

## Going It Alone: *ex parte* Awards

*James McAllister, Director of The Party Wall Consultancy, explores the principles and pitfalls to be considered when exercising sections 10(6) and 10(7) of the Party Wall etc. Act 1996.*

I recently had to serve my first '*ex parte*' award. Fully expecting it to be appealed, I went the extra mile to ensure I did all that was humanly possible to demonstrate that my actions in going *ex parte* were fully justified. Despite ruffling the feathers of my recalcitrant counterpart, the award was thankfully not appealed, and so the works specified within it were allowed to continue unencumbered by the shortcomings of my opposite number. This was a result, but could so easily have had a very different outcome.

Many of us complain about the actions or inactions of our co-appointees, particularly where their fastidiousness or plain laziness is holding up the process, but rarely do we utilise the Act to press ahead on our own and get the job done swiftly and effectually. Sections 10(6) and 10(7) of the Act allow us to take this very action, of course, where the criteria is met.

Section 10(6) of the Act states: *"If a surveyor [...] refuses to act effectively, the surveyor of the other party may proceed to act ex parte and anything so done by him shall be as effectual as if he has been an agreed surveyor"*.

Section 10(7) states: *"If a surveyor [...] neglects to act effectively for a period of ten days beginning with the day on which either party or 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"*.

Note the word 'may' in both sub-sections, suggesting it is not necessarily a *fait accompli*, nonetheless, it is an available option, so why ignore it? The Act, after all, is an 'enabling Act', and the rights of the Building Owner to proceed with his intended works in pursuance of the Act should not be impeded by the procrastination, deliberation or obstinacy of either appointed surveyor.

This gives the lone 'active' surveyor a glorious opportunity to press ahead and continue as if he had been appointed in the capacity of Agreed Surveyor, possibly halving the fee burden to the liable party in the process. This could invariably delight the Building Owner on two counts: 1) progress finally being made; 2) he may no longer be liable for the fees of the defaulting surveyor, regardless of whether or not those fees were deemed 'reasonable'. Of course, it should be borne in mind that the need to proceed *ex parte* might not apply to all matters being the subject of the award. Section 10(7) is clear on this: *"the surveyor of the other party may proceed to act ex parte in respect of the subject matter of the request [...]"*. Thus it may only be one particular aspect of the draft award leading to one surveyor digging in the heels and thus falling foul of section 10(6)/(7). Therefore, a separate award on the other matters already agreed may well be produced in the meantime adopting the standard statutory triumvirate. This is, however, unlikely; if one surveyor is risking the other proceeding *ex parte* under section 10(6)/(7) the chances are it will be on all matters following a behavioural impasse rather than a technical dispute, or else the parties would be turning to the provisions of section 10(11).

In my recent experience, my reasons for acting *ex parte* were quite simply the natural outcome of my inability to engage the adjoining owner's surveyor to join with me in making an award. Whilst he was initially in regular correspondence, once it came to drafting and signing the award, the communication faltered. I politely alerted my counterpart to sections 10(6) and 10(7) and the action I would take if he satisfied the conditions of either. I immediately received requests for irrelevant information that was not in any way pertinent to the works detailed in the notice (nor covered by the Act), so well outside the jurisdiction of our respective appointments. Accordingly, I sent a further draft award asking him to review and amend as necessary, whilst formally alerting him to section 10(6) and 10(7) and the potential ramifications for non-observance.

We weren't in dispute on any issue (other than the relevance of his information requests regarding an unrelated part of the project) and as such, there was no reason to refer the matter to the Third Surveyor under section 10(11). Electing to play it safe, I awaited the effluxion of the 10 days and then set about drafting my *ex parte* award. Mindful of the fact this would be met with some animosity (largely due to the issue of his fees being omitted from the award) I dutifully recorded the date of every email and letter requesting action, particularly the dates a formal request was made, along with the dates draft awards were submitted for review and/or amendment. This information was then carefully inserted in to the front of the award giving a detailed and potted history as to how we got to where we are now and why I had taken the action to proceed in this way.

It is imperative that reference is made to whether the decision was taken under either section 10(6) or section 10(7) and that this marries up with the actions of the other surveyor. One of the grounds upon which the *ex parte* award in *Frances Holland School v Wassef* [2001]<sup>1</sup> was set aside was that the surveyor, who subsequently proceeded *ex parte*, wrote to the other surveyor requesting him to enter in to an award within the next 10 days, and *failure* to do so would mean he would act *ex parte*. Yet when it came to producing the *ex parte* award, the *ex parte* surveyor cited the reason for doing so on the basis the other surveyor's *refusal* to act. Whilst this case concerned the provisions of the 1939 London Building Acts (Amendment) Act, this glaring inconsistency led to Judge Crawford Lindsay QC providing a salutary reminder to us all, which remains relevant under the 1996 Act:

*I conclude that any surveyor who wishes to avail himself of the provisions of section 55 [now Sections 10(6) and 10(7) under the 1996 Act] must comply strictly with the provisions of the Act. This means that the surveyor can rely upon a refusal, or upon a notice that complies with the provisions of the Act, or, where appropriate, upon both grounds. The relevant grounds must be expressed accurately in the ex parte award.*<sup>2</sup>

In this case, the legitimacy of the *ex parte* award was also compromised by the fact that there was no evidence of either a refusal or a failure to act. This underlines the importance of collating and subsequently reciting the necessary evidence to illustrate either a *refusal* to act effectively or a *failure* to act effectively within 10 days of the request being made.

Under the 1996 Act we now have the terms 'refuses' [S.10(6)] and 'neglects' [s.10(7)], but common to both sub-sections is the word 'effectively'. Whilst it is evidently important to distinguish between a refusal to act and neglecting to act (for a period of 10 days from request) it is equally important to establish whether what little action that may have taken place has been *effective*. Clearly, a letter from the other surveyor conveying that he can't be bothered to act any further (but without reference to section 10(5)) would satisfy grounds to act *ex parte* under section 10(6), but what if the response was less polarised? This is where problems may arise, and perhaps the reason why most *ex parte* awards are actioned under section 10(7), being the more clear-cut route. It is mooted that simply sending out holding correspondence or one-liners to buy more time, without actually progressing the matter, may amount to ineffective behaviour which could satisfy both section 10(6) and 10(7), albeit in the latter it would need to continue in this way for the requisite timeframe. In my experience, the late request by the adjoining owner's surveyor for engineer's details on a part of the building owner's works unrelated to the notice (and indeed the Act) was irrelevant, aside from being perhaps ineffective behaviour, but was it a refusal to act effectively? I played it safe and served the 10 day request under section 10(7) and (fortunately) heard nothing more. Perhaps if, in my situation, the other surveyor had stated, in no uncertain terms, that he would only deal with the matter for an hour every third Sunday afternoon and on the basis the award was to be drafted in accordance with the 1939 Act rather than the 1996 Act I may well have proceeded under section 10(6) without a second thought, and would have relished the recital of my reasons for doing so in the *ex parte* award.

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<sup>1</sup> [2001] 2 EGLR 88.

<sup>2</sup> *ibid.*

The concept of refusal to act effectively was also considered in the recent (unreported) county court case of *Manu v Euroview Estates Limited* [2008].<sup>3</sup> Among the issues considered in the judgement was whether the conduct of the adjoining owner's surveyor, Mr Lai (who was also acting as his solicitor), amounted to a 'refusal to act effectively' in that he *refused* to act further until fresh notices were served in place of the original notices served nearly two years previously, when new notices were, in fact, not necessary. The judge, HH Hazel Marshall QC, delivered an important point worthy of future consideration if ever adopting a 'firm' position on the validity of notices:

*Although the bare refusal contained in the letter might, in a different context, have amounted to no more than a statement of position, given the combined facts that it was raised so late in the day, more as part of a negotiating strategy than for genuinely good reasons and against the background of taking a succession of pedantic and difficult points, I find that, in this situation it did not do so...I therefore hold that Mr Lai's letter of 12 January 2006 was, in all the circumstances, a refusal to act effectively.*<sup>4</sup>

Fees (or to accord with the Act's terminology, 'costs') are, sadly, the biggest motivator in either awakening the dilatory surveyor to the implications of section 10(6) & (7) in order to prompt action, or in catalysing their appointing owner's appeal of an *ex parte* award once served. Either way, the prospect of having to fight to recover fees, which would otherwise be afforded the luxury of inclusion within the award, will usually be enough to elicit the desired response.

In a recent article entitled '*Dealing with unreasonable costs*',<sup>5</sup> the author, a pre-eminent Party Wall Surveyor, has alluded to the provisions of sections 10(6) and 10(7) as a useful mechanism for overcoming the ever-present issue of disagreement on 'reasonable' fees. The method being to do nothing more than acknowledge the other surveyor's unreasonable fees at the outset, but pressing ahead with service of the award, *sans* fees, by accompanying it with a 10 day notice under section 10(7), thereby crystallising the issue and avoiding unnecessary delay. If the 'unreasonable' surveyor continues to shirk his obligations to make the award purely on the basis his exaggerated fees have not been agreed, the system is in place for the other to proceed alone. This is an effective and fair way of dealing with the problem, although in this illustration, the 'unreasonable' surveyor did still obtain his fees, albeit negotiated down substantially from the starting position. Taking matters further, it could be submitted that the fees of the surveyor *refusing* or *neglecting* to act need not even be entertained by the *ex parte* surveyor since their services (and naturally their appointment) will have been summarily discharged with the service of the *ex parte* award; this example, of course, assumes the *ex parte* award covers all the points the surveyors were appointed to settle. Accordingly, the non-participating surveyor will no longer exist as a statutory member of the tribunal and fees need not, therefore, be awarded. If the supplanted surveyor wishes to pursue his fees with the appointing party directly, then that is their prerogative, but this could only be enforced contractually, if indeed a contract exists. Some surveyors acting *ex parte* may be a little more sympathetic to the plight of their counterpart and agree to a separate award covering fees, but caution ought to be exercised to ensure there is legal authority to do so; if one of the appointed surveyors has failed to perform their statutory function under the Act by eschewing their obligations by virtue of sections 10(6) and 10(7), would the subsequent collusion with the other surveyor to guarantee their fees by way of a separate award fall within their jurisdiction, or amount to complicit abuse of their powers?

Taking a slightly different stance, there is proven scope to proceed *ex parte* on the issue of fees alone, but again, the precept to this presumes meeting the criteria. The case of *Bansal v Myers* [2007],<sup>6</sup> again an unreported county court decision demonstrates that where the surveyors are in agreement on all matters up to the point of award publication, even on the inclusion of their respective fees, but where one surveyor cannot accept the 'reasonableness' of the other's fees, then grounds for proceeding *ex parte* could be the answer for the 'jilted' surveyor. This would again need to follow the requisite application of sections 10(6)/10(7) to the letter, but underlines the notion that, if properly administered, there is no reason why the more diligent surveyor should not be properly remunerated once he has fulfilled his role.

<sup>3</sup> [2008] 1 EGLR 165.

<sup>4</sup> *Manu v Euroview Estates Limited* [2008] 1 EGLR 165.

<sup>5</sup> P Antino, *Dealing with Unreasonable Costs* (Faculty of Party Wall Surveyors' Newsletter: '*Party Wall Surveyor*', January 2011).

<sup>6</sup> *Bansal v Myers* [2007] unreported, Romford County Court, 26<sup>th</sup> October 2007 (Case No. 7RM01607).

This obviously contrasts with the anecdotal examples cited above where the presumption is that the two surveyors could not even get to the signing of an Award owing to the apathy of one or other. Interestingly, once the appeal of the *ex parte* award in *Bansal* was dismissed, and the *ex parte* award deemed valid, HH Judge Platt clarified that the appellant (the building owner) had missed the opportunity to have the issue of 'reasonable fees' determined by the Third Surveyor:

*Since I have determined that the award was valid the Appellant has lost his right to have the issue referred to the Third Surveyor for determination as a dispute.*<sup>7</sup>

This case also illustrates the injustice of one surveyor proclaiming that the other's fees are unacceptable, but then doing nothing to progress agreement on the issue, particularly where the award is ready to serve, if not already served; obviously, quite a different scenario to that where one surveyor refuses to sign an Award until his exorbitant and unsubstantiated fees have cleared in his account. Rather helpfully, HH Judge Platt put this in to context:

*If he [the building owner's surveyor] had responded with reasoned objections and the two surveyors were unable to resolve the issue, then and only then there would be a dispute to be referred to the Third Surveyor for his determination. It is simply unacceptable for Mr Antino [the adjoining owner's surveyor] to be left with no more than a bare assertion that his fees were unreasonable. The award is therefore a valid award.*<sup>8</sup>

It would therefore seem that the mere suggestion the fees of one party are unreasonable by their counterpart, but without a reasoned justification, does not itself connote a dispute worthy of referral to the Third Surveyor, and if the actions, and fees, of the surveyor who is under pecuniary scrutiny are left out of the original award, he should not have to go cap-in-hand to the parties for his shilling. This is of particular comfort to the morally righteous among us who are prepared to sign and serve an award in good faith regardless of the remuneration terms, and it should placate (or shame) those of us who still resist signing an award until fees and payment terms have been agreed, or worse still, funds have been received.

Moving on to the practical aspects of ensuring we avoid the *ex parte* award being invalid or appealed, it is good practice to notify the parties in advance of your proposal to proceed *ex parte* together with a brief explanation of what this entails. Whilst this is not mandatory as far as the Act is concerned, it is professionally courteous, particularly where this may have cost implications for the party whose surveyor has defaulted.

The other surveyor obviously needs to be aware a request has been made of him, and it would seem best practice to also refer him to the requisite part of the Act rather than infer a breach from one's own interpretation. Often the threat of going *ex parte*, and a timely reminder of what the Act says, will be enough to engage the other surveyor to take heed and avoid his protestations that he has been usurped by sharp practice.

In the drafting of my *ex parte* award I renamed myself as the 'appointed surveyor', as I was uncomfortable using the terms 'building owner's surveyor' or 'adjoining owner's surveyor' when the tripartite practical tribunal had, in this situation, been dissolved. Moreover, I was certainly not appointed as 'agreed surveyor' by the parties in the letter of appointment. However, sections 10(6) and 10(7) state that, in acting *ex parte*, "[...] anything so done by him shall be as effectual as if he had been an agreed surveyor". So the principle is there if not the formal appointment.

It is important not to confuse a refusal to act with an *impasse* where the surveyors are in dispute themselves and cannot agree on what is to be awarded, or how. In such a situation, the Third Surveyor ought to be approached to make an award in accordance with section 10(11). Often, the supplanted surveyor will claim that the *ex parte* is invalid because there was no reason why the matter could not have been referred to the Third Surveyor; the circumstances for going down this route are quite different, as we have seen.

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<sup>7</sup> *Bansal v Myers* [2007] unreported, Romford County Court, 26<sup>th</sup> October 2007 (Case No. 7RM01607).

<sup>8</sup> *ibid.*

Finally, it almost goes without saying that the circumstances leading to action under sections 10(6) and 10(7) are quite different to where one party *refuses* to initially appoint a surveyor [s.10(4)(a)], or *neglects* to appoint a surveyor for a period of 10 days from the date of request [s.10(4)(b)], or indeed where one of the appointed surveyors dies, becomes or deems himself incapable of acting [s.10(5)]. Obviously, any surveyor seeking to go *ex parte* whilst his counterpart is still in the process of being appointed or replaced will catch *the* inevitable cold...

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