

Booyah Investments Limited (Complainant)

-v-

The Lower Norwood Co-operative Building Company Limited (Defendant)

Wimbledon 18/6/21, 29/6/21

Ms Doliveux for the Complainant, Mr Kelly for the Defendant

Judgment

Introduction

1. This is my judgment in the above application, which is for an order under the Party Wall etc. Act 1996 that £7,492.50 plus VAT is a sum recoverable from the Defendant as a civil debt.
2. The application is contested on a single point. The objection is that the procedure prescribed by s 10 of the Act was not properly followed because the Complainant unlawfully rejected the Defendant's choice of surveyor, and it is submitted that this is fatal to the application.
3. The Complainant's objection to the defendant's choice of surveyor – Mr Farr Byramjee (FB) - was on the basis of FB's financial interest in the Respondent. This consisted of owning shares in the Defendant worth about £17,000 and equal to about 0.5% of its capital value.
4. A previous argument that the appointment was invalid because it was not in writing was not pursued upon production of the relevant appointment letter.
5. In the terms of s 10 of the Act, the issue is whether or not this shareholding made FB's appointment void or rendered FB 'incapable' of acting under s 10 such as to entitle the Complainant to demand a different appointment or, in default, make its own.
6. This leads to consideration of the law on 'apparent bias' in relation to the quasi-judicial role of surveyors appointed to resolve Party Wall etc. Act disputes.
7. I received bundles at the first hearing. These consisted of skeleton arguments from both parties, a bundle of documents and a bundle of authorities. Both counsel made submissions, but these were essentially to direct me to the main points set out in the written arguments.
8. The hearing on 18 June 2021 did not conclude until late in the afternoon. Therefore, I reserved judgment until 29 June 2021, my next scheduled sitting at this court. I allowed until 25 June 2021 for further written submissions. I said I would circulate my draft judgment at least a day in advance and would then formally seal it on 29 June 2021, with all parties excused attendance.

Background and Chronology

9. The Complainant owns 529A Norwood Road. The Defendant owns 527 Norwood Road.
10. By letter dated 10 January 2020, FB, a consultant with Stapleton Long surveyors (SL), informed the Complainant that he had been appointed to serve notices in accordance with the Party Wall etc. Act. Details of the proposed works were enclosed. The Complainant responded by an acknowledgement dated 11 January 2020, in which the Complainant

dissented from the proposed works. In anticipation of receiving the notice, the Complainant had already appointed as its surveyor Richard Grove (RG).

11. On 6 February 2020, RG wrote to FB stating 'It has come to my attention that you are a shareholder of (the Defendant).... (as such) you cannot be appointed. Section 20 of the Act defines a surveyor as "any person not a party to the matter appointed or selected under section 10"; in short (the Defendant) is unable to appoint you to act on its behalf as you are a shareholder'. A similar letter of the same date was sent to the Defendant. This gave the Defendant 10 days to appoint an alternative surveyor, failing which RG would make such an appointment on the Defendant's behalf.
12. The Defendant did not appoint a different surveyor, so, by letter dated 17 March 2020, RG appointed Ashley Patience (AP) to act on the Defendant's behalf.
13. RG and AP then selected William Minting (WM) to act as third surveyor.
14. Numerous emails are exhibited in the documents bundle. To summarise these, FB and Richard Balmforth (RB) of SL continued to assert that FB had been validly appointed, but RG and AP maintained their stance that FB was debarred from acting by s 20.
15. The Party Wall Award was made in early August.
16. By the date of the first hearing, it appears to have been accepted that FB was not statutorily debarred by s 20. Mathew Hearson (MH) of Morrisons Solicitors, wrote by email to RB dated 15 January 2021 that 'Our client has not alleged that that (FB) is a party to the dispute for the purposes of (s 20). The issue raised by my client is one of impartiality. (FB's) significant financial interest in the building owner means that a fair-minded and informed observer (would) conclude that there is a real possibility of bias.' In MH's view, this rendered FB's appointment invalid, alternatively it rendered FB immediately incapable of acting within the meaning of s 10(5).
17. Despite this acceptance that FB was not a party within the meaning of s 20, Ms Doliveux in her skeleton argument appears to consider that this remains a live issue (see paras 17 and 18).
18. The other issues that are left to resolve are whether FB's appointment was void, alternatively he was incapable of acting within the meaning of s 10(4), by reason of his financial interest in R.

Section 10 of the PART Wall etc. Act 1996

19. Section 10(1) provides that in party wall disputes both parties may concur in the appointment of a single surveyor (s 10(1)(a)) or may appoint their own (s 10(1)(b)). If the latter, the two appointments shall select a third surveyor.
20. Section 10(2) provides that all appointments and selections shall be in writing and shall not be rescinded by either party.
21. Section 10(3) is not in point since there was no agreed surveyor.
22. Section 10(4) provides that if, in a s 10(1)(b) case, either party neglects to appoint a surveyor within 10 days of service of the request, the other party may make the appointment on his behalf.
23. Section 10(5) provides that if a surveyor appointed under s 10(1)(b) 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.

24. Section 10(6)-(9) are not relevant to the present proceedings.
25. Section 10(10) provides that an award may be made by the agreed surveyor, or by the three surveyors or by any two of them.
26. Section 10(11) provides that either of the parties or either of the surveyors appointed by them may call upon the third surveyor to make the necessary award.
27. Section 10(12) deals with the matters an award may determine. These include the costs of making an award (s 10(12)(c)).
28. Section 10(13) makes provision as to the payment of reasonable costs by such of the parties as the surveyor or surveyors determine.
29. Section 10(14) and (15) are concerned with service of awards.
30. Section 10(16) provides that awards shall be conclusive, save as below.
31. Section 10(17) provides a right of appeal to the county court, which has power to rescind or amend the award in such manner as it thinks fit and to make such order as to costs as it thinks fit.

The submissions of behalf of the Complainant

32. Both parties rely on the same authorities.
33. On behalf of the Complainant, Ms Doliveux submits that 'the only issue for the court to decide' is whether the Defendant refused or neglected to appoint a surveyor under s 10(1)(b). FB's shareholding in the Defendant either made his appointment void ab initio, or rendered him incapable of acting, in either case entitling the Complainant to appoint a surveyor to act for the Defendant under s 10(4) (see para 8). However, as stated above, the argument that FB was never a surveyor within the meaning of s 20 remains live.
34. The nub of the s 20 argument is insufficient independence of the party by whom FB had been appointed. Reliance is placed on the unreported county court cases of *Gray v Elite Town Management* 23 July 2015.
35. The 'void ab initio' argument refers to s 10(3)(b), but s 10(3) is concerned with 'agreed' surveyors appointed under s 10(1)(a) and not separate party appointments made under s 10(1)(b). Regarding the latter, the relevant provisions, in my view, are s 10(4) and (5). However, the issues are in substance the same.
36. Ms Doliveux cites two authorities at para 27 to support her submissions that surveyors appointed under the Act have a 'quasi-judicial' role and 'must act impartially'.
37. A surveyor can 'deem himself incapable of acting' but can also objectively become incapable of acting, whether or not he so 'deems' himself. As to the latter, the test to apply is that set out in *Porter v Magill* 2 AC 357. There needs only to be a possibility of bias to an outside observer to render an appointment void.
38. As 'a matter of common sense', would an outside observer conclude that FB's financial interest in R give rise to a real possibility of bias in favour of R? Ms Doliveux submits that would be the case. It meant FB was never a surveyor for the Defendant as he was insufficient independent of the company. Alternatively, it made FB immediately incapable of acting and the Defendant should have appointed an alternative surveyor once the objection to FB had been made.

39. In these circumstances, the Complainant was entitled to appoint AP under s 10(4). The Defendant had neglected or refused to appoint a surveyor under s 10(4).

The submissions on behalf of the Defendant

40. On behalf of the Defendant, Mr Kelly submits that the award is invalid because of defects in the process laid down by the Act.
41. There was no statutory or other basis for the Complainant to hold that the appointment of FB was ineffective.
42. The 'party to the matter' (s 20) argument raised by RG and then AP was unambiguously rejected by the Complainant's solicitor by his email of 15 January 2021. In case this is now being resiled from, the Defendant's position is that it, the company, is a different legal person from FB. *Loost v Kremer* (a county court case decided in 1997, unreported) established that the surveyor must be a natural person, rather than a corporate entity, but could be the building owner's project architect.
43. Even a very close association with a party is unlikely to invalidate an appointment save in the most extreme cases.
44. In *Gray v Elite Town Management* it was held that 'not being a party' involved 'a degree of independence from the party' and 'excludes any person who is a mere cypher or alter ego of a party'. The judge found that the 'surveyor' in question was such a cypher, but he did not conclude that this invalidated the appointment. In the subsequent appeal at [2016] EWCA Civ 1318, the Court of Appeal declined to interfere with this part of the judgment and commented expressly that the appointment was not invalid.
45. FB is a very different person from the 'surveyor' in *Gray* in terms of his experience, qualifications and a lifetime of involvement with the Party Wall Act. 'He is nobody's cypher or mouthpiece'.
46. Under s 10(5) it was for the Defendant, not the Complainant, to replace FB had he become 'incapable'. There was no basis in the Act for RG to take that decision.
47. Any issue of alleged bias is to be addressed by the judge on appeal, or perhaps by the third surveyor, and not by the surveyor for the other party.
48. Nothing in the statutory scheme gives authority to either surveyor to veto or ignore another's appointment.
49. The argument that FB's appointment was a nullity from the start has no support in statute or case law. Nothing in the Act excludes a person with a financial interest in any of the parties, or the building, or the scheme from being a surveyor.
50. Party Wall Act surveyors perform a quasi-judicial role and must act with a proper level of detachment, but a surveyor 'is not obliged to act without regards to the interests of the party who appointed him' (*Chartered Society of Physiotherapy v Simmonds Church Smiles* [1995] 1 EGLR 155). 'The scheme of the Act is for both owners to have party wall surveyors, who are there to protect their respective owner's interests, consistent always with the quasi-judicial role they are undertaking' (*Grey v Elite Town Management*).
51. It is not for a party to decide, in advance of a decision, that any given person is unsuitable, or must be biased or conflicted and so can be ignored. The time to assess ostensible bias is after the decision has been made.

52. The concluding submission is concerned with the difficulties which would arise if investment in a party could require a surveyor to recuse himself. Where is the line to be drawn? Does this include investments held by members of the surveyor's family?

Discussion

53. The law on ostensible bias is not limited to tribunals but can also apply to the representatives of parties: see *Skjevesland v Geveran Trading Co Ltd* [2002] EWCA Civ 1567, and *Ahmed v Iqbal* [2020] EWHC 2666 (Fam), [2020] ALL ER (D) 54 (Oct). In the latter case the judge upheld an objection to a legal representative who had become inextricably bound up in the case to the point where she might not only be putting her client's case but also her own, which would lead to a reasonable lay apprehension of unfairness and create a real risk of an order made at trial being set aside on appeal. The key difference with the present case, however, is the decision was that of a court and not of a party.
54. If the s 20 'party' point remains live, I have no hesitation in rejecting it. FB and the Defendant were not the same 'party'. FB and the Defendant were different legal entities. There is no justification under the Act for stretching the meaning of 'party' to include any person owning any part of it.
55. The argument that FB's appointment was a 'nullity' can also be answered shortly. He was appointed in writing under the terms of the Act. The objection, taken almost immediately, was not that this was a 'nullity' but that he was disqualified as being a party to the dispute. The switch to 'apparent bias' came just over a year later.
56. I am not aware of any authority which has held that an appointment with the alleged potential for conflict of interest is, on that ground alone, of no legal effect.
57. There is no provision in the Act for one party to veto or ignore the appointment of another party's surveyor. The rescission of an appointment is expressly forbidden (s 10(2)).
58. I fully agree with Mr Kelly that Under s 10(5) it was for the Defendant, not the Complainant, to replace FB had he become 'incapable'. There was no basis in the Act for RG to take that decision.
59. I add this. If a surveyor becomes or deems himself incapable of acting under s 10(5), the party who appointed him may appoint another surveyor in his place. If the party does not do so, I am far from convinced that this engages s 10(4). The latter is concerned with refusal or neglect to appoint under s 10(1)(b). It makes no reference to s 10(5), unlike s 10(6) and (7). But this can be left for another day. For the reasons I have given, there was no power to veto FB's appointment.
60. A party cannot make its own decision on the disqualification of another party's representative. The Complainant should either have sought declaratory or injunctive relief or raised the matter in an appeal against the award to the county court. The Complainant had no right to make its own adjudication.

Conclusions

61. The parties agree that if the Complainant failed to follow the statutory scheme this complaint must be dismissed. For the reasons I have given I hold there was such failure.
62. Under s 86 of the Magistrates' Courts Act 1980 I have the power to order the Complainant to pay costs the Defendant in such sum as I think just and reasonable.
63. Both parties have served schedules of costs. The Defendant claims a total of £10,490 inclusive of VAT. If successful, the Complainant would have sought £9,496.20. In the

Defendant's case the claim includes £1,400 for interviewing witnesses and preparing statements. There is no such element in the Complainant's schedule. Therefore, taking that into account the legal costs are very similar and I see no reason to award less than the defendant seeks. However, I will consider any written representations the complainant wishes to submit before this judgment is handed down.

DDJMC Adrian Turner

Addendum

Ms Doliveux submitted further submissions before the deadline expired, but these did not reach me until after I had sent my draft judgment.

I have now considered these submissions, but they do not persuade me to make any changes to the judgment.

DDJMC Adrian Turner