CO/3431/2015

Neutral Citation Number: [2016] EWHC xxxx (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 9 February 2016

B e f o r e:

MR JUSTICE HOLGATE

Between:
THE QUEEN ON THE APPLICATION OF
FARRS LANE DEVELOPMENTS LIMITED

Claimant

v

BRISTOL MAGISTRATES' COURT

Defendant

JAMES MCALLISTER

Interested Party

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
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(Official Shorthand Writers to the Court)

Mr N Isaac (instructed by Ashfords LLP) appeared on behalf of the **Claimant**
The Defendant did not attend and was not represented
Mr S Frame (instructed by Direct Access) appeared on behalf of the **Interested Party**

J U D G M E N T
(Approved)

1. MR JUSTICE HOLGATE:
2. Introduction
3. The claimant is a property developer in the process of implementing a planning permission for the redevelopment of a large abandoned industrial building, Harris & Co, Farrs Lane, Bristol, into flats. The scheme involves works falling within the ambit of the Party Wall etc. Act 1996 and so the claimant was required to serve notices on adjoining property owners of its wish to carry out those works.
4. The claimant appointed the interested party, James McAllister, to serve party structure notices on its behalf and to act as its party wall surveyor under section 10(1) of the 1996 Act should any dispute or deemed dispute arise on the subject matter of the notices. It is not in issue that the claimant agreed to appoint the interested party on a contractual basis according to his standard terms of business, at an hourly rate of £90.
5. Following his appointment, the surveyor served on behalf of the "building owner" (the claimant) ten party structure notices on "adjoining owners" of ten separate property interests. In the absence of written consent to the works notified, disputes were deemed to have arisen by virtue of section 5 of the Act in relation to each notice between the claimant and the respective adjoining owner.
6. In section 20 of the 1996 Act, the term "building owner" means "an owner of land who is desirous of exercising rights under this Act"; in other words, the building owner is the person wishing to carry out the works to, for example, a party wall, which fall within the ambit of the statute. Section 20 defines the "adjoining owner" as "any owner ... of land, buildings, storeys or rooms adjoining those of the building owner ...".

7. Between 17 and 23 December 2014, Mr McAllister made ten awards for authorising the

claimant's proposed works. In five cases he made an award acting solely as the "agreed surveyor" under section 10(1)(a) of the Act, and in the remaining cases he acted jointly with the surveyor appointed by the relevant adjoining owner pursuant to section 10(1)(b).

8. The court bundle includes by way of example one of the awards made. In paragraph 13, it was determined by the two surveyors making the award that the building owner (the claimant) should pay the adjoining owner's costs, comprising the fees of that party's surveyor, directly to the surveyor concerned in the sum specified. Paragraph 14 of the award, which is the paragraph directly in dispute in these proceedings, provided:

    i. "That the Building Owner shall immediately, upon receipt of this Award, pay the Building Owner's Surveyor's fee of £1,300.00 plus VAT for his involvement up to and including the preparation and service of this Award. That, unless otherwise awarded by the Two Surveyors, the Building Owner shall pay the Building Owner's Surveyor's fees at £90.00 per hour, or part thereof, plus VAT for any attendance outside of the aforementioned allowance, including additional inspections of the works authorised by this award, as may be required, or in the event of damage being caused to the Adjoining Owner's property, or other such contingencies or variations arising or any general post-Award matters reasonably requiring the Building Owner's Surveyor's involvement."

9. In effect paragraph 14 required that Mr McAllister's fees should be paid directly to him by the building owner, ie the claimant.

10. Although, as soon as the awards were issued, the claimant made it clear that it considered that Mr McAllister's fees provided for in the awards were excessive, it did not bring any appeals in the County Court pursuant to section 10(17) of the 1996 Act. The total amount to be paid to Mr McAllister under these ten awards was £24,363.72. The claimant has made a payment in excess of £5,000 to Mr McAllister of which he has applied £3,879.07 to these liabilities, leaving a balance due, so it is said, of £20,484.65.

11. In order to enforce the awards Mr McAllister issued ten complaints under section 17 of

the 1996 Act (one for each of the awards) in the Bristol Magistrates' Court for civil orders to recover the sums awarded as his fees. Section 17 provides:

i. "Any sum payable in pursuance of this Act (otherwise than by way of fine) shall be recoverable summarily as a civil debt."

12. The hearing took place before a panel of lay justices on 13 May 2015. Mr McAllister represented himself. The claimant in these proceedings responded to the summonses. It was represented by counsel, Mr Nicholas Isaac (who also appears on behalf of the claimant in these proceedings) and his instructing solicitors, Ashford LLP. Skeleton arguments were exchanged in advance and Mr McAllister filed a supplemental skeleton.

13. At the hearing, the claimant argued that (1) the magistrates had no jurisdiction to make an order in Mr McAllister's favour since he was neither the building owner nor an adjoining owner and therefore not a party to the award, the sole purpose of which was to resolve actual or deemed disputes between building owner and adjoining owner; and (2) that the award was ultra vires to the extent that it purported to determine the fees payable by the claimant to Mr McAllister, given that that was not a matter in dispute between building owner and adjoining owner.

14. Paragraph 12 of the detailed statement of facts in support of the application for judicial review states that during the hearing the clerk to the magistrates said "We have been making such orders for the last 10 years". When responding to the claimant’s pre-action protocol letter prior to the commencement of this current claim for judicial review, the magistrates pointed out that the clerk had been involved in the proceedings because “he is the legal adviser who specialises in the area of Party Wall cases [within] the Avon, Somerset and Gloucestershire area. [He] was for the same reason allocated to the court hearing the application, because of his knowledge of this area of law."

15. The magistrates rejected the claimant's arguments and made the orders sought by Mr McAllister. On the issue of costs, Mr McAllister presented a timesheet in relation to all of the ten complaints in which he claimed costs at the rate of £90 per hour (the contractual rate for his party wall surveying services agreed with the claimant) multiplied by the number of hours he had devoted to the proceedings before the justices. The claimant argued that it was wrong in principle for him to be paid at professional rates when acting as a litigant in person without legal training and suggested that the standard litigant in person rate should be applied if so many hours' work were to be allowed. The justices rejected that argument and awarded Mr McAllister his claim costs in full, which amounted to £3,598 comprising £3,393 taken from his timesheet and a further £205 for the issue fee.
16. On 2 June 2015, within the prescribed time limit, the claimant applied to the magistrates to state a case. On 22 June the magistrates responded by refusing to state a case and giving their reasons for their decision.
17. Following the exchange of pre-action protocol correspondence, the present claim for judicial review was issued on 21 July 2015 to challenge the magistrates' decision to refuse to state a case and seeking (amongst other things) a mandatory order requiring a case to be stated. On 17 September 2015 Mr Rhodri Price Lewis QC, sitting as a deputy High Court judge, granted permission for the application for judicial review to be made, noting (inter alia) that in his view the application to have a case stated was not frivolous and in addition the claim raises arguable questions of law and jurisdiction that should be answered. The interested party, Mr McAllister, has remained neutral on the question whether a case should be stated.
18. For the purposes of these proceedings, both parties have agreed that this is a case where,

applying authorities such as R (Newham LBC) v Stratford Magistrates' Court [2012] LLR 486 at paragraph 22, the matter should now be dealt with as an application for judicial review without requiring a case to be stated by the justices. This is on the basis that both parties explicitly agree that no further findings of fact are necessary in order to decide the points of law in issue and that the justices have explained their refusal to state a case in terms which make the issues apparent.

19. The issues in this claim

20. The claimant asks the court to determine three issues: (1)the award of Mr McAllister's costs was ultra vires because it did not relate to a dispute between the building owner and the adjoining owner; (2) even if an award may include an award for surveyors' costs which are not disputed between the owners, whether as to liability or quantum, the award may not direct the party liable to pay those costs to pay them to the surveyor directly (instead the award may only direct payments as between the two relevant "owners"); (3) the justices erred by awarding Mr McAllister costs based on the number of hours he spent on the case multiplied by his hourly rate as a surveyor.

21. It is common ground that if the claimant succeeds on issues (1) or (2), then the magistrates' orders for the payment of the fees along with the costs order must be quashed. It is also common ground that (a) if the claimant fails on issues (1) and (2) then Mr. McAllister's fees were recoverable under section 17 of the 1996 Act; (b) issue 3 only arises if the claimant is unsuccessful on both issues (1) and (2); and (c) there are no decisions of the courts, or indeed obiter dicta, dealing with points (1) or (2).

22. In paragraph 30 of the claimant's skeleton, it is said that:

    i. "The principle noted in Onigbanjo v Pearson [a decision in the

> Mayor's and City of London County Court given on 10 March 2008], that an award cannot require payment by a party to one of the appointed surveyors, is plainly correct based on a proper construction of section 10, and supports the more general proposition that section 17 is not intended to permit surveyors to enforce unpaid surveyors' costs under an award."

23. Paragraph 35 of the judgment of His Honour Judge Birtles records that the appellant in that case submitted that the sums in the award for the payment of surveyors' fees were outwith the surveyors' jurisdiction because they had no power to direct that sums be paid by one of the owners, a party to the dispute, to third parties. In fact, on the construction of the award adopted by the judge (in paragraph 37 of his judgment) the correctness of the appellant's submission did not fall to be decided. In the alternative, the judge said in paragraph 42 of his judgment that if he had been wrong in his construction of the award, then he would modify it so that it provided that the sums awarded should be made payable by one of the owners to the other owner. It follows that the judge did not find it necessary to decide issue (2) in the present proceedings. He did not make any explicit assumption as to whether the appellant's proposition was correct; he dealt with matters as if it did not fall to be determined. The decision is therefore not an authority on the point and it does not contain any obiter dicta which might assist me.
24. Reference has been made to paragraph 20 of the decision of the Court of Appeal in Blake v Reeves [2010] 1 WLR 1; [2009] EWCA Civ 611 where the court endorsed Judge Birtles' decision in Onigbanjo. But it is apparent that the Court of Appeal did not endorse any aspect of that judgment which could support the proposition advanced by the claimant under issue (2) in this claim. The subject matter of issue 2 was not in point in Blake v Reeves.
25. I also note that in the third judgment given in Zissis v Lukomski [2006] 1 WLR 2778;

[2006] EWCA Civ 341, it would appear that Brooke LJ assumed that an award of surveyors' fees was recoverable summarily as a civil debt pursuant to section 17 (see paragraph 58). However, it does not appear that the point was argued in that case. The judgment does not set out any reasoning which might support that assumption. Although the opinion is entitled to the greatest of respect, it has not been relied upon by the interested party in this case in order to support the decision of the justices.

26. At the court's request, counsel for the claimant helpfully supplied, after the close of argument, a copy of a guidance note published by the RICS Practice Standards Division entitled Party Wall Legislation and Procedure (6th edition). Paragraph 7.5.1 of the guidance note, dealing with the subject of surveyor fees, states (inter alia) that:

    i. "It is usual for the award to include the adjoining owner's costs by way of surveyors fees as a lump sum based on time incurred, including an allowance for any necessary subsequent inspections. …… The surveyor appointed by the building owner would normally agree fees directly with the latter, but there is no reason why the responsibility for, and reasonableness of, these cannot be determined in an award."

27. These passages suggest that, in the view of the RICS, surveyor's fees can be made the subject of an award, whether or not they have been the subject of a dispute between the relevant owners. But then the note continues:

    i. "Despite the custom and practice of the surveyors addressing invoices to the owner determined responsible for the costs, the courts have ruled that there is no contractual or statutory basis for this arrangement and only an owner can enforce an award in respect of his or her awarded costs. Surveyors should therefore take care in the wording of awards in respect of costs and in the contractual arrangements made with their appointing owners in respect of their fees."

28. However, the document does not indicate any decision of the courts or provision of the statute to support that guidance. Indeed, as I have noted already, it is common ground

between counsel in this case that the matters raised under issues (1) and (2) have not been dealt with in any authority, whether in terms of ratio decidendi or obiter dicta.

29. There has also been a dispute between the parties as to whether the practice which was followed by the interested party in this case is unusual. This is not a matter upon which I can comment. No evidence has been produced by either side on this aspect. In any event, any evidence of that nature would not be a proper interpretative tool for resolving a question of statutory construction. I simply observe that, if indeed the practice followed here by Mr McAllister is unusual, that may in part be because of the views expressed in the RICS guidance note.

30. Statutory Framework

31. In paragraph 21 of the Court of Appeal's decision in Blake v Reeves (supra), Etherton LJ (as he then was) explained that disputes which may arise under section 10 of the 1996 Act may include an actual dispute between adjoining owners arising under section 1(8) or a deemed dispute under section 6(5) or section 6(7) or a dispute under other provisions such as section 7(2) (compensation for loss and damage resulting from execution of work pursuant to the 1996 Act), section 11(2) (responsibility for the expenses of work), section 11(8) (expenses of making good damage under the 1996 Act), or section 13(2) (objection to building owner's account of expenses).

32. The relevant provisions for the purposes of the issues in this case are largely to be found in section 10, which include:

    i. "(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—

    (b) both parties shall concur in the appointment of one surveyor (in this section referred to as an 'agreed surveyor'); or

(c) 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').

i. ...

ii. (4) If either party to the dispute—

(a) refuses to appoint a surveyor under subsection (1)(b), or
(b) neglects to appoint a surveyor under subsection (1)(b) for a period of ten days beginning with the day on which the other party serves a request on him,

iii. the other party may make the appointment on his behalf.

iv. ...

v. (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.

vi. (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.

vii. (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;

viii. but any period appointed by the award for executing any work shall not unless otherwise agreed between the building owner and the adjoining owner begin to run until after the expiration of the period prescribed by this Act for service of the notice in respect of which the dispute arises or is deemed to have arisen.

ix. (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,

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

xi. ...

xii. (15) Where an award is made by the third surveyor—

(a) he shall, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors; and

(b) if it is served on their appointed surveyors, they shall serve it forthwith on the parties.

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

xiv. (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."

33. At one stage in these proceedings, the interested party, relying upon section 10(16), pointed to the absence of any appeal by the claimant under section 10(17) against the award in respect of surveyors' fees, as if to suggest that that matter had become conclusively determined. But it is common ground on the basis of well-established authority that section 10(16) does not prevent an ultra vires challenge from being raised by other means, whether or not an appeal under section 10(17) is brought in the County

Court, for example in proceedings to recover the amounts awarded.

34. Issue 1

35. The claimant submits that section 10(10) is limited to a dispute between the building owner and the adjoining owner or owners. That indeed is correct. It is also pointed out that, as regards disputes covered by subsection (10), the function of either the “agreed surveyor” or, as the case may be, “the three surveyors or any two of them”, is to "settle" by award any such “dispute”. Likewise, under section 10(11), which applies where either the parties or the surveyors appointed by the parties call upon a third surveyor to act, the third surveyor is to "determine the disputed matters and he shall make the necessary award".

36. The claimant then submits that the word “determine” in section 10(12) and (13) indicates that an award by a surveyor can only deal with disputed matters. It is accepted by the claimant that if there had been a dispute before the making of the award about Mr McAllister's fees, either as to their quantum or reasonableness within the terms of section 10(13) or as to which of the parties to the dispute should be liable for those fees, then that matter could have been determined by the surveyor or surveyors. But the claimant submits that an award may not deal with the surveyors' fees where they are not the subject of a dispute.

37. I note that in this case the award referred to Mr McAllister's terms and conditions. It has not been suggested that those terms and conditions were unknown to the respective owners who were parties to the dispute, or that they were unable to obtain a copy of those terms or that there is some other reason as to why a dispute about the surveyor’s fees

could not have arisen if any party had seen fit to raise it before the award was made. Of course, where a dispute is raised about liability for, or quantum of, a surveyor's fees during the section 10 process and, accordingly on the claimant's case, an award under section 10 may properly determine that dispute, the appropriate remedy for any disagreement with that part of the award is an appeal to the County Court under section 10(17) and CPR Part 52.

38. In my judgment, the construction contended for by the claimant does not accord with the natural meaning of the language used in the 1996 Act and would not allow the legislation to operate in a sensible manner.

39. First, turning to section 10(12)(c), the phrase "any other matter *arising out of or incidental to* the dispute..." is apt to include matters going beyond the ambit of the dispute between the parties. For example, there could be consequential matters which are not the subject of disagreement between the parties. Second, the word "determined" is not limited to the making of a decision on a dispute. As a matter of ordinary English, the word can simply mean "to lay down decisively or authoritatively or to pronounce or to declare". That makes sense in the present context, so that the award can be enforced between the owners as a totality. Such an approach enables a complete package of provisions to be treated as binding as between the parties and to be enforced, some of which provisions may be the outcome of the resolution of disputed matters and others of which may not.

40. It is common ground that section 10(12)(c) can cover consequential matters arising from the approval of "works" by an award; for example, an environmental protection scheme relating not only to the carrying out of disputed "works" but also subsequent monitoring of their effects. However, on the claimant's argument, an award could only determine,

and therefore could only include, such matters if they themselves had been in dispute. I reject that narrow reading of the word "determine".

41. Mr Isaac said that non-controversial matters are often "recorded" in an award, albeit they do not form part of the formal award itself. I do not consider that Parliament would have intended the legislation to be construed in this way. It would mean that an award would either have to be drafted by surveyors so as to separate disputed matters which had been resolved by the surveyors from matters of consensus but which nevertheless should be recorded alongside the formal award so as to set out a complete and meaningful package of measures; or, alternatively, that exercise would have to be carried out subsequently as a matter of construction by the parties or by the courts in order to work out which parts of an award were truly within section 10 and which fell outside.
42. In my judgment, that approach would make no sense. A particular subject may not have been in dispute between the parties during the section 10 process, but it is nonetheless important that it be "pronounced" or "declared" so as to form part of the overall "determination" by the surveyors so that subsequently it may be enforced as part of the award and the "conclusive" effect of section 10(16) may apply to the totality. It would make no sense to sever those parts of the "works" or any consequential matters which are not the subject of a dispute from those which are, and treated as falling outside an award. All such matters will often need to be considered and dealt with as a whole. To divide them into the two categories in the manner suggested by the claimant would be artificial and unjustifiable. The claimant has not advanced any reason as to why that should need to be done or identified any beneficial purpose that might be achieved as a result.
43. The claimant's construction would also interfere with the proper operation of the appeal procedure in section 10(17). An appeal may only be made against "the award" and the

County Court's power is limited to rescinding or modifying "the award". If "the award" could only relate to those items which had been in dispute, then the interaction between a challenge to one or more of those disputed matters and other aspects which had been agreed could not be raised before or dealt with by the court.

44. Because the word "determine" in section 10(12) cannot be given the narrower construction for which the claimant contends in relation to "any other matter arising out of or incidental to the dispute …" in sub-paragraph (c) (and also sub-paragraphs (a) and (b)), it must follow that the same approach must be taken to the power to award costs contained in the final part of sub-paragraph (c) and in section 10(13) in respect of costs, including the costs or fees of a surveyor in making an award under section 10.
45. Mr Isaac faintly suggested that these provisions only relate to "costs", not fees, and so by implication cover only disbursements. He had no answer to the point that if correct, that argument would also apply to the use of the word "costs" in other statutory provisions for the award of costs, such as the Senior Courts Act 1981 section 51 and indeed section 10(17)(b) of the 1996 Act. I reject the claimant's contention. The word "costs" is used because it is one or other of the parties to the dispute who will bear the costs of the award being made, and those costs include not only disbursements but the fees of those appointed to act as statutory surveyors.
46. For these reasons, I reject the claimant's submission under issue (1) that a section 10 award is restricted to dealing with those matters about which the building owner and the adjoining owner disagree.

47. Issue (2)

48. The claimant submits that if an award under section 10 directs that costs are to be paid by one party, it may only direct that that sum be paid to another party to the dispute, ie another owner. If correct, this would mean that although an award has declared the amount which is to be paid to the surveyor on account of his fees and disbursements, he would have to look to one of the parties to enforce the award if necessary, and then that party would have to pass on to the surveyor the amount which he has been awarded and to which he is entitled (subject to any appeal under section 10(17)). On any view that would be a circuitous route, but nevertheless is it what Parliament can be taken to have intended when enacting the 1996 Act? In my judgment the answer is “no”.

49. There is no express restriction in section 10 or in any other part of the 1996 Act to support the claimant’s contention. Section 10(12)(c) enables the surveyors to make an award determining "any other matter arising out of or incidental to the dispute including the costs of making the award". Subsection (13) provides that "the reasonable costs incurred in" matters which include "(a) making or obtaining an award under this section" "shall be paid by such of the parties as the surveyor or surveyors making the award determine". The statute is expressed in broad terms without imposing any express restriction that an award under subsections (12) and (13) may only require the costs of making the award to be paid by one party to another party. The statute enables the surveyor(s) to determine which party is to pay the costs awarded without limiting the discharge of that obligation in the award to a payment to another *party*, rather than to the surveyor entitled to receive that payment.

50. I accept the submission of Mr Frame on behalf of the interested party that the Claimant’s approach makes no sense when considering, for example, the position of a surveyor acting singly, in particular a surveyor who has been appointed by the two

parties in dispute. There may or may not be a dispute as to the amount of his fees or who should pay them. Either way, they can be the subject of an award under section 10. Where such an award is made, it is perfectly plain that the costs are to be paid to the surveyor. Likewise, in the present case, paragraph 13 of the award dealt with the costs of the adjoining owner's surveyors and directed that they should be paid by the building owner. In that instance, it was directed that they should be paid directly to the adjoining owner's surveyor.

51. In order to justify a narrower approach to section 10(13) of the 1996 Act, the claimant relied solely upon section 10(17). It was submitted that only parties to the dispute may appeal to the County Court against the terms of an award. Although that statement is correct, it does not support the claimant's case that an award under section 10 may not require the payment of the surveyor's fees directly to the surveyor. By definition, where an award has been made determining that one or other of the parties should pay the surveyor's fees, there is no need for that surveyor to make any appeal to the County Court. He does not need to become an appellant in any proceedings under section 10(17).
52. Then it was submitted that the appeal to the County Court would be decided solely between the property owners. This might be described as the "respondent" problem. It was submitted first, that the surveyor could not take part in the appeal or be made a party to it so as to be bound by the outcome. Second, it was said that if the County Court should agree that a surveyor (or surveyors) has acted unreasonably in setting the level of fees payable under an award and reduces the fees due significantly, the costs of those proceedings will have to be borne by one or other of the owners who were a party to the original dispute rather than by the surveyor.
53. The claimant did not place any provisions before the court to support the first submission.

I accept Mr Frame's response that the CPR does in fact enable a surveyor in such a situation to be joined as a party if necessary, so that he can make submissions, if appropriate, and be bound by the outcome (eg CPR 52.12A and CPR 52.1(3)).

54. As regards the second submission, namely the scenario where a surveyor has acted so unreasonably that consideration should be given to making an order against him for the costs of the County Court appeal, section 10(17)(b) is expressed in very wide terms. The County Court may "make such order as to costs as the court thinks fit". Such language echoes the similarly broad text of section 51 of the Senior Courts Act 1981, in relation to which it is well established that the court has jurisdiction to make orders in appropriate cases against non-parties (see also CPR 46.2).

55. It was suggested that this analysis might cause considerable difficulties for surveyors. I do not see why that should be so. First, a surveyor who acts reasonably should generally have no reason to fear that he will need to apply to be heard in a section 10(17) appeal, less still that he will be ordered to pay the costs of those proceedings or part thereof. Second, even where a surveyor may potentially be the subject of a third-party order for costs, the application for such an order would have to be made on notice so that the surveyor would have an opportunity to make representations to the court and it is to be expected that that jurisdiction would only be exercised in clear cases.

56. It was then submitted that the interpretation contended for by Mr. McAllister would be undesirable because it could place statutorily appointed surveyors in a position of conflict. It was said that where a surveyor makes an award in relation to his costs, whether or not they have previously been disputed, he could find that his award is being challenged by one of the parties, possibly the party who appointed the surveyor in the first place, and that could taint his participation in any further procedures under the

1996 Act (for example the monitoring of the works as they are carried out or dealing with any problems which arise from the carrying out of the works).

57. I see no force in this argument for the purposes of resolving issue (2), because it is accepted by the claimant that in a case *where a dispute has arisen* before the making of the award as to the liability for, or quantum of, the surveyor's costs, he nevertheless has jurisdiction to deal with the matter. Even on the claimant's case, it follows that there could be an appeal against such an award made intra vires. In that situation there could be an issue as to whether a surveyor has awarded himself an excessive amount of costs. So the potential for conflict as described by the claimant may arise even on the construction of the statute for which it contends.

58. In fact, this analysis also applies to the second issue raised by the claimant. Even if its is assumed, for the sake of argument, that no award may be made by a surveyor in respect of his costs for payment directly to himself, the claimant accepts that on that basis the surveyor would have to take enforcement action (for example, on a contractual basis) in the courts. So, one way or another, the very issue which it is said could give rise to a conflict would have to be dealt with by the court. The claimant did not make any submission to contradict that point.

59. After close of oral argument, Mr Isaac, sought by email to make some further submissions on matters of public policy affecting the construction of the statute, under issues (1) and (2). There was no objection to this. He suggested that the claimant’s approach should be adopted because of the adverse consequences of the Interested Party’s construction, in terms of shifting the burden of proving that fees were unreasonably high to a paying owner, imposing an obligation upon a paying owner to obtain advice from lawyers and then to take legal action by way of an appeal within

an absolute time limit of 14 days. With respect, these points have no more force than the ones advanced previously in the course of oral argument, because these circumstances would arise in any event, on the claimant's own argument under issue (1), where, acting within the scope of his jurisdiction, a surveyor resolves a *dispute* as to fees, whether as to liability or as to quantum.

60. The parties have referred to other provisions in section 10, but in order to resolve the first two of the issues raised by the claimant I do not find it necessary to go any further. They do not affect the conclusions which I have reached one way or the other.
61. For these reasons I reject the claimant's case under issue (2). An award under section 10 of the 1996 Act requiring a party to pay a statutorily appointed surveyor's fees may direct that that payment be made to the surveyor directly.

62. Issue 3

63. When Mr Isaac opened this part of the claimant's case, he complained initially about a failure on the part of the justices to give reasons for the costs decision that they made. This contention is untenable, with respect. Both parties have chosen that the matter should proceed straight to judicial review without requiring the justices to state a case, on the basis that no further findings or reasons were needed. If the justices had been required to state a case, then further reasoning might well have been provided. It would be unreasonable to ask this court to criticise the justices for a failure to give reasons given the procedural course which the claimant in particular has elected to follow.
64. Secondly, Mr Isaac returned to the basis upon which this challenge was presented in the skeleton argument, namely one of irrationality. As he recognised, irrationality is

a particularly high hurdle for any claimant to surmount. The explanation given by the magistrates' court in its response to the pre-action protocol is that the justices arrived at a sum for costs which they considered according to section 64 of the Magistrates' Courts Act 1980 to be "just and reasonable" in the exercise of their discretion.

65. On the material which is before the court, it is impossible for me to conclude that the justices have acted irrationally, a fortiori in the absence of any further explanation that they might have given, simply because they awarded a sum of money which is equivalent to 38.5 hours multiplied by Mr McAllister's hourly rate of £90.

66. I also bear in mind that issue (3) only arises on the basis that this court has decided that Mr. McAllister acted intra vires. Secondly, it follows that the claimant had an opportunity to challenge the quantum of the fees before the County Court and did not exercise that right of appeal. Thirdly, it follows on the arguments as presented by the parties that, because the claimants have failed under issues (1) and (2), Mr McAllister was entitled to rely upon section 17. The claimants have not suggested that there is any freestanding issue regarding the entitlement of the interested party to rely upon section 17 if I should reject the claimant's case on both issues (1) and (2). Fourthly, I bear in mind that, on the conclusions I have reached, Mr. McAllister was pursuing a legitimate remedy in order to recover the fees which had been awarded, in some instances jointly by two surveyors, for the carrying out of his duties under the 1996 Act. The points which were raised in order to defeat his claim did not go to the merits of the amounts which had been awarded but to his legal powers. They sought to raise substantial legal arguments but, in agreement with the justices, I have found them to be unmeritorious. Fifthly, he had to face a legally represented claimant represented by counsel with a good deal of experience in this field. I am entitled to draw the inference

that Mr. McAllister had to deploy considerable personal resources in order to litigate the matter. If he had not done so, he would have had to incur considerable costs himself by obtaining legal representation.

67. When I bear all those circumstances in mind, in my judgment it lay well within the discretion of the justices to award a sum of money falling just below £3600, of which £205 related to court fees, as being reasonable and just.

68. Although it is not necessary to my conclusion, I would add that had Mr McAllister lost in front of the justices he was faced with a claim for costs by a legally represented party of £5,448.

69. Before leaving this aspect, I note some further points. First, the claimant did have a remedy in this case, namely to go to the County Court in order to challenge the quantum of the costs awarded in favour of Mr McAllister. Second, the surveyors very properly notified the recipients of the award of their entitlement to appeal against it under section 10(17). Third, that right of appeal was not exercised. Fourth, the dispute concerning Mr McAllister's fees relates to a sum of about £20,000. It must be a matter for regret, to say the least, that the claimant has thought it appropriate to pursue the three legal issues in the High Court by incurring costs of £24,400, whereas the disputed costs for the work actually carried out under the 1996 Act were substantially less. Although these matters do not form any part of the basis for my decision, they should be noted.

70. So for all these reasons, the claim for judicial review is dismissed, but I would like to thank counsel for their interesting and helpful arguments.

71. Now, other matters, please. Costs?

72. MR FRAME: My Lord yes, costs.

73. MR JUSTICE HOLGATE: There is a schedule.

74. MR FRAME: Do you have a schedule?

75. MR JUSTICE HOLGATE: And no doubt it has been served.

76. MR FRAME: Yes.

77. MR JUSTICE HOLGATE: And no doubt this has happened both ways, so you have both had an opportunity to discuss it. What are you asking for, please? It is a figure of £9,326.40; is that right?

78. MR FRAME: Yes.

79. MR JUSTICE HOLGATE: Is that disputed, please?

80. MR ISAAC: Well, my Lord, obviously this is a summary assessment.

81. MR JUSTICE HOLGATE: Yes, I am familiar with that. It happens all the time.

82. MR ISAAC: Indeed, absolutely, and quite right it should.

83. MR JUSTICE HOLGATE: So my question was: is it disputed?

84. MR ISAAC: Well, yes, it is not accepted in full.

85. MR JUSTICE HOLGATE: What would you like me to decide?

86. MR ISAAC: I would like to you decide, first of all you will be unsurprised to hear that Mr McAllister who charges again in this case £90 an hour as a litigant in person, we are not in the Magistrates' Court now we are in the civil courts: he is a litigant in person; he should not recover more than the litigant in person rate.

87. MR JUSTICE HOLGATE: Could you show me any rule or authority to that effect which I should apply? Which items are they, please?

88. MR ISAAC: That covers the entirety of the part A items.

89. MR JUSTICE HOLGATE: The figure leading up to £2,772.

90. MR ISAAC: Correct. Your Lordship, you will just have to give me a minute.

91. MR JUSTICE HOLGATE: So your point would be that should be reduced pro rata from

£90 to £18.

92. MR ISAAC: Yes.

93. MR JUSTICE HOLGATE: Are there any other points then taken on that part?

94. MR ISAAC: I am sorry, my learned friend says it is £19. CPR 46.5.

95. MR JUSTICE HOLGATE: We will look at that in just a moment. Shall we just get the list of points first of all?

96. MR ISAAC: Well, it is a very short list, you will be pleased to hear. That is the first. I would normally criticise the length of time that has been spent, but if a litigant in person rate is applied that balances that out.

97. MR JUSTICE HOLGATE: What is the total length of time?

98. MR ISAAC: There is no total length of time.

99. MR JUSTICE HOLGATE: No, but we can get a rough feel for it, can we not?

100. MR ISAAC: Yes. I am just looking at the first page. We have about 10 hours on the first five or six entries.

101. MR JUSTICE HOLGATE: Yes, I see that. I suppose another way of doing this is to go to the bottom and divide by 90.

102. MR ISAAC: Yes. That would also work. Which would give you, 27 it is going to be 30 hours, just over.

103. MR JUSTICE HOLGATE: That gives me a rough feel.

104. MR ISAAC: As far as Mr Frame's fee is concerned, I do not think I am in a position really to attack --

105. MR JUSTICE HOLGATE: It would be a bit hard.

106. MR ISAAC: It would be a bit hard, yes, I am not going to (Inaudible) that.

107. MR JUSTICE HOLGATE: It is really the first item. As a matter of interest, if

I look at the claimant's schedule of costs for the hearing.

108. MR ISAAC: I think the Court of Appeal are not very keen on your Lordship doing that.

109. MR JUSTICE HOLGATE: Is it legally irrelevant altogether? Is that what the Court of Appeal said?

110. MR ISAAC: I think it is correct to say that you should not be looking at them in order to judge the quantum of the successful parties at all.

111. MR JUSTICE HOLGATE: No, but what about the number of hours' work? That is all I had in mind.

112. MR ISAAC: Yes, I cannot see any in principle objection to that.

113. MR JUSTICE HOLGATE: No, nor could I. Is it much less than 30 hours?

114. MR ISAAC: It is about five, maybe eight hours, total.

115. MR JUSTICE HOLGATE: Okay.

116. MR ISAAC: In fact I am not sure it is even that much. It is about eight or ten hours, if my maths is not awry.

117. MR JUSTICE HOLGATE: That is part A, is it? Total part A, £2,400. Is that what you are looking at, when you get to 10 hours?

118. MR ISAAC: I am looking at attendances on respondent, on the claimant, on the court, on counsel and on documents. So that is the --

119. MR JUSTICE HOLGATE: Without going through it all, when you come up with 10 hours is that taking you through to the bottom of page 2?

120. MR ISAAC: Sorry, I am looking at the Magistrates' Court one. That is my mistake. That is why I have got that completely wrong.

121. MR JUSTICE HOLGATE: The one in the High Court, part A. Does anyone

have a figure for this so I do not have to do it?

122. MR ISAAC: If it is a rate of £145 an hour, it is actually about 16 hours.

123. MR JUSTICE HOLGATE: Some was at a lower rate, but I get a rough feel for it. 16-plus hours, but that does not include other items over the pages: preparation of bundles and so on.

124. MR ISAAC: No, but that is something the respondent has to deal with.

125. MR JUSTICE HOLGATE: Absolutely.

126. MR ISAAC: My Lord, that is it.

127. MR JUSTICE HOLGATE: Right, what would you like to say about that, please? Your fee is not challenged.

128. MR FRAME: I am very glad to hear that, my Lord.

129. MR JUSTICE HOLGATE: We look at the total number of hours, and also we must look at --

130. MR FRAME: Yes. It is actually 46.5.

131. MR JUSTICE HOLGATE: Can you give me the page, please?

132. MR FRAME: 1549.

133. MR JUSTICE HOLGATE: Thank you. (Pause). There is subparagraph (2). Where else do we look, please?

134. MR FRAME: Subparagraph (4), it says:

> i. "The amount of costs to be allowed to the litigant in person for any item of work claimed will be—
>
> (a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work."

135. MR JUSTICE HOLGATE: I think that is what Mr Isaac calls opportunity costs.

136. MR FRAME: Yes. My Lord, the interested party has submitted a letter from his

accountant, which I believe you have appended to your schedule of costs?

137. MR JUSTICE HOLGATE: Quite possibly.

138. MR FRAME: This letter was served on the other side.

139. MR JUSTICE HOLGATE: Do you have a spare copy? (Handed). Thank you. (Pause). Yes, it does not really deal with the point raised by the rule though, does it?

140. MR FRAME: The letter unfortunately only deals with turnover. My Lord, I think I have to concede the point.

141. MR JUSTICE HOLGATE: Well, it is a question of how in fairness. If you wanted to pursue the point, you would have to adduce the evidence and it would have to be dealt with subsequently. That would be more costs and it gets disproportionate. So bearing that in mind?

142. MR FRAME: I am going to ask for the hours to be allowed but at the hourly rate set out in the Practice Direction 46 which is £19 an hour.

143. MR JUSTICE HOLGATE: Well, that is what the other side is asking for.

144. MR FRAME: Yes, I concede that.

145. MR JUSTICE HOLGATE: I am going to ask you to work out the figure, please. It has not been totalled up, has it?

146. MR ISAAC: No, but we can work it out.

147. MR JUSTICE HOLGATE: Thank you. Could you submit the order to my clerk and I will sign it? Thank you.

148. Can I thank everybody for their help and very interesting arguments. I would say that I hope I may be forgiven for any infelicities of expression. This was an extempore judgment. In order to deal with the matter expeditiously I thought it appropriate not to reserve. Had it not been dealt with today, it would have had to have been left over for

five or more weeks, and I did not think that would have been a good way to treat the parties. So although there might have been other points I would have liked to have dealt with as a matter of courtesy to both counsel, I nonetheless reached a very clear and firm view about what the outcome should be on all the significant points. It was unnecessary for me to go further. I thought that the right way to handle this proportionately was to deal with it today. May I also thank the court staff for sitting late.