

IN THE CARDIFF CIVIL AND FAMILY JUSTICE CENTRE

2 Park Street
Cardiff
CF10 1ET

BEFORE:

HIS HONOUR JUDGE MILWYN JARMAN QC

BETWEEN:

ZULFKAR AHMED

APPLICANT

- and -

MRS MAUREEN PARSONS

RESPONDENT

Legal Representation

Mr Alan Steynor (of counsel) on behalf of the Applicant
Ms Elizabeth Marshall (of counsel) on behalf of the Respondent

Other Parties Present and their status

None known

Judgment

Judgment date: 3 April 2018
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His Honour Judge Milwyn Jarman QC:

1. This is an appeal under the Party Wall etc Act 1996 in respect of an award under the provisions of that Act which is dated 16 November 2017 and signed by Mr Ball, who is the building owner's surveyor within the meaning of that Act, and a Mr McAllister who is the adjoining owner's surveyor within the meaning of that Act. The parties were and are neighbours. Mrs Parsons lives at 129 Llanedeyrn Road in Penylan, Cardiff and Mr Ahmed lives next door at 131.
2. The background to the award is dealt with to some extent in the award itself. In paragraph 3 it is noted that in about 2015 Mrs Parsons carried out operations to remove a concrete hardstanding to the rear patio area and to excavate the rear garden in order to level the area to be laid with paving. Near to the boundary with Mr Ahmed's property there were further works in about August 2016 to form pockets to receive concrete as support for two timber fence posts in order to facilitate the erection of a new fence to separate the rear garden of Mrs Parsons' property and the rear garden of Mr Ahmed's property. Then also in August 2016, works were undertaken to the front of Mrs Parsons' garden comprising the installation of a concrete driveway to replace the driveway which previously existed and again, towards the boundary with Mr Ahmed's property, a timber post and rail fence was installed.
3. The award goes on to note that Mr Ahmed had objected to those operations and considered them to be notifiable operations within the meaning of the Act and further said that no notice had been served by Mrs Parsons in accordance with the provisions of the Act. Mr Ahmed also considered that the fence posts and intended fence panels were trespassing on his land on the basis that damage had been caused to his own boundary wall as a result of the notifiable works. So, it was noted that a dispute had arisen within the meaning of the Act between the neighbours.
4. The appointments were then set out and the findings and determination were made in part two. These can be summarised as follows. Firstly, the surveyors took the view that the works to remove the concrete hardstanding at the rear patio area were not notifiable works under the Act. Second, the excavations taken to form two new fence posts, where those extend lower than the foundations of a structure on Mr Ahmed's land and within three metres thereof may well be notifiable, pursuant to Section 6(1) of the Act. Third, no notice was served in respect of those works, but that it was the opinion of the two surveyors that the nature of those notifiable works was so minor, that the risk of damage to Mr Ahmed's property was so remote that to enforce the procedural administration of the Act would be an abuse of process. Fourth, the fence posts and intended location of the fence were within Mrs Parsons land and accordingly did not amount to a trespass astride the line of the junction.
5. The conclusion that followed from that was that the works were not notifiable in pursuance to the Act. Then there comes an important passage in the findings which really goes to the heart of this case. At paragraph 15, the award said that Mr Ahmed's boundary wall:

“Has not been damaged as a direct result of any notifiable work in pursuance of the act carried out by the building owner. The wall is of poor construction built and formed in two sections with a gap between the two sections by way of a construction joint. The construction joint has been rendered over on the adjoining owner's side of the wall and has

consequently cracked at the natural joint line. The coursing between the two sections of wall is inconsistent suggesting the first course of either side of the wall was started at different levels or has settled due to lack of suitable foundation support (refer to photographs in appendix 1). Other damage noted to the wall is aged. It is therefore the finding and determination of the two surveyors that any defects within the adjoining owner's boundary wall are entirely unrelated to any notifiable works undertaken by the building owner. It is also the finding and determination of the two surveyors that the adjoining owner's boundary wall is structurally unsound and should be demolished with immediate effect on health and safety grounds. Thereby further extinguishing any claim by the adjoining owner as to the consequential damage from any notifiable works were this to be the case."

6. There was a further finding that at some stage Mr Ahmed or his predecessor had built a shed and that those were notifiable works under the Act but no notice had been given. Then part three sets out the award, which may be summarised as follows. Firstly, Mrs Parsons was not required to serve a notice in respect of the removal of the concrete hardstanding to the rear patio area.
7. Secondly the works in respect of which a notice should have been served, namely the pockets for the formation of concrete to take the wooden posts for the fence was de minimis, such that notification in accordance with the Act would not usually be expected for works that are so minor and immaterial in the context of potential impact on Mr Ahmed's property. Thirdly Mrs Parsons was not required to serve a notice in respect of the position of the fence posts and fence panels. Fourthly Mr Ahmed has suffered no damage attributable to any notifiable works undertaken by Mrs Parsons and accordingly no award for compensation was made to him with regard to the condition of the boundary wall. Then there was a further reference to the fact that a shed had been erected on Mr Ahmed's land without service of the relevant notice.
8. In light of those findings, the surveyors went on to make award of costs, firstly that each party should bear their own surveyor's cost and. secondly, that Mr Ahmed should pay Mrs Parsons:

"Her legal costs in this matter in the sum of £3,873.57 including VAT without deduction or set off. Such costs being confirmed by the building owner's solicitors to the satisfaction of the two surveyors as being incurred solely in relation to matters pursuant to or incidental to the act and the dispute arising thereunder."

Finally, Mr Ahmed should pay Mrs Parsons legal costs incurred by a barrister employed by her in response of an application made by Mr Ahmed for injunctive relief in the sum of £360 including VAT.

9. The basis on which I am asked to rescind that order is set out in a skeleton argument by Mr Steynor of counsel instructed on behalf of Mr Ahmed. He has made it clear that it is that document which set out the grounds as now put forward on behalf of Mr Ahmed on which it is said the award should be rescinded. The matters which are relied upon are summarised in paragraph 19 of the skeleton argument as follows:

“The conclusion which Mr Ahmed has reached and urges upon the Court is that this award is so unsatisfactory that it ought simply to be set aside in its entirety. First, it failed to define adequately the issues which the parties asked the surveyors to determine. Secondly, it takes a narrow view of the jurisdiction of the surveyors to deal only with notifiable works and thirdly this renders most of the decisions of the surveyors outside their jurisdiction. Fourthly, the conclusions of fact regarding loss sustained by Mr Ahmed both with regard to disruption to his property while the works were in progress and the damage to his property including the boundary wall are simply wrong and contrary to the evidence and fifthly, the requirement to demolish to the boundary wall is ultra vires and displays prejudice on the part of the surveyors.”

10. At the heart of these grounds is the question of what jurisdiction surveyors have when they have been appointed, as I am satisfied they were in this case, under the Party Wall etc., Act 1996 and accordingly I will need to make detailed reference to some of the sections in that Act. The first part of the Act deals with construction and repair of walls on the line of a junction between the property which is not relevant in the present case. What is relevant is adjacent excavation and construction under Section 6.

11. Sub section 1 reads as follows:

“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.”

12. Sub section 5 provides that:

“Where (that) section applies the building owner shall, at least one month before beginning to excavate ... serve ... a notice.”

Then if the adjoining owner does not consent the dispute between the parties will be deemed to have arisen.

13. Section 7 deals with compensation and sub sections 1 and 2 provide as follows:

“1) A building owner shall not exercise any right conferred on him by this act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier. 2) The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this act.”

14. Then section 10 provides for the resolution of disputes as follows in respect of sub sections 1 and 2:

“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 the section referred to as the three surveyors). 2) All appointments and selections made under this section shall be in writing and shall not be rescinded by either party.”

15. And then the following sub sections towards the end of that section are also relevant:

“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 cost 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.”

16. And then finally under 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.”

17. Mrs Marshall on behalf of Mrs Parsons has drawn my attention to the case of *Zissis v Lukomski & Anor* [2006] EWCA Civ 341 in which the Court of Appeal discussed the nature and ambit of an appeal under section 10(17) and came to the conclusion that it was an appeal to which Part 52 of the Civil Procedure Rules 1998 apply. Lord Justice Peter Gibson with whom the other Lordships agreed at paragraph 41 said that he thought it was:

“...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.”

18. Because the nature of the jurisdiction of the surveyors under the Act is an important aspect of this case it is necessary also to make further reference to the background. As indicated in the early part of 2017 after the works or most of them had been

commenced, proceedings were commenced by Mr Ahmed seeking an injunction. Solicitors were instructed by Mrs Parsons to defend those proceedings.

19. In February 2017, Mr Ahmed wrote to them suggesting that there should be surveyors to deal with the issues in the case which included boundary issues, trespass, nuisance amongst other matters. In that letter he said he would not use local surveyors because he felt that they did not have the level of expertise and that he had agreed for someone to act for him so Mrs Parsons should find an independent surveyor. There was reference in that letter to the 1996 Act.

20. He says:

“I suggest mediation through surveyors using the party wall procedures and for any experts to be instructed jointly at your client’s cost. I am the innocent party and your client’s illegality by not serving notice means that the work cannot be legitimised at my expense. The surveyors can make an award as the acts in the capacity of semi quasi judicial role. He can also mediate the issues and is encouraged to do so under the new boundary built.”

21. In further correspondence in March 2017 he suggested that once the boundary is agreed using the parties’ prospective surveyors a further agreement is made on any separation. The correspondence proceeded and the solicitors for Mrs Parsons in August replied to Mr Ahmed noting the continued referral and reliance on the dispute resolution procedures as detailed in Section 10 of the 1996 act. The letter continues:

“We must remind you that this is a matter where you have issued a claim currently proceeding through the Cardiff Civil Justice Centre. The claim is now being defended. We have now spoken to the Court who have confirmed that directions questionnaires will shortly be sent out to the parties for completion to enable the litigation to proceed. We are therefore strongly of the view that the fact that this matter is proceeding through the Courts renders the dispute resolution procedure redundant. In any event, we make no admissions that this a dispute to which the Party Wall Act 1996 applies.”

22. They then went on to say they had agreed that in the ongoing litigation a jointly instructed surveyor should be appointed. Mr Ahmed, it is common ground, referred to Party Wall Act 1996 and the procedure thereunder in his allocation questionnaire. At one stage in this appeal it was thought that a court order had been made adopting that suggestion but on checking the file and counsel checking on CaseMan it appears that no such order was made.

23. Mr Ahmed replied on 15 August 2017 reiterating that the matter is a Party Wall dispute:

“Regardless of your client’s view as she has undertaken work to or near a structure, my wall. She has also disturbed the line of junction by using excavators and then building a wall of wooden fences on which I allege to be my land.”

So, said Mr Ahmed in that letter:

“This falls under Section 10(1), (6) and (7) of the 1996 act.”

And he says he instructed Mr McAllister.

24. Mr McAllister, by letter dated 16 August 2017 confirmed that he had been appointed by Mr Ahmed pursuant to Section 10(1)(a) of the Party Wall Act subject to the agreement of Mrs Parsons, this was an email to her solicitors and those solicitors replied that Mrs Parsons had appointed her own surveyor under Section 10(1)(b) of the act.

25. There were further emails passing back between the surveyors, Mr Ahmed and Mrs Parsons’ solicitors. On 13 October Mr McAllister emailed Mr Ball saying that he wished to ascertain what falls within their jurisdiction under Section 10 of the 1996 act so that he could manage Mr Ahmed’s expectations. He goes on as follows:

“I have not taken a dual appointment for him to deal with common law issues. You may well do so for Mrs Parsons but I thought I would make it clear the only matters I am going to deal with are those that fall under or incidental to the dispute under the 1996 act.”

26. In September, Mrs Parsons’ solicitors wrote to Mr Ball setting out the nature of the dispute but Mr Ahmed also wrote directly to Mr Ball’s instructing solicitors indicating that there was a meeting. Mr Ball said he had:

“Endeavoured to explain to Mr Ahmed the procedures to be adopted under the mechanism of the act and the procedures required by the Court.”

27. Mr McAllister then emailed Mr Ahmed saying this:

“As discussed, Mr Ball and I are presently only appointed in accordance with Section 10 of the Party Wall Act. Therefore, we will determine the dispute pursuant to matters within the remit of the act by way of an award. The award is the determination of the statutory tribunal ... our award will not deal with all the common law issues you mentioned. You are advised to take independent legal professional advice on such matters in order to consider the merits of taking any legal award in this regard. Whilst Mr Ball and I may agree the boundary location for the purposes of making our award, this is not the same as defining the boundary for Land Registry registration. Therefore, the matters outside the act that Mr Ball and I will not be dealing with include defining the boundary position, matters of nuisance and trespass not attributable to works in pursuance of the act. Any matters of planning law and any other matters in which you consider Mrs Parsons has interfered with your common law rights.”

28. Mr Ahmed, in light of that email wrote to Mrs Parsons’ solicitors saying this:

“I have now spoken to both party wall surveyors onsite. My understanding is that they will not deal with all issues complained of, e.g. nuisance, trespass or determination of boundary or raising the height of the lower garden and damage to my shrubs. They will only report to determine if there were any notifiable works under the Party Wall Act.”

29. Mr Ahmed then sought to rescind his instructions to Mr McAllister but unsurprisingly Mr McAllister referred to Section 10(2) of the act which expressly prohibits rescinding of appointments under the act. In my judgment, it is therefore reasonably clear that the surveyors were instructed to deal with matters under the Act. Those essentially were relating to works, not to other matters such as defining the boundary or nuisance and the jurisdiction of the surveyors under that was to deal with any matter which is connected with any work to which the Act relates and which is in dispute between the two parties.
30. In my judgment, they were entitled to proceed on that basis. Maybe with hindsight it is regrettable that the issues under the Act were dealt with in this way but on the other hand, clearly matters did arise under the Act, such as whether there were notifiable works and whether there was any damage to the boundary wall. In my judgment, those were two issues which were at the centre of the award and which the surveyors proceeded to deal with within the confines of the Act. Accordingly, I do not accept that that essential position justifies the rescission of the award on the basis that the surveyors should have proceeded in any other way.
31. It does leave other issues unresolved, and it is very much to be hoped, that this can be achieved by settlement or by mediation. However, there has been a valid award of the two essential matters which arose under the Act. That broad determination deals with many of the points taken by Mr Steynor on behalf of Mr Ahmed in the presentation of this appeal.
32. He referred me to paragraph 6 onwards of his skeleton argument which he says really sets out paragraph by paragraph the concerns. Paragraph 6 deals with the essential matters which I have just dealt with. In paragraph 7, he says:

“It’s possible for the parties to agree to adopt and adapt the procedures.”

I accept that, but in this case I am satisfied that that was not agreed to, and that the instructions were under the Act. It may be that the limitations were realised too late but I am satisfied, although as Mr Ahmed said in evidence he is not an expert on the Act, that he was making reference to it as early as February 2017 and was saying that there were some issues to be resolved under it.

33. In paragraph 8 of Mr Steynor’s skeleton argument he says that:

“The problem with the award is that it by no means deals with all the issues but having regard to the precise ambit of the surveyor’s jurisdiction under the act that is not a ground for rescinding it.”

The functions under the Act it is said in paragraph 9 are taken too narrow a view of. It is accepted that the award correctly records that Mrs Parsons did not sign or serve any notice but then the surveyors go on to say that the works to remove the concrete hardstanding was not notifiable and that the excavations to facilitate the forming of new fence posts may have been notifiable but were de minimis. Again, it seems to me that those conclusions were within the jurisdiction of the surveyors.

34. The real issue it seems to me in respect of the award is the finding in relation to the lack of damage to Mr Ahmed’s boundary wall. He was called to give evidence. He accepted that the crack is along the lines of a construction joint in the wall as referred

to in the award. He says that the crack was not there before the works carried out by Mrs Parsons were carried out, although there was no photographic evidence of that, which may not be surprising, but the difficulty is that these two surveyors attended site, they saw the wall, they made conclusions that it was not structurally sound, and they gave their reasons.

35. The fact that they come to that conclusion is criticised as being outside the scope of the award but it seems to me that they were making that point in relation to the causal effect of any works carried out by Mrs Parsons upon the wall. They said that it was further indication that no damage had been caused by the works. They noted that there were further cracks which were of an aged appearance. In my judgment, the findings which they made were within the jurisdiction of the two surveyors.
36. Criticism is also made that the surveyors also make a finding that the fence posts were within Mrs Parsons' property but the award expressly does so in order to find whether they were notifiable works or not. The award does not seek, in my judgment, to define the boundary as Mr McAllister clearly stated it would not.
37. Then there is reference to the shed on Mr Ahmed's ground. It is true that it is not clear what was relevance of that finding. It is not the case that the award, having made that observation then went on to deduce from it certain conclusions. It is said that that might have affected the award of costs, which I shall come on to in due course, but it does not seem to me on fair reading of the award as a whole that that is the case.
38. Objection is taken to the award of costs.. That it seems to me again was within the jurisdiction. Having regard to the finding that some works were notifiable under the Act but were de minimis, that the surveyors did not find that any damage to Mr Ahmed's wall was caused by the works in question the conclusion on costs by the two surveyors is unobjectionable. So too in my judgment is the finding that Mrs Parsons' legal costs in relation to the award should be paid.
39. There was some suggestion that that refers to all of the costs relating to the court proceedings but that is not my reading of the award. The award in that regard specifically says that it is restricted to any costs related to the award under the 1996 Act. It is true that then there is a specific award for the barristers' costs in relation to the injunction proceedings. That is a very discreet amount and it does seem to me that that comes within the meaning of reasonable costs within Section 10(13) namely in:

“Any other matter arising out the dispute.”

The application for the injunction, it seems to me, comes within that definition.

40. The outcome is that I can see no basis for setting aside the award. Mr Steynor realistically accepted that either the award stands or it does not. I accept what he says in that it does leave matters somewhat in an unsatisfactory state but that is the procedure which was chosen and which was adopted as I have said. Certain aspects have now been concluded. I would very much hope that the parties can settle all outstanding matters by way of mediation or otherwise.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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