 10. The relevant provision of section 10 is subsection (17) which provides:

> "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 -
>
> (b) rescind the award or modify it in such manner as the court thinks fit, and
>
> (c) make such order as to costs as the court thinks fit."

28. There are no other statutory provisions indicative of the appeal procedure. For that one must go to the CPR, bearing in mind that they are a new procedural code and the procedural practices which obtained prior to the CPR were not necessarily intended to be reproduced in the CPR. General statements, such as that made by the Earl of Lytton, cannot be taken to give guidance on the procedure to be followed in compliance with the CPR brought into force four years later.

29. The following provisions of Part 52 are relevant.

30. By CPR 52.1 (so far as material):

> "(1) The rules in this Part apply to appeals to –
>
> ××××..
>
> (c) a county court.

(3) In this Part -

××××

(b) "appeal court" means the court to which an appeal is made;

(c)"lower court" means the court, tribunal or other person or body from whose decision an appeal is brought; ×..

(4) This Part is subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal."

31. CPR 52.11 governs the hearing of appeals and provides (so far as material):

"(1) Every appeal will be limited to a review of the decision of the lower court unless -

(d) a practice direction makes different provisions for a particular category of appeal; or

(e) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re–hearing.

"(2) Unless it orders otherwise, the appeal court will not receive -

(a) oral evidence; or

(b) evidence which was not before the court below.

(3) The appeal court will allow an appeal where a decision of the lower court was -

(a) wrong; ××

(4) The appeal court may draw any inference of fact which it considers justified on the evidence."

32. In the Part 52 Practice Direction the following provisions are relevant.

33. Paragraph 9.1 provides (so far as material):

> "The hearing of an appeal will be a re–hearing (as opposed to a review of the decision of the lower court) if the appeal is from the decision of a minister, person or other body and the minister, person or other body -
>
> (1) did not hold a hearing to come to that decision;×."

34. Paragraphs 17.1 - 17.6 of Section II of the Practice Direction contain general provisions about statutory appeals. Of those provisions the following are relevant.

> "17.1 This part of this section -
>
> (1) applies where under any enactment an appeal (other than by way of case stated) lies to the court from a Minister of State, government department, tribunal or other person ('statutory appeals'); and
>
> (2) is subject to any provision about a specific category of appeal in any enactment or Section III of this practice direction.
>
> 17.2 Part 52 applies to statutory appeals with the following amendments:
>
> 17.3 The appellant must file the appellant's notice at the appeal court within 28 days after the date of the decision of the lower court he wishes to appeal.
>
> 17.5 In addition to the respondents to the appeal, the appellant must serve the appellant's notice in accordance with rule 52.4(3) on the chairman of the tribunal, Minister of State, government department or other person from whose decision the appeal is brought."

35. Section III contains provisions about specific appeals, but, as paragraph 20.1 states, is not exhaustive and does not create, amend or remove any right of appeal. There is no mention of the Act in Section III.

36. A valuable commentary on the application of Part 52 to statutory appeals and on the question whether an appeal should be by way of rehearing or review is contained in the judgment of May LJ in the regrettably still unreported case of E.I. Du Pont de Nemours & Co v S.T. Dupont [2003] EWCA Civ 1368. In that case this court considered the application of Part 52 to appeals under the Trade Marks Act 1938. May LJ commented:

> "92. Rule 52 of the Civil Procedure Rules draws together a very wide range of possible appeals. It applies, not only to the Civil Division of the Court of Appeal, but also to appeals to the High Court and county courts. It encompasses, not only

> appeals where the lower court was itself a court, but also statutory appeals from decisions of tribunals, ministers or other bodies or persons. Within the court system, it applies to an appeal from a district judge to a circuit judge, just as it applies to an appeal from a High Court Judge to the Court of Appeal. Subject to Rule 52.1(4) and paragraph 17.1(2) of the practice direction, it applies to a wide variety of statutory appeals where the nature of the decision appealed against and the procedure by which it is reached may differ substantially ××.
>
> 93. It is accordingly evident that Rule 52.11 requires, and in my opinion contains, a degree of flexibility necessary to enable the court to achieve the overriding objective of dealing with individual cases justly."

37. In paragraph 95 May LJ turned to the receipt on appeal of new evidence:

> "As to fresh evidence, under Rule 52.11(2) on an appeal by way of review the court will not receive evidence which was not before the lower court unless it orders otherwise. There is an obligation on the parties to bring forward all the evidence on which they intend to rely before the lower court. The principles on which the appeal court will admit fresh evidence under this provision are now well understood and do not require elaboration here. They may be found, for instance, in the judgment of Hale LJ in *Hertfordshire Investments Ltd v Bubb* [2000] 1WLR 2318 at 2325D–H. Rule 52.11(2) also applies to appeals by way of rehearing under rule 52.11(1)(b), so that decisions on fresh evidence do not depend on whether the appeal is by way of review or rehearing."

38. May LJ continued in paragraph 96:

> "Submissions to the effect that an appeal hearing should be a rehearing are often motivated by the belief that only thus can sufficient reconsideration be given to elements of the decision of the lower court. In my judgment, this is largely unnecessary given the scope of a hearing by way of review under rule 52.11(1). Further the power to admit fresh evidence in Rule 52.11(1)(b) will normally approximate to that of a rehearing 'in the fullest sense of the word' such as Brooke LJ referred to in paragraph 31 of his judgment in Tanfern [Ltd v Cameron–MacDonald [2000] 1 WLR 1311]. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves. ××.. Circumstances in which the hearing of an appeal will be a rehearing are described in

> paragraph 9 of the Part 52 practice direction. This refers to some statutory appeals where the decision appealed from is that of a person who did not hold a hearing or where the procedure did not provide for the consideration of evidence. In some such instances, it might be argued that the appeal would in effect be the first hearing by a judicial process, and that a full hearing was necessary to comply with Article 6 of the European Convention on Human Rights ×.."

39. With that commentary in mind I turn to the question whether Part 52 governs the appeal under section 10(17) of the Act. At first sight, because that subsection provides for an appeal under an enactment to a county court from a person other than a Minister of State, government department or tribunal, the appeal comes within the language of paragraph 17.1 of the Practice Direction as a statutory appeal. The fact that the Act is not mentioned in Section III of the Practice Direction is of no consequence, given that the section is not exhaustive. The provisions of section 10(17), being provisions about a specific category of appeal in an enactment, are not superseded. Thus the requirement that the appeal be brought to the county court within 14 days overrides the provision in paragraph 17.3 for a 28 day period.

40. Paragraph 9.1 of the Practice Direction specifically recognises that the decision from which the appeal is brought can be one reached without a hearing and that the appeal from it will nevertheless be governed by Part 52. There are ample powers under rule 52.11 to enable the court to receive evidence, and in the exercise of any power or discretion the court will be alive to the overriding objective of dealing with the case before it justly. Given that an award under the Act is non–speaking and made without a hearing, I would envisage that the appeal by way of a rehearing will ordinarily require the county court to receive evidence in order to reach its own conclusion on whether the award was wrong. The flexibility contained in the provisions of Part 52 seems to me to defeat the thrust of Mr Bickford–Smith's argument that it would not be right for Part 52 to apply to an appeal under section 10(17). On the contrary I think it plain that Part 52 was intended to cover a form of statutory appeal like that under section 10(17) and that the provisions of Part 52 are amply sufficient to allow justice to be done on such an appeal.

41. For the sake of completeness I should mention that there are two points in the reasoning of the District Judge on which I take a different view from him. One is, as I have noted in paragraph 18 above, his assertion that it followed from the fact that the appointed surveyors are in a quasi–judicial position with statutory powers and responsibilities that the court on the appeal reviews the award. For the reasons already given, the appeal against the award will be by way of a rehearing. The second point is the suggested analogy between an appeal under section 10(17) and the procedure on an appeal under section 204 or section 204A Housing Act 1996. I can obtain no assistance from a comparison with the procedure for appeals under the Housing Act, which permits appeals only on a point of law. Subject to those points, in my judgment the District Judge correctly held that an appeal under section 10(17) is a statutory appeal governed by Part 52.

42. The District Judge, in reaching his decision, was exercising the county court's appellate jurisdiction with the result that an appeal from his decision is a second appeal within CPR 52.13.

Issue (2): Part 8

Issue (3): CPR 3.10

43. It is convenient to consider these two issues together as they both concern steps which the District Judge allegedly could have taken instead of dismissing the claim of Mrs Zissis. This part of the argument proceeds on the assumption that the District Judge was right to find that the addendum award was invalid. The correctness of that assumption will of course be considered at the adjourned hearing.

44. Mr Bickford–Smith submitted that it is well–established that a party challenging an invalid award does not need to do so by the appeal process but may seek declaratory relief or challenge the award's validity by resisting its enforcement or by bringing an action inconsistent with it (Re Stone and Hastie's Contract [1903] 2 KB 463 and Gyle–Thompson v Wall Street (Properties) Ltd [1974] 1 WLR at page 130). I accept that. Mr Bickford–Smith said that the District Judge should have accepted that the proceedings were correctly brought under Part 8 for the purpose of obtaining, for example, a declaration that the addendum award was invalid and that his decision to dismiss the claim overlooked this fundamental point. Alternatively, he submitted, the District Judge had power under CPR 3.10 to make an order to remedy the procedural error, and he pointed to cases where the power has been used in similar circumstances (see, for example, Hannigan v Hannigan [2000] 2 FCR 650).

45. I have some sympathy with the District Judge, as the Particulars of Claim plainly proceeded on the footing that the proceedings were by way of an appeal under section 10(17), even in relation to the averment that the addendum award was invalid. Further, it does not seem to have been pointed out to the District Judge how he might remedy the situation nor, it appears, was he asked to do so.

46. Nevertheless, I think it plain that consistently with the overriding objective and with a view to saving expense and a waste of court resources the District Judge was wrong to have dismissed the claim when he had found that, as Mrs Zissis had averred, the addendum award was invalid. He should either have allowed the amendment of the Particulars of Claim so that the relief sought was a declaration that the award was a nullity or, more consistently with the alternative claim for modification of the award, he should have allowed the proceedings to proceed under Part 52. I can see no reason why an appellant appealing against an award should not be able to claim in proceedings brought under Part 52 that the award is a nullity and that in the alternative the award should be varied.

47. This point too is one of general importance and deserved consideration by this court. For this reason we gave permission to appeal on it.

Issue (4): Indemnity costs

48. The District Judge gave the following as his reasons for awarding indemnity costs:

> "Firstly the Defendant offered the Claimant at a very early stage a compromise whereby the claim would be dismissed with no order as to costs but the Claimant insisted on proceeding and as was made clear to me in February, the essential driving force behind the litigation now was the costs of that litigation. For those two reasons it seemed to me to be right that costs should be on the indemnity basis. If parties litigate only as to costs then it seems to me that they must bear a greater risk that if unsuccessful they will be paying costs on the indemnity basis"

49. Mr Bickford–Smith submitted that the District Judge had failed to ask himself the relevant question for awarding costs on the indemnity basis, which was whether Mrs Zissis had acted unreasonably in the conduct of the litigation. It is now established that there must be some element of that conduct which deserves a mark of disapproval. As Simon Brown LJ put it in Kiam v MGN (No 2) [2002] 1 WLR 2810 at paragraph 12:

> "such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight ×."

(See also Simms v The Law Society [2004] EWCA Civ 849 at paragraph 16 per Carnwath LJ).

50. Mr Hutchings submitted that, in the light of Mr Lukomski's efforts to obtain a consent order, Mrs Zissis did behave unreasonably. He suggested that it was quite unnecessary that she should appeal against the addendum award which she and Mr Lukomski agreed was invalid and that instead she should have awaited the bringing by Mr Carter of enforcement proceedings and when they were commenced she should have resisted them without involving Mr Lukomski. Whilst I praise Mr Lukomski for his attempts at reaching a settlement with Mrs Zissis and avoiding litigation costs and have sympathy with him in finding himself a party to this expensive litigation, I cannot say that the conduct of Mrs Zissis was so unreasonable as to bring upon herself the liability to pay costs on an indemnity basis. She was entitled to take the view that she should bring proceedings to get the award set aside or modified, and Mr Lukomski as the adjoining owner was the proper defendant. It is not straightforward to seek to make a third party like Mr Carter a defendant pursuant to section 51 of the Supreme Court Act 1981 so that an order for costs might be obtained against him, and the outcome of any such litigation was uncertain. The

District Judge was, it appears, determined to have the procedural issue relating to Part 52 decided. In the circumstances the conduct of Mrs Zissis, who appears to have acted throughout on professional advice, was not such as to merit indemnity costs.

51. Mr Hutchings did not seek to support that part of the District Judge's reasoning which proceeded on the footing that if one litigates about costs one may have to pay costs on the indemnity basis. It appears that the District Judge may have misunderstood what was said about costs in that the litigation was about Mr Carter's costs, the subject of the addendum award. In any case, there is no sound reason why parties litigating on issues of costs should be more vulnerable to an order for costs on the indemnity basis.

52. Because on this issue Mrs Zissis had a real prospect of succeeding on the appeal, we gave permission to appeal. For the reasons given, I would allow the appeal on this issue to the extent of substituting costs on the standard basis for costs on the indemnity basis as the costs of Mr Lukomski which Mrs Zissis must pay.

Costs in the Court of Appeal

53. We indicated at the end of the hearing before us that Mrs Zissis should pay half the costs of Mr Lukomski. The award of costs can reflect the parties' respective success and failure on individual issues if the court thinks this to be just. The greater part of the written and oral arguments and of the authorities provided for us was devoted to Issue (1) on which Mr Lukomski won and Mrs Zissis lost. Issue (4) on which Mr Lukomski lost and Mrs Zissis won took far less time, although it required some additional documentation. Our order was made having regard to all the circumstances of the appeal.

Lord Justice Wilson:

54. I agree

Lord Justice Brooke:

55. I also agree.

56. This case was complicated by two unusual features. The first was that Mr Carter believed that he had the power to make an award unilaterally in his favour providing for the payment of his costs. His belief that he was entitled to do this was not shared by the lawyers advising either of the parties, but the legal validity of his award will be tested in the appeal that is to be heard after Easter, and I will not say anything more about this matter now, apart from identifying it as a complicating factor.

57. The second was that Mr Carter interpreted s 17 of the Party Wall etc Act ("Any sum payable in pursuance of this Act (otherwise than by way of fine) shall be recoverable summarily as a civil debt") as entitling him to enforce the award he made in his favour not by way of summary process as a civil debt in the magistrates' court (for which see the second definition of "sum enforceable as a civil debt" in s 150(1) of the Magistrates' Courts Act 1980), but as if it was an award that could be enforced in the county court pursuant to what is now CPR 70.5(1). This led to concurrent process in the county court over the same matter.

58. CPR 70.5 creates a procedure, which can be initiated by a court officer without the intervention of a judge, for the enforcement of an award of a sum of money made by any court, tribunal, body or person other than the High Court or a county court so long as an enactment provides that the award may be enforced as if payable under a court order, or that the decision may be enforced as if it were a court order. The 1996 Act contains no such provision, so that an award made under that Act cannot be enforced through the CPR 70.5 procedure.

59. This very unusual case therefore provides this court not only with an opportunity for removing the uncertainty which has existed over the correct procedure for appeals under the 1996 Act, but also for clarifying the way in which awards made under that Act are to be enforced.

60. I therefore direct that the judgments of the court in this case be sent to the Deputy Head of Civil Justice, so that he may consider whether directions should be given as to the level of judge who should hear appeals or validity challenges arising under the 1996 Act, and whether guidance should be given, by way of a Practice Direction or otherwise, as to the form of procedure to be followed when an appeal is conducted by way of rehearing against an award made under that Act.

61. Finally, I endorse what Sir Peter Gibson has said in para 37 of his judgment about the importance of May LJ's judgment in the *Du Pont de Nemours* case. This is now the leading authority on the difference between an appeal by way of review and an appeal by way of rehearing under CPR Part 52. This judgment was not known to any of the parties to this appeal until we drew it to their attention. It deserves to be more widely reported.