

*(SOME) PARTY WALL PITFALLS*



# Payment of surveyor's fees: enforcement of Award



Section 10(12) :

*An award may determine:*

*(a) the right to execute any work;*

*(b) the time and manner of exercising any work; and*

*(c) any other matter arising out of or incidental to the dispute **including the costs of making the award**".*

Section 17 :

***"any sum payable in pursuance of the Act shall be recoverable summarily as a civil debt",***



Holgate J in ***R (Farrs Lane Developments Limited) v Bristol Magistrates' Court*** [2016] EWHC 982

- the surveyor's obligation under s.10(12) to “determine” matters “*arising out of or incidental to a dispute*” is very broad in scope
- awards providing for surveyor's costs are not ultra vires
- a surveyor is entitled to *directly* enforce the terms of an award where it makes provision for the payment of his fees, despite not being a party and despite the question of fees not being a *matter in issue* between the owners.

# *Questions of access*



- Section 8(1) - access is obtainable *'for the purpose of executing any work in pursuance of this Act'*.
- Section 8(5) of the Act provides that a surveyor *'may ... enter and remain on any land or premises for the purpose of carrying out the object for which he is appointed'*.
- Section 8(2) - if the premises are closed then breaking an entry may be permissible. *'Break open any fences or doors in order to enter the premises'*

## *Removal of Party Wall Surveyor?*



## Section 10(2)

- *“All appointments and selections made under this section shall be in writing and shall not be rescinded by either party”.*

*Decision (1): Reeves v Young and Antonio* (unreported, 3 January 2017)

- Can the surveyors dispense with the services of an agreed surveyor?



## HHJ Bailey:



*“...[S.10(9)] sets out circumstances in which the two owner appointed surveyors might select a new third surveyor. Those circumstances are when the third surveyor refuses to act, neglects to act, dies or deems himself incapable of acting. There is no scope there for a new third surveyor to be selected in any other circumstances or for any other reason however excellent it may seem to the two surveyors to make a further selection... I am accordingly satisfied that Mr Redler was duly appointed and that the surveyors had no business to be selecting Mr Antino in his place. That was an invalid selection. Mr Redler remains the third surveyor duly selected in this party wall process.”*

*Decision (2): Mills v Savage* (unreported 15<sup>th</sup> June 2016)

- Mills' appointed surveyor: *"for costs reasons my appointing owners have asked me to resign ... I deem myself incapable of acting"*.
- Subsection 10(5) of the Act:  
*"If, before the dispute is settled, a surveyor appointed under paragraph (b) of subsection (1) by a party to the dispute dies, or becomes or deems himself incapable of acting, the party who appointed him may appoint another surveyor in his place with the same power and authority."*
- Q: Had the surveyor validly deemed himself incapable of acting?

HHJ Bailey:

**L**  
**C**

- *“deems” means the “party-appointed surveyor is capable, but ... considers or decides that he should not continue to act.”*
- *“it is entirely a matter for a party-appointed surveyor who, while remaining capable of acting as such, has decided that he no longer wishes to continue in the role to resign as party wall surveyor by deeming himself incapable of acting... he may do so on whatever grounds seems appropriate to him.”*
- Other surveyors should not *“police the deemed incapacity ... have no business to be requiring explanations or demanding a resumption of acting ... Whatever [they] think about their colleague’s action they have not accept it and proceed....”*

*The limits of parties' influence over their surveyors*



## *Gray v Elite town Management (unreported, 23<sup>rd</sup> July 2015)*



HHJ Bailey:

- *“... ”not being a party” in the definition of “surveyor” requires there to be an independent appointment to the extent that... it involves a degree of independence from the party. **It excludes any person who is a mere cypher or alter ego of a party”.***

*Discontinuance / withdrawal: can the dispute resolution procedure actually be abandoned?*



*Bibizadeh and Bibzadeh v Dodosh (unreported, 15<sup>th</sup> September 2015)*

Section 10(4):

*“(4) If either party to the dispute –*

*(a) refuses to appoint a surveyor under sub-section 1(b), or*

*(b) Neglects to appoint a surveyor under subsection 1(b) for a period of ten days beginning with the day on which the other party serves a request on him,*

*The other party may make the appointment on his behalf”*

HHJ Bailey:

*“... there is no provision in the 1996 Act for withdrawing a notice... once it has been served. Neither is there any provision in s.10 for a dispute once it has arisen or has deemed to have arisen to be brought to an end by some form of discontinuance.... Difficulties may arise where the prospective building owner decides that he no longer wishes to proceed with any of his proposals which engage the Act or, as here, decides that it was inappropriate to serve a notice and the Act was not engaged.”*



*Must an award authorise an alternative scheme  
if it avoids unnecessary inconvenience?*

L  
C



## Section 7(1):

*(1) A building owner shall not exercise any right conferred on him by this Act in such manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier.*

- *Gray v Elite Town Management (CA) - Jackson LJ:*

*“that provision imposes an obligation on the building owner, not on the surveyors. Furthermore, it seems to me that that provision relates to the manner in which works are to be carried out once a specific design has been approved”.*

## *Ultra Vires Awards*

