Case No: HT-2017-000042

Neutral Citation Number: [2017] EWHC XXXX (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 19 April 2017

BEFORE:

MRS JUSTICE O'FARRELL DBE

BETWEEN:

LEA VALLEY DEVELOPMENT LIMITED

Claimant

- and -

THOMAS WILLIAM DERBYSHIRE

Defendant

MR N ISAAC (instructed by Devonshires Solicitors LLP) appeared on behalf of the Claimant

MR J MORT QC (instructed by Child & Child) appeared on behalf of the Defendant

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JUDGMENT
(As Approved)

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MRS JUSTICE O'FARRELL:

1. The claimant in this matter is a wholly owned subsidiary of Aldwyck Housing Group Limited, which is a not for profit social housing provider. The claimant is the freehold owner and registered proprietor of 26-30 Muswell Hill, London, N10 3TA. The defendant is the freehold owner and registered proprietor of the adjoining property at 32 Muswell Hill, a detached Edwardian house converted into six flats, which at various times have been let out to tenants.

2. On 18 November 2014, the claimant entered into a JCT Design and Build contract with Kind & Company Limited, for site clearance and the design and construction of 12 apartments and associated external works and drainage at 26 to 30 Muswell Hill. The works include notifiable excavation works under s.6 of the Party Wall etc Act 1996 (hereafter referred to as the Act). Consequently the claimant as building owner was required to give notice and obtain an award authorising the excavation works that were in close proximity to the adjoining property owned by the defendant.

3. On 19 December 2014 a party wall award was made and there have been subsequent awards since then dealing with various aspects of compensation. Following notification under s.6 of the Act the claimant appointed its surveyor, Mr John Chick of J P Chick & Partners Limited, and the defendant appointed its surveyor, Mr Ian Martin of Martin Surveying Associates. A third surveyor was appointed in accordance with the Act, namely Mr Alastair Redler of Delva Patman Redler LLP.

4. The initial party wall award was issued on 19 December 2014. That award provided that if the works were undertaken by the building owner, as authorised, the conditions set out at s.4 of the award were applicable, including at (d) that if the claimant undertakes the works it shall:

> "Make good all structural or decorative damage to the adjoining owner's property occasioned by the works, including underpinning the adjoining owner's property if required in material to match the existing fabric and finishes to the reasonable satisfaction of the building site owner's surveyor and the adjoining owner's surveyor. Such making good to be executed upon completion of the works or at any earlier time deemed appropriate by the agreed surveyor and the adjoining owner's surveyor. If so required by the adjoining owner, i.e. the defendant, make payment in lieu of carrying out the works to make the damage good, such sums to be determined by the agreed surveyor."

At 4(e) there was also a requirement that if the works were undertaken the building owner shall:

> "Indemnify the adjoining owner and tenants in respect of injury to or loss of life of any person or damage to property caused or in consequence of the execution of the works and the costs of making any justified claims."

5. Section 7(2) of the Act provides that:

> "(2) The building owner (i.e. the claimant in this case) shall compensate any adjoining owner (that is the defendant in this case) 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."

6. Unfortunately, shortly after the commencement of the works by the claimant it became clear that severe damage was being caused by those works to the defendant's property and by the late summer/early autumn of 2015 the damage to the property was so severe that the tenants had to vacate it in order to ensure their safety. In or around August 2016 it was agreed in principle between Mr Chick, the claimant's surveyor, and Mr Martin, the defendant's surveyor, that the property had been so damaged by the works, in particular the notifiable excavation works on the site, that it could not be economically repaired and must therefore be demolished and rebuilt. As I understand it, this is the course which the defendant proposes to adopt i.e. it is common ground between the parties that the current building at number 32 Muswell Hill must be demolished and completely rebuilt.

7. Between 30 November 2015 and 25 January 2017, four compensation awards have been made by the surveyors appointed by the parties under the terms of the Act, awarding sums in respect of loss of rent and fees to be paid by the claimant to the defendant, namely:
   (i) on 30 November 2015 payment of £84,717.28;
   (ii) on 5 May 2016 payment of £48,798.60;
   (iii) on 21 September 2016 payment of £37,172.74 and
   (iv) on 25 January 2017 payment of £42,272.28.

8. The current dispute has arisen between the parties in respect of the much more significant costs involved in demolishing and rebuilding of the property and the basis on which any compensation should be assessed under the Act.

9. The claimant instructed a quantity surveyor at Arcadis LLP to provide an estimate for the costs of demolishing and rebuilding the property, set out in a report in which Arcadis estimated that those costs would be some £1,051,574.55. The defendant appointed their own quantity surveyor at Halsted Associates and a report dated 8 December 2016 was produced in which the cost estimate for demolishing and rebuilding the property was given as some £1.952 million.

10. In November 2016 the claimant also commissioned a valuation report from Anthony Ford of Cluttons LLP. The report was produced on 21 January 2107 and assesses the diminution in the freehold value of the property attributable to the damage caused by the works i.e. an alternative basis of valuation in respect of the loss suffered by the defendant. That report has estimated that the diminution in value attributable to the works carried out by the claimant is between £488,000 and £1 million.

11. In summary, the claimant's position is that in the circumstances of this case and for the purposes of s.7(2) of the Act, the correct measure of compensation in respect of the damage suffered by the defendant is by reference to the diminution in value of the property, that is between £488,000 and £1 million. The defendant's position is that the correct measure of compensation is by reference to the cost of demolishing and rebuilding the property, which on its case is some £1.952 million.

12. The matters that are currently before the court are threefold:
    (i) first of all the defendant's application for an extension of time, if so needed, for filing its acknowledgement of service;
    (ii) secondly, the defendant's application for a declaration that the court lacks jurisdiction or in the alternative, if it has jurisdiction, should stay the claimant's current claim pending a determination by the surveyors of the outstanding issues in relation to compensation; and
    (iii) thirdly, the claimant's application for expedition of its claim.

13. The Part 8 claim in question was issued by the claimant on 20 February 2017 seeking declaratory relief from the court in the following terms, namely:
    (1) a declaration that in the circumstances of this case the claimant's obligation to pay compensation to the defendant should be calculated by reference to the diminution in value of the property; alternatively;
    (2) a declaration as to what in the circumstances of this case the proper measure of compensation should be.

14. Dealing firstly with the issue as to whether or not any extension of time is needed or should be granted in relation to the acknowledgement of service, the relevant facts can be cited fairly shortly. On 21 February 2017 the claimant served or rather sent the Part 8 claim to solicitors acting for the defendant. On the same day the defendant's solicitor responded by email in the following terms:

> "Thank you for your email below and I confirm the documents are safely received. I will look at them in detail, but there are two points which I should immediately make:
> (1) I will take my client's instructions as to whether I am authorised formally to accept service of proceedings…
> (3), if the application for an expedited hearing proceeds we will apply for a stay pending resolution of the issues by the third surveyor."

15. On 24 February 2017 a further email was sent by the defendant's solicitor stating:

> "This is just to confirm that I am authorised to accept service."

It is common ground that no further copy of the Part 8 claim was served on the defendant. Assuming therefore that there was good service by reference to the second response of the defendant's solicitors the defendant should have filed an acknowledgement of service not more than 14 days after service of the claim i.e. by 10 March 2017. In fact the acknowledgement of service was not served until 21 March 2017 when the defendant formally gave notice that it wished to challenge jurisdiction in relation to the claim.

16. It seems to me that this is a technical dispute without any substance. It is quite clear that as from 21 February 2017 the defendant and its solicitors were aware that the Part 8 claim had been issued. They had received a copy of it and the two emails, properly construed, simply notify the claimants that having considered the matter with the defendant, the defendant's solicitors confirmed that they were authorised to accept service. I accept that there is a degree of ambiguity in that it could be they were

authorised as from 24 February or it could be interpreted as them confirming that they were in fact authorised as from 21 February. However, nothing turns upon it, because it was also clearly the case that as at 21 February the claimant could be in no doubt that if and insofar as the defendant's solicitors did have authorisation to accept proceedings, there would be an application for a stay. There was a reference to advice having been obtained from counsel as to whether or not the statement of facts could be agreed and whether or not the claimant's proposed course of action was appropriate. But what was clear was that the Part 8 claim was going to be disputed and that there would be a stay application made by the defendant pending resolution of the issues by the further surveyor, which is what in due course occurred.

17. If I had to analyse it in technical terms, there was an effective service by the claimant's solicitors on the defendant's solicitors on 21 February, as the defendant's solicitors confirmed that they had the appropriate authorisation by their email of 24 February and did not at that stage request the claimant to re-effect service. No useful purpose would have been served by re-service of the Part 8 claim. Both sides were well aware of what the claim was and on the basis on which it would be disputed.

18. I then turn to whether or not, the acknowledgement of service being late, the court should grant relief from sanction. I have no doubt that relief from sanction should be granted in this case. The applicable principles are set out in the Court of Appeal in Denton v. White [2014] EWCA Civ 906 and in the White Book at paragraphs 3.9.3 onwards. The breach in this case is not a serious breach, it is at best a technical breach. Both parties were aware of the application, aware of the service and aware that it would be disputed. There appears to have been a lack of communication between the solicitors, which would have clarified whether or not re-service was expected by the defendant's solicitors following their email of 24 February or not. However, there has been no prejudice to the claimants. They were at all times aware that the defendant intended to take a jurisdictional challenge and seek a stay, as they have done today. It is clearly a case in which the court should grant relief from sanctions and I so do. I do not consider that this is a case where either party should obtain the costs of that application from the other, so I make no order as to costs in relation to the application for an extension of time.

19. I now turn to consider the more substantial issue, which is the defendant's challenge to jurisdiction and/or its application for a stay. The defendant's position is that the court has no jurisdiction to determine the basis on which damages or compensation should be valued, because that is a matter that is left to the surveyors in accordance with the terms of the Act. Even if the court does have jurisdiction it should not exercise jurisdiction in this case but should stay the proceedings so as to leave the matter to the surveyors.

20. The claimant's position is that the court does have an inherent jurisdiction to determine the issue of law or construction that has been framed in this case and the court's determination would not trespass on the party wall activities of the surveyors. It is not excluded by the Act and it would assist in the resolution of the dispute between the parties as to the appropriate basis on which compensation should be assessed.

21. In relation to jurisdiction I start by turning to the terms of the Act itself. Section 10 provides for the resolution of disputes. Section 10(1) states that:

"(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 this section referred to as "the three surveyors")."

In this case s.10(1)(b) was adopted, namely each party appointed its own surveyor and those two surveyors appointed a third.

22. Section 10(10) provides:

"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."

23. Sub-section (11) provides:

"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."

24. Sub-section (12) provides that:

"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 costs of making the award."

25. Sub-section (16) provides that:

"The award shall be conclusive and shall not except as provided by this section be questioned in any court."

26. Sub-section (17) provides:

"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."

27. Therefore, the scheme of the Act is that where there is, as in this case, any dispute as to the works proposed to be carried out on or near to a boundary, following notice issued by the claimant in the absence of consent by the defendant, a dispute is deemed to have arisen. Section 10 provides that such a dispute shall be settled by an award made by two of the surveyors or in the event that they cannot reach agreement, the third surveyor.

28. The Act provides a comprehensive code by which any disputes in relation party wall matters can be determined without recourse to the courts. Sub-section (12) of s.10 is in very wide terms. It enables the surveyors not only to determine the works that may be carried out and the manner in which they may be carried out, but also any other matter arising out of or incidental to the dispute and I think it is common ground between the parties that that includes the power to award the appropriate compensation in accordance with s.7.

29. It is clear that the award is to be conclusive, subject to a right of appeal. The rights of appeal are in very broad terms and entitle the parties to a complete re-hearing on appeal. The court has power to rescind the award or modify the award in such manner as the court thinks fit i.e. it is not limited to challenges based on errors of law or a want of jurisdiction.

30. The court has an inherent jurisdiction to provide declaratory relief under s.19 of the Senior Courts Act 1981 and as set out in CPR 40.20. Mr. Mort's submission is that because the Party Wall Act provides for a complete code for resolving disputes between the parties, that acts as an ouster of the court's jurisdiction in respect of any matter that can be determined under s.10, subject only to any appeal under s.10(17). In my judgment Mr Isaac is correct that for the inherent jurisdiction of the court to be ousted would require very clear wording but such wording does not appear in s.10 of the Act. Although it is clear that the intention is that this Act will enable the parties to have their disputes resolved without recourse to the courts, it does not go so far as to exclude the power of the court in appropriate circumstances to grant such relief as may be appropriate on the facts of any particular case. By way of contrast, section 1 of the Arbitration Act 1996 expressly precludes the court from interfering with an arbitration agreement save in defined circumstances and makes provision for any proceedings to be stayed pending arbitration on the application of one of the parties.

31. In this case there is no such prohibition on the court participating in determining any dispute and the very wide powers of appeal indicate that this was not a matter in which Parliament felt the need to exclude the court's power to grant relief in appropriate circumstances. Therefore, although there is no direct authority on this case, it seems to me that on a correct construction of the Act it does not exclude the inherent jurisdiction of the court to grant declaratory relief.

32. I then turn to the issue as to whether or not the court should exercise its inherent jurisdiction in this case or whether it would be more appropriate to stay the proceedings pending determination by the surveyors of the outstanding matters in relation to the party wall dispute. I start by looking at the award that was issued on 19 December 2014. This award is in fairly clear and straightforward terms. It provides that if the claimant undertakes the works it shall make good all structural or decorative damage to the adjoining owner's property occasioned by the works including underpinning, if

required, and in material to match the existing fabric and finishes, to the reasonable satisfaction of the surveyors appointed by the parties, and that making good should be executed on completion or at any time deemed appropriate by the surveyors. The option of making payment in lieu of carrying out the works is one that can be exercised at the discretion of the defendant and is not something that can be imposed on the defendant. That award is final and conclusive in accordance with s.10(16) no appeal having been started by either party to overturn or modify the terms of that award.

33. The issue that the claimant is asking the court to determine is one that is narrow in compass and one that ought to be capable of determination by the court after a relatively short hearing. It is to determine whether, in the circumstances of this case, which must take into account the terms of the first party wall award, the claimant's obligation to pay compensation should be calculated by reference to diminution in value or the cost of reinstatement. Given the agreement on the key facts, that question is one of law and interpretation of the first party wall award and s.7(2) of the Act. It does not require determination by the court of any extensive factual or expert issues.

34. I accept Mr Mort's submission that there may be issues that arise as to the basis on which any compensation should be valued, whether by reference to cost of reinstatement or diminution in value. That may need some further investigation into the costs assessed by the experts, including some investigation as to what is practicable on this site and what planning permission might or might not be sought and obtained. However, the essential issue, namely the appropriate basis of compensation, does not need a detailed investigation of those points, it simply needs the court to determine the point by reference to common law precedent, s.7(2) and the wording of the first party wall award.

35. If that issue were to be determined, it would not be trespassing on the role of the surveyors under the Act, it would simply be identifying the appropriate test that the surveyors should adopt when making their assessment. The court would not be determining the dispute as to the amount of compensation, it would simply be determining the appropriate interpretation of the law, the Award and the Act so as to enable the surveyors to move forward and settle the further award.

36. I have considered whether the parties should simply be left to take this matter to the surveyors. I bear in mind the risk quite properly drawn to my attention by Mr Mort, of parallel proceedings. However, if this court can determine this short issue fairly quickly, then it is likely that the surveyors will await the outcome of that court determination. The parties have not yet referred this matter to the surveyors, and therefore the sensible course is for both parties to wait for the court determination before seeking a further award from the surveyors.

37. The advantage of having this point determined is that it could narrow the issues between the parties and leave the surveyors to determine the facts and figures based on the reports that are already available. Although that will not exclude the possibility of any appeal, it is very likely to dispose of the key dispute. Given that this matter can be determined by the court in short order, it is the sort of issue that is appropriate to be dealt with by way of a Part 8 claim.

38. So, for those reasons I reject the defendant's challenge to jurisdiction and dismiss the defendant's application for a stay.
