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Is the *parte* over?

James McAllister, Director of The Party Wall Consultancy, discusses the implications of a recent Court of Appeal case concerning the appeal of ex parte awards.

Introduction

The recent Court of Appeal decision in *Patel v Peters & Anors*[1] has provided some welcome clarification on the validity of *ex parte* awards pursuant to the operation of sections 10(6) and 10(7) in connection with fees, particularly where a late, but effective, response is received prior to issue of the *ex parte* award. This case also outlines the correct methodology and procedure for resolving disputes over fees.

The Background

This case concerned notifiable works proposed by the Building Owner (Patel), which affected three adjoining properties. Notices were served and surveyors were duly appointed in the usual manner. The various Adjoining Owners had collectively appointed one surveyor to act for each of them.

Various awards were issued in relation to the notified works, each containing a clause entitling the Adjoining Owner's Surveyor ("AOS") to be paid, by the Building Owner, his reasonable expenses in connection with the preparation of the award and one subsequent inspection. Each award also allowed: *"the quantum of such expenses to be agreed or awarded by any 2 of the 3 surveyors".* The escalating fees of the AOS soon became a matter of dispute as the Building Owner's Surveyor ("BOS") was not prepared to accept them. The AOS sought payment on the basis of time expended, as evidenced by his supporting timesheets. The BOS rejected the AOS's timesheets as irrelevant and instead suggested that the fees of the AOS should be determined by making an objective assessment of a reasonable fee based on the time commitment a competent surveyor *should* have spent on the matter. In the event this could not be agreed, it was the BOS's contention that the matter should be referred to the third surveyor for determination. This was not acceptable to the AOS. Predictably, relations between the surveyors deteriorated, which later invited judicial scrutiny as to the general conduct of the surveyors. However, although this was considered by the judges in both the County Court hearing at first instance and in the Court of Appeal as being largely irrelevant to the material issue of the appeal, it does, at least, set the scene as to how the following circumstances unfolded.

The embryo of the subsequent litigation concerned the validity of a request to act served upon the BOS by the AOS pursuant to section 10(7), and the validity of the consequential *ex parte* awards issued by the AOS. Following prior attempts to engage the BOS on the issue of agreeing fees, the AOS had served a letter on 21st December 2011 requesting the BOS to act effectively within 10 days by reviewing his timesheets and agree his outstanding fees. The Christmas period then ensued and the BOS did not respond within 10 days of the request. Interestingly, the AOS considered it to be "ungentlemanly" to serve a 10 day notice over a holiday period going on to state that he would not consider the 10 days to have expired *"until the public holidays have been adjusted for"*, thereby inferring a modification to the statutory 10 day period. The BOS had not only failed to respond within the 10 day period following the request, but had not responded within the extension to the 10 day period purported to have been permitted by the AOS by accounting for public holidays. The BOS did, however, finally respond on 6 January 2012, but the AOS had taken the view that his entitlement to proceed *ex parte* had now been invoked and no action (however effective) by the BOS could now reverse this. The AOS then proceeded to award his fees in three *ex parte* awards[2] a month later.

[1] [2014] EWCA Civ 335.
[2] There was one *ex parte* award between the Building Owner and each Adjoining Owner.

The County Court hearing

The Building Owner appealed the *ex parte* awards in accordance with section 10(17) and the matter came before HHJ Hand QC in the central London County Court. The preliminary issues before the court (as later modified)[3] were as follows:

i) Was the letter dated 21st December 2011 a valid notice under section 10(7)?
ii) Did the wording of the letter alter the 10 day period stipulated by section 10(7)?
iii) Did the BOS respond in time?
iv) Did the BOS refuse or neglect to act effectively?

The judge conjoined issues 1 and 2 and held that the 10(7) notice *was* valid and the wording concerning an adjustment for bank holidays *did not* alter the 10 day period in any way that invalidated the request to act. On issue 3, the judge decided that whilst the BOS did not respond within the 10 day period, a valid response *could* have been made outside the 10 day period provided that the 'requesting'[4] surveyor had not yet issued the *ex parte* award. He contrasted the time frame for compliance stipulated in section 10(7) with the 14 day period set out in section 10(17) for award appeals, suggesting that the latter is set in stone, whereas the flexibility of the provisions contained in section 10(17) are determined by the decided action of the responding party. In other words, there might be some scope to keep alive the ability of the 'defaulting'[5] surveyor to act beyond the 10 day period, provided they act effectively, although the judge declined to lay down any decisive rule on the issue.[6] As for issue 4, the judge held that the BOS had both *refused* and *neglected* to act effectively, albeit the absence of a response alone was not determinative. Instead, the judge looked at the character of the BOS's response. Given that the BOS was not prepared to consider the timesheets of the AOS, which were the subject matter of the request, the judge was satisfied that this was both a *refusal* to act and *neglecting* to act effectively. This conclusion was underpinned by the judge's view that a debate about costs was firmly within the scope of sections 10(6) and 10(7). Therefore, a late response by the defaulting surveyor (BOS), albeit dealing with the subject matter of the request effectively, might have precluded the ability of the requesting surveyor (AOS) to then proceed *ex parte*.

The Court of Appeal hearing

Understandably, the Building Owner did not accept this decision and was given permission to appeal in the Court of Appeal on the basis the case raised important points of principle under the Act. However, despite the written and oral submissions of counsel for the Building Owner, and the representative for the Adjoining Owners[7] arguably raising points of principle, Lord Justice Richards was of the view that the resolution of the dispute turned on the particular facts of the case, rather than points of law. Notwithstanding this, the points arising in the judgment have undoubtedly placated the demand for greater clarity in such matters.

The central issue before the court was whether the BOS had *refused* or *neglected* to act effectively, thereby empowering the AOS to act *ex parte* in the subsequent issue of awards in relation to his fees.

The first ground of appeal[8] related to the first and second preliminary issues in the County Court. LJJ Richards, Beatson and Briggs agreed with the earlier decision of HHJ Hand QC that the notice was indeed a valid request under section 10(7) and the wording in the notice regarding allowance for bank holidays did not invalidate the notice. It was reiterated that the 10 day period in section 10(7) is laid down by statute and cannot be altered by either party, thereby mirroring the rigidity of other timeframes set out within the Act. The issue of whether an estoppel might arise in preventing the requesting surveyor from acting before the purported extension to the 10 day period had expired was briefly raised, although no guidance was given since the issue did not arise out of the facts of this particular case.

[3] There was a fifth preliminary issue which considered whether a clause in the earlier awards precluded the AOS from making any awards under sections 10(6) and 10(7) of the Act; however, this was later discarded.
[4] The surveyor who served the request to act on the other surveyor.
[5] The surveyor in receipt of the request to act.
[6] It should be noted that this was a County Court hearing and no rule would bind any other court, albeit persuasive in future proceedings.
[7] Dr Levy appeared as a litigant in person on behalf of the other Adjoining Owners.
[8] Albeit this was subsequently not pursued by the appellants.

Ironically, what became a pivotal issue in the Court of Appeal hearing was overlooked by the County Court judge as not being relevant on the basis it was not covered by the preliminary issues, despite the fact he did then tentatively rake over the issue. The issue being whether, as the County Court judge put it, section 10(7) creates "a continuing state of affairs" such that a surveyor who neglects to act effectively *within* the 10 day period may act effectively *after* that period, and thus prevent the requesting surveyor from acting *ex parte*. Fortunately, the justices in the Court of Appeal felt the point did warrant determination as it was integral to their ability to later ascertain whether the *ex parte* awards were valid.

The Court of Appeal decided that whilst section 10(7) empowers a requesting surveyor to act *ex parte* on the subject matter of the request if the defaulting surveyor fails to respond within 10 days of the request, there is nothing in this subsection of the Act to suggest that the defaulting surveyor cannot bring an end to his neglect by acting effectively *before* the requesting surveyor has proceeded to act *ex parte*. This affirms that there is an opportunity for a surveyor who has failed to offer a timely response to a request to act to then halt the *ex parte* actions of the requesting surveyor, even if the 10 days have passed, provided the response is an effective action. Again, a distinction was drawn between sections 10(7) and 10(17) where expiry of the 14 day appeal period 'debars' any late action by the appellant.[9]

The Lord Justices of Appeal reiterated that the underlying purpose of section 10(7) was to avoid delay in section 10 proceedings being imposed by one of the surveyors failing to properly cooperate. Therefore, once the defaulting surveyor has brought to an end his neglect by acting effectively, *"the rationale for empowering the requesting surveyor to act ex parte has disappeared"*.[10]

Having settled the legal framework to support the validity of late, but effective, action to end the *neglect* (and with it, the *ex parte* process[11]), the court turned to the facts of the present case to adduce whether the BOS had *refused* to act effectively pursuant to section 10(6). Reversing the County Court decision, and in so doing the validity of the AOS's *ex parte* awards, the justices held that, whilst the BOS had refused to review the AOS's timesheets in the pursuit of agreeing fees, a reasoned justification for the refusal was given. The BOS had proffered an alternative basis for fee assessment, which comprised an objective calculation on the time input that a competent surveyor *should* have spent in fulfilling his duties. According to Richards LJ, he had *"engaged head-on with the subject-matter of the request and set out his position in respect of it"*.[12] In his view, *"this came nowhere near to a refusal or neglect to act effectively"*.[13]

The focus of the counter-argument propounded by the Adjoining Owners was that the RICS Guidance Note: *'Party wall legislation and procedure'*[14] contemplates that an award typically includes for fees *"as a lump sum based on time incurred"*.[15] Thus, the BOS's demand to consider an alternative 'summary assessment' method was a refusal to act effectively on the basis this departs form the industry-recognised norm. Richards LJ did not accept this argument and was satisfied that the alternative method of assessing reasonable fees on the basis of what a competent surveyor *should* have charged was an 'effective' proposition, meaning that the actions of the BOS were neither *refusal* nor *neglect*.

As an aside, Richards LJ also stated that this type of dispute between surveyors *"cried out for referral to the third surveyor"*.[16] This provides a clear indication of the settlement procedure preferred by the courts in such circumstances. Since it is usually a dispute over fees that catalyses the breakdown in relations between surveyors culminating in a demand from one to the other to act on the issue, it begs the question whether, in light of this case, *ex parte* awards will become less common.

[9] *Freetown Limited v Assethold Limited* [2012] EWCA Civ 1657.
[10] [27] Richards LJ.
[11] On the basis an *ex parte* award ha not been issued at the time the defaulting surveyor acted effectively.
[12] [30] Richards LJ.
[13] *ibid.*
[14] 6th edition.
[15] *ibid*, para 7.5.1.
[16] [30] Richards LJ.

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One final point concerns the terminology laid down in the awards in respect of the determination of fees. The awards stated: *"the quantum of such expenses to be agreed or awarded by any 2 of the 3 surveyors".* Richards LJ considered that whilst this *"purported to lay down specific machinery for the determination of the expenses"*,[17] it was not legally effective and did nothing to displace the statutory provisions governing the making of awards on the matter of costs.

Conclusion

This case illustrates that there is a tendency for surveyors to adopt a literal interpretation of the Act without having regard to the underlying purpose. This contrasts with the 'purposive' approach adopted by the courts. Sections 10(6) and 10(7) were clearly contemplated by the statutory draftsmen as a mechanism to keep matters moving forward in the event of a breakdown in cooperation by one of the appointed surveyors. Whilst rigid timeframes are needed for matters such as an appeal against an award, the rationale consistently adopted by the judiciary in both the aforementioned hearings was that other aspects of the Act can be more flexibly applied if the desired outcome contemplated by the Act is ultimately achieved, even if it is a little late in the day. Accordingly, a degree of caution needs to be exercised before dismissing the ability of our opposite numbers to act once the allotted time period for them to do so has expired, particularly if we (as the requesting surveyor) have not yet got our act together and issued the *ex parte* award.

The Court of Appeal decision in this case also makes clear that surveyors should not assume they have carte blanche to go *ex parte* once the 10 days is up following a section 10(7) request if their opposite number later responds in a way that can be construed as 'effective' before the *ex parte* award has been issued. The concept of what is deemed to be acting effectively has also been helpfully explored in this case which may avoid unnecessary, and invalid, *ex parte* awards.

This decision also advises surveyors in dispute over fees that referral to the third surveyor is the correct approach and further demonstrates the practical intention of the three-surveyor tribunal.

Unfortunately, this case inadvertently brings the prospect of hypothetical fee assessments to the table as the standard default. Whilst it remains to be seen whether this will open the floodgates to an abuse of the duties of Building Owners' Surveyors in keeping their appointing owner's costs down by suppressing the fees of others, it may equally discourage Adjoining Owners' Surveyors from artificially ramping up costs under the misapprehension that it isn't their appointing owner they will need to go cap in hand to for payment.

James McAllister is a Director of The Party Wall Consultancy and is a Certified Commercial Mediator and founder of PropertyMediator.co.uk.

Tel: 0844 3510885
Email: info@partywallconsultancy.co.uk | www.partywallconsultancy.co.uk

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[17] [10] Richards LJ.