

**Procedure for enforcing awarded costs pursuant to
section 17 of the Party Wall etc. Act 1996 (“the Act”)**
– A Surveyor’s Approach

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Introduction

These guidelines set out the procedure for surveyors appointed under section 10(1) of the Act wishing to enforce payment of their awarded costs.¹ Accordingly, these guidelines will only be effective where the surveyor seeking enforcement (“Surveyor”) has been properly appointed in writing by either the Building Owner or the Adjoining Owner,² and their fees have been determined in a valid award (“Award”).³

It should be noted that since enforcement of awarded costs pursuant to section 17 of the Act takes place by way of a complaint laid in the Magistrates’ Court,⁴ the complaint must be made within 6 months⁵ of the debt becoming due, i.e. the date of the Award. It should also be noted that since neither the Civil Procedure Rules nor the Criminal Procedure Rules apply to section 17 proceedings, there is no pre-action protocol governing the process of summary recovery of a civil debt in the Magistrates’ Court. Therefore, the following procedure has been adopted in the interests of natural justice due to the absence of any legislative guidelines.

Procedure

1. The Surveyor should firstly, on informal terms, refer the party liable for their costs (“Debtor”) to the clause in the Award where their costs are determined and invite prompt payment.
2. In the event the Debtor fails to pay the sum awarded in a timely manner, or refuses to pay the sum awarded in full, the Surveyor should then issue a ‘Letter Before Action’, marked as such, and sent by ordinary post with a duplicate sent by registered post. This should also be sent by email, where possible. The Letter Before Action should refer to the Award, and the clause where costs have been determined, and it

¹ This is the Surveyor’s fees and any disbursements, as awarded.

² As defined by section 20 of the Act.

³ Irrespective of whether the Award is under appeal.

⁴ Section 58(1), Magistrates Courts Act 1980. This is now settled law: *R (on the application of Farris Lane Developments Ltd) v Bristol Magistrates’ Court and James McAllister* [2016] EWHC 982.

⁵ Section 127(1) Magistrates Courts Act 1980.

should clearly set out the sum owing (“the Debt”). The Letter Before Action should set a deadline for payment not less than 7 days from deemed receipt of the letter in the ordinary course of post⁶ and explain in clear terms the consequences of non-payment. This should refer to section 17 of the Act and that enforcement proceedings shall take place on complaint in the Magistrates’ Court following issue of a summons if the Debt remains unpaid by the stated deadline. It is prudent to also state that should enforcement be necessary, legal costs/costs for appearing as a litigant in person will be sought along with the court application fee and any associated disbursements. It should be noted that the Magistrates’ Court has no jurisdiction to award interest on the debt, so this should not be claimed.

3. In the event the Debtor fails to pay the debt by the deadline set out in the Letter Before Action, the Surveyor should then proceed to lay a complaint (“Complaint”) in their local Magistrates’ Court. Most Magistrates’ Courts are happy to accept the laying of the Complaint by email which helps expedite matters, particularly where the 6-month deadline is imminent, but this also simplifies the annexation of file attachments. The Complaint should comprise the following:
 - (i) Brief summary of the matter including reference to section 17 of the Act, the Award, the costs determined by the Award, the Debt and the Letter Before Action;
 - (ii) Confirmation of the parties. The Surveyor is the ‘Complainant’, the Debtor is the ‘Respondent’;
 - (iii) Attachments including:
 - The signed Award;
 - The invoice for the awarded fee;
 - The Letter Before Action;
 - Any other relevant correspondence between the Complainant/Surveyor and the Respondent/Debtor.
4. The Magistrates’ Court (“Court”) will acknowledge the Complaint usually within 5-7 days, but will treat the date the Complaint was laid as the relevant date for the purposes of the 6-month deadline. If no response has been received within 7 days, it is advisable for the Complainant/Surveyor to contact the Court keeping a detailed record of any phone calls and written correspondence.
5. Once the Court does acknowledge the Complaint, the Complainant/Surveyor is usually invited to attend the Court to obtain the Summons and sign the Complaint within 5-7 days. The Summons and Complaint are usually drafted by the senior legal adviser at the Court in advance of meeting the Complainant/Surveyor. The Court will

⁶ Or from the date of sending if issued by email.

enquire as to the Surveyor's availability for the hearing to take place, which is usually within 14 days of the Summons being drafted. When the Summons is collected and the Complaint signed by the Complainant/Surveyor (the Court will keep copies) the application fee is paid to the Court. At the time of writing this is £70.00.⁷ A receipt should be obtained for later evidence of this cost which the Surveyor will seek to recover from the Respondent/Debtor.

6. It is then the Complainant's/Surveyor's responsibility to post the Summons with a copy of the Complaint to the Respondent/Debtor. It is advisable this is sent by ordinary post with a duplicate by registered post.
7. In some instances, the Respondent/Debtor will pay the Debt immediately upon receiving the Summons to avoid the prospect of appearing in the Magistrates' Court. Any settlement should obviously include the court application fee as well as the original Debt. Where the Debt remains unpaid the matter shall then proceed to the hearing.
8. In advance of the hearing, the Complainant/Surveyor should draft a brief and succinct skeleton argument to briefly set out the reason for the Complaint and what it is the Court is being asked to do, which is to summarily enforce a civil debt arising under a statutory award. The skeleton argument is for the benefit of the Debtor/Respondent as well as the Court, particularly where the Court has limited experience of enforcing awarded costs under the Act. The skeleton argument should include a schedule of costs which set out not only the Debt being sought, but also the court application fee, any disbursements associated with the proceedings (such as travel costs) and any legal costs. Where the Complainant/Surveyor has counsel, then these costs will form the basis of the legal costs being claimed. Where the Complainant/Surveyor is appearing as a 'litigant in person' they may wish to invite the court to award their costs in the proceedings based on their professional rate, but this is entirely at the Court's discretion pursuant to section 64 of the Magistrates Courts Act 1980. It should be noted that despite the fact section 17 proceedings concern summary recovery of a civil debt, the Civil Procedure Rules do not apply so the Complainant/Surveyor is not limited to the prescribed litigant in person rates set out in the Civil Procedure Rules.⁸
9. Again, whilst there is no pre-action protocol governing section 17 proceedings, it is advisable for the Complainant/Surveyor to serve the Respondent/Debtor with a copy of the skeleton argument and schedule of costs so that it is received at least 2-3 working days before the hearing. A copy should also be filed with the Court at the

⁷ VAT is not applicable.

⁸ See *R (on the application of Farris Lane Developments Ltd) v Bristol Magistrates' Court and James McAllister* [2016] EWHC 982.

same time. The Respondent/Debtor may instruct counsel and serve the Complainant/Surveyor with a skeleton argument of their defence ahead of the hearing.

10. At the hearing the Court's legal adviser may introduce the Act to the lay magistrates as it is unlikely they will have dealt with section 17 proceedings previously. It will then be for the Complainant/Surveyor or their counsel to put their case and for the Respondent/Debtor or their counsel to respond. In some instances, the Court's legal adviser will be unfamiliar with the process meaning the Complainant/Surveyor or their counsel will have to provide more background information on section 17 of the Act and the matter before the Court. In most instances, the Respondent/Debtor will not have exercised their right to appeal the Award meaning the Magistrates are statutorily precluded from questioning the content of the Award in light of section 10(16) of the Act. Accordingly, the Magistrates should not entertain the Respondent/Debtor on their grievances with the Award or the conduct of the Complainant/Surveyor. The Magistrates only have jurisdiction to enforce the Debt, so their role is very simply to enquire whether the Debt has been paid, and if it has not, to then order the Respondent/Debtor to pay within a set timeframe.
11. Once both parties have addressed the Magistrates and responded to any questions, the Magistrates will retire to consider the matter before returning to advise the parties of their decision, which will invariably be that the Respondent/Debtor must pay the Complainant/Surveyor the awarded sum within a stated timeframe.⁹ On the basis the Court enforces the Debt, the Complainant/Surveyor will have been successful in the proceedings and will then wish to turn the Court's attention to the matter of costs. At this juncture the schedule of costs will be put to the Magistrates for consideration. The Respondent/Debtor may wish to make submissions on costs before the Magistrates again retire to consider their decision. The Magistrates will then return to make their order on costs. Where the Complainant/ Surveyor appears as a litigant in person, the Court has discretion to award a sum that they consider is 'just and reasonable'.¹⁰ It is unusual for the Court to consider the Complainant's/ Surveyor's professional rate to be unreasonable when it is the same rate upon which the awarded fee was calculated and where it is evident this cost would be lower than the costs that might have been incurred had the Complainant/Surveyor instructed counsel; however, it is entirely at the Court's discretion.
12. Where the legal status of the Award is being challenged by the Respondent/Debtor on grounds of being a nullity, then the matter may advance to a 'contested hearing' before a District or Circuit Judge rather than lay Magistrates. In this scenario the

⁹ This is usually 28 days.

¹⁰ Section 64, Magistrates Courts Act 1980.

hearing will be adjourned to a later date. Where the Award being is enforced is currently under appeal pursuant to section 10(17) of the Act in the County Court, the Magistrates have no statutory power to suspend enforcement of the Award and adjourn the section 17 proceedings pending the outcome of the appeal. The rationale for this being that this would inadvertently benefit the Respondent/Debtor, particularly as the Magistrates' Court has no power to award interest on the Debt.¹¹

13. The status of CPR Part 36 offers and 'Calderbank' type 'without prejudice save as to costs' offers in the context of section 17 proceedings is also worthy of consideration. This is in relation to the impact on any costs award where the Complainant/Surveyor or the Respondent/Debtor sought to offer, ahead of the hearing, a settlement more advantageous to the other party than ultimately awarded by the Court. In the first instance, Part 36 offers will have no legal status since they fall under the Civil Procedure Rules which do not apply in section 17 proceedings. Whilst 'Calderbank' style offers would have legal effect, it is not within the Court's jurisdiction to modify the amount by which the Complainant/Surveyor is to be awarded as the Award will clearly state the sum to be enforced. It is, therefore, difficult to see what benefit such an offer will have unless the Respondent/Debtor was to offer, in advance of the hearing, a sum greater than the awarded sum being claimed so as to prevent the proceedings going ahead, but that the Complainant/Surveyor declined the offer and elected to escalate the matter to a hearing nonetheless.
14. Finally, the Respondent/Debtor has an absolute right of appeal against the decision of the Magistrates' Court. There are two options for appeal, either to the Crown Court on matters of fact,¹² or by way of a 'case stated' application to the Divisional Court on matters of law. A case stated application will extinguish the right to appeal to the Crown Court¹³ meaning any appeal against matters of fact is then lost by the appellant.

Conclusion

In light of the decision in *R (on the application of Farris Lane Developments Ltd) v Bristol Magistrates' Court and James McAllister*¹⁴ challenges by the Respondent/Debtor against the Magistrates Court's jurisdiction to hear section 17 proceedings are infrequent as the matter is now settled law. It is often the case that Magistrates' Courts outside the major cities of England and Wales will be unfamiliar with the Act, but will be familiar with summary enforcement of civil debts. Reference to *Farris Lane* will assist the Court should there be any uncertainty.

¹¹ *R (Natural England) v Day* [2014] EWCA Crim 2683.

¹² Although the procedure is unclear as it is questionable whether the Criminal Procedure Rules apply.

¹³ Section 111(4), Magistrates Courts Act 1980.

¹⁴ [2016] EWHC 982.