Neutral Citation Number: [2014] EWHC 1219 (QB)

Case Nos: QB/2013/0589

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HHJ BAILEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th April 2014

Before:

MR JUSTICE AKENHEAD

- -

Between:

RANDALL WAYNE DILLARD	**Appellant**
- and -	
F&C COMMERCIAL PROPERTY HOLDINGS LIMITED	**Respondent**

- -
- -

Jonathan Gaunt QC (instructed by **Dewar Hogan**) for the **Appellant**
John de Waal QC (instructed by **Forsters LLP**) for the **Respondent**

Hearing date: 3 April 2014

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JUDGMENT

Mr Justice Akenhead:

The Background

1. The Appellant, Randall Wayne Dillard, acquired a large Georgian house in Soho, 23, Great Pulteney Street ("the Adjoining Premises") as his home, in or shortly before 2006, and carried out apparently substantial refurbishment and redecoration at those premises. The Respondents, F&C Commercial Property Holdings Ltd ("the Developer") owned 24-27, Great Pulteney Street, which was adjacent to the Adjoining Premises. The Developer wanted to re-develop its site, this involving the demolition of existing buildings, and, sensibly, the two parties entered into a deed dated 8 October 2007 ("the Deed") to regulate the relations between them in relation to this development. The Developer had secured a planning permission and conservation area consent on 18 July 2007. I will return in detail to the Deed but, although it had a specified dispute resolution procedure (Clause 12) it also, by Clause 11, required the parties to adhere to the requirements of the Party Wall etc Act 1996 ("the Act").

2. Following the postponement of its development to 2010, the Developer appointed Mr Aaron Morris as its surveyor and Mr Dillard appointed Mr Geoff Shore as his surveyor. On 17 December 2009, 9 February 2010, 8 April 2010 and 20 December 2010 Mr Morris on behalf of the Developer served various notices under the Act on Mr Dillard. The two surveyors appointed Mr North as the "Third Surveyor". Following various disputes or differences between the parties, these three surveyors produced three awards under the provisions of the Act on 25 March 2010, 26 July 2010 and 21 January 2011 with an "Addendum Award" on 5 April 2013, which was the first to address compensation.

3. Mr Dillard issued an Appellant's Notice in the Central London County Court, asking for a re-hearing, complaining that the latest award gave "no reasons and was made without consultation with me as to the likely cost of remedying the disrepair caused by the" developer's works and that "the award is a nullity since it deal with matters which by agreement…[the parties] agreed to refer to determination by an expert…rather than the party wall surveyors". Mr Dillard says that the cost of remedial works and likely losses will exceed £500,000 rather than the £9,350 allowed in the Addendum Award. The Grounds of Appeal attached were in these terms:

> "1. The Award ought to be set aside because the parties have agreed another method of assessing the compensation which would be payable to the Appellant by the Respondent for any damage to the Appellant's property…caused by the Respondent's works…
>
> 2. The Appellant and the Respondent entered into an agreement governing the said works dated 8th October 2007.
>
> 3. Clause 7 of that agreement provided for the Respondent to indemnify the Appellant in respect of any damage to the Appellant's property and clause 7.5 provided that in the event of any dispute resulting from the said obligation the matter will be referred to the dispute resolution procedure set out in clause 12 of the agreement (which provided for determination by an expert).
>
> 4. Clause 10 of that agreement provided for the Respondent to indemnify the Appellant in respect of increased running costs and servicing of, and any damage to, the Appellant's air handling unit. Clause 10.4 provided that any dispute relating to the requirements of that clause should be referred to the dispute resolution procedure set out in clause 12 of the agreement.
>
> 5. The Appellant was not aware until very shortly before the purported Award was made that the party wall surveyors intended to deal with the question of compensation, and were in the process of gathering evidence from the structural

engineer and interior designer as to the extent of, and the likely cost of remedying, the observable damage to his property.

6. The award should be set aside and the matter remitted to an expert for determination in accordance with the agreed procedure.

7. In the alternative, the amount of compensation specified in the award is wholly inadequate and the court should set the award aside and substitute its own award. The Appellant will present expert evidence as to the true extent and cost of the damage once he has been able to obtain it…"

4. The Developer applied to have Paragraphs 1,2, 3, 4 and 6 of the Grounds of Appeal struck out. HHJ Bailey, who is the specialist TCC judge at the Central London County Court, heard this application on or before October 2013 and delivered an *ex-tempore* judgment, allowing the application. In essence, he decided that the dispute resolution procedure within the Act was not contractually ousted by the Deed and in effect that the Addendum Award was jurisdictionally valid. Although he accepted apparently that there were "two parallel (but not exactly coextensive…) procedures for dealing with disputes" (Paragraph 26), he accepted that Clause 11 of the Deed by which the parties agreed to "adhere to the requirements of the" Act had a literal meaning He therefore struck out the requisite paragraphs.

5. Mr Dillard then issued an Appellant's Notice on 25 October 2013 seeking to challenge this decision in the Queen's Bench division before a High Court judge essentially on the ground that the judge's interpretation of the Deed was wrong.

The Deed

6. The recitals to the Deed were:

"A. The Developer is the freehold owner of the Site and the Adjoining Owner is the freehold owner of the Adjoining Property

B. The Developer wishes to redevelop the Site and has obtained the Planning Permission for the Scheme

C. The Developer and the Adjoining Owner acknowledge that the Scheme will have an impact on the Adjoining Property and have agreed to document the agreement reached between them in relation to this."

Clause 1.1 contains definitions including the Building Works: "the demolition of the existing building on the Site and works of development to be carried out at the Site in accordance with the Scheme", the Site being the Developer's property and the Scheme being those works proposed in the requisite Planning Permission.

7. Clauses 3 and 4 provided for in the Developer not to construct a new building on the Site containing windows, apertures openings or terraces or flat roofs which respectively faced or overlooked the Adjoining Property as well as in relation to rights of light.

8. Clause 7 is an important clause in this case with Clause 7.1 requiring the Developer to take comprehensive Schedules of Condition "of the Adjoining Property covering all internal and external elements and roof surfaces and these were to be signed by surveyors acting for both parties". Clause 7.2 provided as follows:

"In the event of any damage the Developer shall, if so required by the Adjoining Owner, promptly make good, repair or rectify such damage or deterioration to the reasonable satisfaction of the Adjoining Owner at the cost of the Developer."

Clause 7.4 provided:

"The Developer will indemnify and keep the Adjoining Owner indemnified against all loss, damage, claims and expenses relating to the structure, fabric and contents of the Adjoining Building arising directly as a result of the Building Works."

Clause 7.5 provided:

"In the event of any dispute resulting from the extent of the Developer's obligations in this clause the matter will be referred to the Dispute Resolution Procedure set out in Clause 12."

9. Clause 9 set out obligations on the Developer to procure that the effects of noise and vibration were kept to a minimum, that disruptive elements of work were approached "sensitively", that appropriate work methods were used to limit the escape of dust and dirt and the like. Clause 10 related to the AHU on the roof of Mr Dillard's house which provided for ventilation and air conditioning:

"10.2 The Developer will implement the necessary protection to the AHU during the Building Works as agreed between the parties at the end costs.

10.3 The Developer will also meet the costs of increased filter changes to the AHU and increased servicing by a suitably qualified contractor nominated by the Adjoining Owner as frequently as necessary and the cost of repair or, if necessary replacement, of the whole or any part of the AHU damaged by builder's dust or debris.

10.4 Any dispute resulting from the interpretation or requirements of this Clause will be referred to the Dispute Resolution Procedure set out in Clause 12."

10. Clause 12 addressed the Dispute Resolution Procedure referred to in Clauses 7.5 and 10.4 and 10.4:

"12.1 In this Deed, where any matter falls to be agreed between the parties both parties will seek to resolve the issue as quickly as possible through their respective surveyors.

12.2 If the matter can not be agreed within 10 Working days of the date when it falls to be decided, the issue should be referred on the application of either party for the determination of a single expert to be agreed between the parties within a further period of 10 Working Days or in the absence of such agreement to be appointed on the application of either party by the President for the time being of the Royal Institute of Chartered Surveyors on such terms as to the liability and remuneration of such expert as the president shall direct.

12.3 Such expert shall afford to the parties an opportunity to make representations in writing and (save for manifest error) his determination shall be final and binding upon the parties…"

11. Clause 11 brings in reference to the Act:

"11.1 The parties will adhere to the requirements of the Party Wall etc Act 1996 and the Developer will pay the Adjoining Owner's reasonable costs in relation to the party wall surveyor, structural engineer, heating and ventilation specialist or any other specialist required in relation to party all matters.

11.2 Both parties will agree how the Building Works are being monitored and, where issues are raised as a result of that process and recommendations made, the Developer will comply with those recommendations.

The Act

12. The Act provides for the relationship between the "building owner" and the "adjoining owner" where and when works are proposed to, on or near any party wall or party fence wall. Material sections are:

> "2 (1) This section applies where lands of different owners adjoin and at the line of junction the said lands are built on or a boundary wall, being a party fence wall or the external wall of a building, has been erected.
>
> (2) A building owner shall have the following rights—
>
> (a) to underpin, thicken or raise a party structure, a party fence wall, or an external wall which belongs to the building owner and is built against a party structure or party fence wall;
>
> (b) to make good, repair, or demolish and rebuild, a party structure or party fence wall in a case where such work is necessary on account of defect or want of repair of the structure or wall…
>
> (f) to cut into a party structure for any purpose (which may be or include the purpose of inserting a damp proof course);
>
> (g) to cut away from a party wall, party fence wall, external wall or boundary wall any footing or any projecting chimney breast, jamb or flue, or other projection on or over the land of the building owner in order to erect, raise or underpin any such wall or for any other purpose…
>
> (m) subject to the provisions of section 11(7), to reduce, or to demolish and rebuild, a party wall or party fence wall…
>
> 3 (1) Before exercising any right conferred on him by section 2 a building owner shall serve on any adjoining owner a notice (in this Act referred to as a "party structure notice") stating…
>
> 4 (1) An adjoining owner may, having been served with a party structure notice serve on the building owner a notice (in this Act referred to as a "counter notice")…
>
> (3) A building owner on whom a counter notice has been served shall comply with the requirements of the counter notice unless…
>
> 5 If an owner on whom a party structure notice or a counter notice has been served does not serve a notice indicating his consent to it within the period of fourteen days beginning with the day on which the party structure notice or counter notice was served, he shall be deemed to have dissented from the notice and a dispute shall be deemed to have arisen between the parties.
>
> 6 (1) This section applies where—
>
> (a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of three metres measured horizontally from any part of a building or structure of an adjoining owner; and
>
> (b) any part of the proposed excavation, building or structure will within those three metres extend to a lower level than the level of the bottom of the foundations of the building or structure of the adjoining owner.
>
> (2) This section also applies where—

(a) a building owner proposes to excavate, or excavate for and erect a building or structure, within a distance of six metres measured horizontally from any part of a building or structure of an adjoining owner…

(3) The building owner may, and if required by the adjoining owner shall, at his own expense underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner so far as may be necessary...

(5) In any case where this section applies the building owner shall, at least one month before beginning to excavate, or excavate for and erect a building or structure, serve on the adjoining owner a notice indicating his proposals and stating whether he proposes to underpin or otherwise strengthen or safeguard the foundations of the building or structure of the adjoining owner…

(7) If an owner on whom a notice referred to in subsection (5) has been served does not serve a notice indicating his consent to it within the period of fourteen days beginning with the day on which the notice referred to in subsection (5) was served, he shall be deemed to have dissented from the notice and a dispute shall be deemed to have arisen between the parties…

7 (1) A building owner shall not exercise any right conferred on him by this Act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier.

(2) The building owner shall compensate any adjoining owner 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.

(3) Where a building owner in exercising any right conferred on him by this Act lays open any part of the adjoining land or building he shall at his own expense make and maintain so long as may be necessary a proper hoarding, shoring or fans or temporary construction for the protection of the adjoining land or building and the security of any adjoining occupier…

(5) Any works executed in pursuance of this Act shall—

(a) comply with the provisions of statutory requirements; and

(b) be executed in accordance with such plans, sections and particulars as may be agreed between the owners or in the event of dispute determined in accordance with section 10;

and no deviation shall be made from those plans, sections and particulars except such as may be agreed between the owners (or surveyors acting on their behalf) or in the event of dispute determined in accordance with section 10.

10 (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”).

(10) 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.

(11) 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.

(12) 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…

(13) The reasonable costs incurred in—

(a) making or obtaining an award under this section;

(b) reasonable inspections of work to which the award relates; and

(c) any other matter arising out of the dispute,

shall be paid by such of the parties as the surveyor or surveyors making the award determine.

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

(17) 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."

Discussion

13. It is unnecessary to set out separately or in detail the arguments of both parties' Counsel. In summary, Mr Gaunt QC for Mr Dillard argued that, construed sensibly and commercially, Clauses 7.5, 10.4 and 12 provide for any dispute relating to the earlier two paragraphs to be resolved by the expert determination procedure and that Clause 11 can and should be read in that light. Mr de Waal QC argues that HHJ Bailey was right in effect.

14. Essentially, the basic and well known principles of contract construction apply. Where the wording is absolutely clear (say, "X shall paint the new doors white"), one can and should apply the literal meaning because that is obviously what the parties intended. However, where there are superficially or possibly conflicts between terms, short of irreconcilable ambiguities, one needs to consider commercial contracts in a commercial way.

15. The problem, such as it is, arises because there is an expressed dispute resolution procedure in the Deed for addressing specified areas of dispute but there is also apparently by way of incorporation of a mutual obligation to "adhere to the requirements" of the Act, the dispute resolution procedure for disputes arising under the Act (Section 10). The two procedures are markedly different:

(a) The Deed procedure provides for a final and binding expert determination by a single expert in respect of which there is no appeal.

(b) The Section 10 procedure is for each side's nominated surveyor and as necessary a third surveyor to resolve disputes with their award being final and

binding unless one or other or both parties appeal to the County Court (as Mr Dillard purportedly did in this case).

16. There are other differences in relation to the scope of disputes potentially referable for resolution:

(a) The Deed covers the Building Works which are all the works on the whole of F&C's site to the extent that they cause damage to Mr Dillard's property. It is much wider than the Act.

(b) The Section 10 procedure covers a much more limited scope of dispute, namely only matters connected with any work to which the Act relates. As can be seen from the preceding sections of the statute, this work is primarily the Section 2 and 6 works which do not cover all the work to be carried out on the F&C site but only in effect work associated with work to or on party walls or other structures on the boundary between the properties or work or where there is underpinning work where the new building work is to be done within 6 metres of the boundary which leads to the need for the adjoining owner's property to be underpinned. Thus, for example, if piling work was done 20 metres away and the vibration caused damage to Mr Dillard's house, that would not be covered by the Act.

17. I have formed the clear view that the proper interpretation of the Deed is that the parties intended that for all disputes associated with Clauses 7 and 10 the Clause 12 procedure was to apply. My reasons are as follows:

(a) The wording of Clauses 7.5 and 10.3 referring "any" dispute is emphatic and all embracing. The parties are agreeing that all disputes arising under those clauses are to be referred through the Clause 12 procedure to expert determination.

(b) Certainly, there is no hint or suggestion in those clauses that this is subject to Clause 11 of the Deed and Section 10 of the Act in some way carving out of the general wording in Clause 7.5 and 10.3 the need for any disputes arising under the Act (o the extent otherwise covered by the earlier clauses) nonetheless to be dealt with by the Act dispute resolution procedures.

(c) The wording in Clause 11 is specific in referring to adherence to the "requirements" of the Act; it is not put in terms that the parties shall be bound by all the provisions of the Act notwithstanding the Deed's other provisions.

(d) There are many "requirements" in the Act, some of which are set out above, such as the need for the Building Owner (here the Developer) to give notice if it intends to carry out certain types of work. There is therefore plenty for Clause 11 to "bite" upon. Clauses 7.5, 10.4 and 12 do not stymie the three surveyors as there is a large amount they can and should do, such as agreeing or awarding what works can or should be done.

(e) Many of these requirements are facilitative in the sense that they enable the Building Owner's works to go ahead after consultation and even after dispute between surveyors. In practice, what is expected is for surveyors to agree on what works can be done, what safeguards should be introduced in particular to protect the Adjoining Owner's property and interests and what specific provision can be made for heads of compensation, in advance. Indeed, that can be seen in the first three awards here. If they disagree, the third surveyor can be brought in to break the deadlock.

(f) The Act recognises however that, in spite of this, disputes can occur between the Building and Adjoining Owners and a dispute resolution procedure is

provided for which is most akin to arbitration, albeit it is not arbitration under the Arbitration Act 1996 as such because two of the dispute resolvers are the surveyors acting for each of the parties and will have drafted the party wall awards which provide for the works in question to go ahead. The two or three surveyor procedure is limited in terms of jurisdiction by Section 10(10) to matters or disputes which are "connected with any work to which [the] Act relates" and which is in dispute between the building owner and the adjoining owner. The Clause 12 procedure goes very much wider at least in the context of disputes arising under Clauses 7.5 and 10.4 because they cover works which are not "connected with any work to which [the] Act relates".

(g) There is however an overlap between the Clause 12 procedure and the Act in relation to disputed entitlements to "loss, damage, claims and expenses relating to the structure, fabric and contents of the Adjoining Building arising directly as a result of [the party wall part of] the Building Works" (slightly adapted from Clause 7.4) and claims attributable to Mr Dillard's AHU being inadequately protected and damage then resulting from the party wall part of the "Building Works". The Clause 12 procedure is the wider in relation to the Clauses 7.5 and 10.4 disputes because the Building Works cover the party wall works as the latter are in general always to be contemplated as enabling or as part of the Building Works to proceed, albeit involving work only to and immediately close to the party wall or other structure.

(h) The parties could not, commercially and sensibly, have contemplated a dual dispute resolution procedure for disputes arising under Clauses 7.5 and 10.4. That would produce a deeply unsatisfactory result in that for instance, if one party wanted to go down the expert determination route and had initiated that approach first but the other wanted the Party Wall and tried to initiate that route, there would either be a race as to which would produce a result first or the production of possibly competing decisions.

(i) Because it is immaterial what each party actually thought these possibly conflicting provisions meant, the primary pointer to what they must have intended is the reference to "any dispute" arising under Clauses 7.5 and 10.4 being referable to expert determination. What the parties must be taken to have agreed is that all such disputes, whether otherwise verbally covered by the wording in Clause 11, would be referable exclusively under Clause 12 and not under the party wall dispute resolution procedure.

(j) It is accepted rightly that parties may contractually opt out of the Act, as the parties have done here in part at least relating top the relief set out in Clauses 7 and 10 of the Deed.

18. This decision is related only to what the Deed means and the Court has not been asked to address any issues such as estoppel which might otherwise produce another result.

The Procedural Issue

19. F&C through its Counsel sought to argue that this Court had no jurisdiction because this was an appeal from an appeal and, it is argued, CPR 52.13(1) is engaged:

> "Permission is required from the Court of Appeal for any appeal to that court from a decision of the County Court or the High Court which was itself made on appeal."

Mr de Waal QC argued that there was an appeal by Mr Dillard against the supposedly offending Addendum award, which was dealt with by HHJ Bailey, and thus this is an appeal from an appeal.

20. Griffith Williams J granted permission to appeal on 6 February 2014 and F&C's solicitors wrote in saying that this permission was a nullity by reason of CPR 52.13(1), citing a Court of Appeal decision in **Clark v Perks** [2001] 1 WLR 17. Mr Dillard's solicitors on 14 February 2014, saying that the Party Wall award was a nullity and there was no appeal as such. Foskett J issued his Order dated 18 February 2014 rejecting F&C's application on the grounds that HHJ Bailey's decision was not a final order as that judge was simply striking out parts of a proposed appeal.

21. I reject F&C's arguments on this point for the following reasons:

(a) It is necessary to consider the substance of what Mr Dillard was doing in his Appellant's Notice to the County Court. Although it purports to be an appeal against the Addendum Award of party wall surveyors under Section 10 of the Act, it is actually complaining about two things, first saying that the award was unfair and wrong and secondly that the award was "a nullity" because it addressed matters which were to be dealt with under the Deed by an expert as opposed to by the party wall surveyors. The first part can properly be described as an appeal but the second is not.

(b) By analogy with arbitration under the Arbitration Act 1996, one can "appeal" against an award (by agreement or with permission) or one can challenge the award on the grounds that the arbitrator(s) did not have jurisdiction.

(c) In my view, the concept of an appeal and a jurisdictional challenge are or certainly may be very different. An appeal may be on facts or law with the basic award, decision or judgment (being appealed from) said to be wrong in law or in fact. A jurisdictional challenge may seek to say that the award, decision or judgment is not in effect an award, decision or judgment. Thus, an award issued by an "arbitrator" not appointed by the parties or pursuant to the parties' contract or a "judgment" handed out by a person who is not a judge at all will not be an award or judgment at all and there is nothing as such to appeal from.

(d) Thus, one would not substantively be appealing the award or judgment on these two examples but would be saying that it is not an award or judgment at all.

(e) Here, so far as he was asserting that the Addendum Award was made by the three surveyors in circumstances in which, albeit possibly unwittingly and in good faith, they had no right to address money matters or compensation which were covered by Clause 7 and 10 because, by agreement between the parties in the Deed, these matters were not to be dealt with by them, he was not in substance appealing the award but simply challenging the surveyors' jurisdiction to issue any award determining compensation under Clause 7 and 10 and in that regard saying that it was not an award at all.

(f) This is therefore not an appeal from an appeal but from a judgment of the County Court judge, as it happens wrongly, deciding a jurisdictional challenge; there is a difference.

(g) It is unnecessary to decide additionally whether Mr Justice Foskett was also right. However, I do agree that the decision of HHJ Bailey was not "final" for the reasons which he gave but I would not have thought that finality was an aspect of CPR 52.13, given both that it is addressing a different concept and practice to the issue about finality and that the word "final" is not used.

Decision

22. The appeal is allowed and HHJ Bailey's decision is set aside. As agreed orally, costs will follow the event and, following receipt of written representations, I will proceed summarily to assess the costs.

23. I would finally add this. I would very much hope that, if the parties can not settle the whole dispute between them, they do agree on some final dispute resolution method and it may be that expert determination is amongst the cheapest and most final procedures. It would be unfortunate if they became bogged down in yet further litigation which postponed the resolution of the essential dispute between them. I was told for instance that there was a possibility of a developing argument as to whether there was some estoppel, possibly by convention, or possibly some implied variation of the Deed such that the parties are to be taken to have agreed that the party wall surveyors were to deal with all disputes, even those for which they had no jurisdiction (as I have now held). This would be a waste of resources and cost because it simply defers the resolution of the real dispute which is primarily: what if anything is owed to Mr Dillard for any loss, damage, claims and expenses relating to the structure, fabric and contents of the Adjoining Building arising directly as a result of the Building Works.