



The Party Wall etc. Act 1996

Explaining the procedures to enforce payment of any sum so awarded as a civil debt

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Abstract

Purpose – The purpose of this paper is to consider the procedures under section 17 of the Party Wall etc. Act 1996 (“The Act”) for enforcement proceedings to recover an awarded sum. This paper will demonstrate that the procedure is unclear and confusing to the party wall surveyors, the magistrates, the county court officers and the legal profession who express conflicting views on the appropriate method of enforcement. The intent of this paper is to examine and explain the procedures that will allow the recovery of costs and other contingencies, as a civil debt within the Magistrates’ Court, with a comparison of the more traditional route of the County Court.

Design/methodology/approach – The author has reviewed the relevant sections of the statutory acts and the limited publications that discuss and promote various methods of enforcement of actions that have been awarded and are recoverable summarily as a civil debt. Accordingly, the options to enforce payment within the magistrates’ and county courts will be considered, explained, and discussed within this paper.

Findings – This paper makes a contribution to the limited existing literature and theoretical interpretation of section 17 of the Party Wall etc. Act 1996, to provide a framework for considering the procedures and principles necessary to enforce payment of costs awarded under the Act. The paper makes a comparative analysis of the differences between the two recognised approaches and explains why a particular method (the Magistrates’ Court) will normally be the preferred option.

Originality/value – The paper demonstrates that there is confusion surrounding the appropriate method of enforcement, and provides a structured and detailed explanation of the appropriate method of enforcement.

Keywords England, Wales, Legislation, Civil law, Fees, Non payment, Costs, Party walls, Civil debt, Enforcement, Magistrates’ Court

Paper type Research paper

1. Introduction

The intent of this paper is to examine and explain the procedures that will allow the appointed surveyor(s) under the Party Wall etc. Act 1996 to award costs, other contingencies, and the appropriate procedures to recover any awarded sum of money summarily as a civil debt within the Magistrates Court, in comparison to the more traditional route of the county court.

Section 17 of the Act provides that:

S.17: Any sum payable in pursuance of this Act (otherwise than by way of a fine) shall be recoverable summarily as a civil debt.

The application of the Act will create costs, the liability to pay those costs will be determined by the surveyors under Sections 10(10), (12) and (13). The appointed surveyor(s) are entitled to include the reasonable costs of the surveyor’s professional fees, legal fees, and other contingencies such as compensation for inconvenience and nuisance under Section 7.

Enforcing payment of an awarded sum is a rare occasion with most owners accepting their liability and making the appropriate payment in accordance with the award. However, the situation of non-payment was anticipated and accordingly,



the Act incorporated Section 17 creating a rather unique opportunity for awarded sums to be recovered “summarily as a civil debt” which entitles the claimant to commence proceedings within the magistrates’ court. However, the process is unclear and often misunderstood by the legal community, the court, and the surveyors. Therefore, the recovery of a civil debt through the magistrates’ court is rarely adopted.

Unfortunately, the procedures and the right to issue a complaint is often dismissed because the magistrates’ justices clerks are not aware of the procedures and wrongly advise that the claim should be referred to the county court.

The magistrates’ court is likely to be wholly unfamiliar with the Act and this will probably give rise to difficulties (Bickford-Smith and Sydenham, 2009, p. 100). The claimants have often been left confused about the process and indeed what their options are. Although this is slowly being addressed because of the legal guidance provided by Lord Justice Brooks in paragraph 57 of his judgement in *Zissis v Lukomski* (2006) in which he refers to the magistrates’ court procedures for the recovery of awarded costs.

It is important to note that Section 17 does not restrict the recovery of costs to the magistrates’ court and accordingly, it is open for the claimant to use the county court procedures. Notwithstanding, the magistrates’ court provides important benefits that are not available within the county court.

2. The surveyors jurisdiction

The surveyor’s appointment and hence jurisdiction must flow from the service of a valid notice (*Gyle-Thompson v Wall Street (Properties) Ltd*, 1974) and dissent or deemed dissent having occurred. In these circumstances, Section 10(1)(a) requires each party to either agree to the appointment of one surveyor who acts as the “agreed surveyor” or in the alternative, under Section 10(1)(b) to each appoint their own surveyor. Where two surveyors are appointed, they shall forthwith select a third surveyor. Having been validly appointed, the two surveyors will settle any matter by an award under Section 10(10).

S.10(10)(a) and (b): (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.

Issues which are required to be resolved by the appointed surveyors will vary enormously between projects, but will generally include such matters as the method of executing the works, rights of access (Antino, 2011), timing, not to cause unnecessary inconvenience, and compensation under Section 7(1).

The provisions of Section 10(12) and Section 10(13) provide the surveyors with the autonomy to determine what issues they consider fall within their jurisdiction, with one limiting factor, the issue must be in pursuance of the Act.

S.10(12)(a)(b) and (c): (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;
- 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.

S.10(13)(a)(b) and (c): (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.

Accordingly, the costs and/or other matters which the surveyors should consider will most certainly include:

- (1) the professional fees of the appointed surveyor(s);
- (2) the costs of executing any works which may or may not (depending on the nature of the works) be awarded against either one or both of the appointing owners;
- (3) any reasonable levels of compensation; and
- (4) other contingencies which they may consider necessary.

Section 7(1) places an explicit obligation upon the building owner to carry out the works without causing unnecessary inconvenience to the adjoining owner and/or occupiers.

S.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.

Section 7(2) allows the surveyor(s) to consider the level of compensation.

S.7(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.

The jurisdiction to award compensation in respect of disturbances and inconvenience is supported under Section 11(6) of the Act. The court of appeal in "Europa" confirmed the often misunderstood distinction between statutory compensation for damage caused by lawful works and common law damages in tort where the works are unlawful (Chynoweth, 2004, p. 3).

S.11(6): Where the adjoining premises are laid open in exercise of the right mentioned in Section 2(2)(e) a fair allowance in respect of disturbance and inconvenience shall be paid by the building owner or the adjoining owner or occupier.

Having considered the express authority to award the costs and other contingencies incurred, the surveyors must have due regard to the reasonableness of those costs. Unfortunately, whilst there is no recognised legal definition of "reasonable", one important principle is that the surveyors must consider "[...] the sum of money which will put the party who has been injured [...] in the same position as he would have been if he had not suffered the wrong [...]" (Bickford-Smith and Sydenham, 2009, p. 101). In essence the simple rule is that they cannot gain a financial advantage from the loss.

Once the surveyors have reached a decision on the reasonable costs they shall serve an award upon the appointing owners. Under Section 10(17) the appointing owners have a right to appeal the award and must do so within 14 days.

S.10(17)(a) and (b): (17) Either of the parties to the dispute may, within the period of 14 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.

The service of the award should be properly recorded with the appointing owners having been made fully aware of the obligations of the award and advised of their right to appeal the award. Following the expiry of 14 days, the award will stand and shall not be disputed in any court. If the sum so awarded is not paid the aggrieved party will have to apply the procedures of Section 17.

3. The magistrates' court

The primary role of any magistrates' court is to deal with criminal cases in England and Wales, although they also have jurisdiction to deal with civil matters. The most common examples of civil matters are the non-payment of residential or commercial council tax and breaches of planning and building regulations.

The Party Wall Act clearly anticipated situations arising where an owner might fail to pay the sum so awarded and accordingly, incorporated Section 17, which allows any sum payable to be recovered summarily as a civil debt. However, this principle is particularly confusing to the magistrates' clerk because they continue to incorrectly assume that the correct procedure would be to adopt the county court procedures.

3.1 *The Magistrates Court Act 1980*

The jurisdiction to enforce payment of an award in the magistrates' court flows from Section 17 on the principle that a civil debt is within the definition provided by Chapter 43, Section 150 (1) of the Magistrates Court Act 1980. Accordingly, it is clearly open to a party seeking to recover any awarded sum to do so by way of a complaint under Section 58 of the Magistrates Court Act 1980. Further guidance is now available in the *Stones Justices Manual* (Carr and Turner, 2011) paragraphs 8.2672-8.2675.

One significant benefit of the magistrates' court is that it is likely to provide a much quicker hearing date and its power to bring defendants to court for non-compliance is much greater with substantial penalties available (Frame, 2010, p. 94). The claimant can also have the trial listed in their local court.

3.2 *The procedure*

For the purposes of this paper it is assumed that a valid award has been made and the mandatory 14-day period of appeal has passed without challenge and an owner has failed to satisfy payment as awarded by the surveyor(s).

To initiate civil proceedings within the magistrates' court, the claimant should make a written complaint to the justice's clerk of their local magistrates' court. Whilst the complaint should ideally be in writing it is advisable, but not mandatory to use a prescribed form. This will eliminate any mistakes which may be used as a technicality by the defendants to prevent the complaint from being heard.

The Magistrates Court (Forms) Rules 1981 suggest either a Form 98 or a Form 104, however the technically correct version is Form 104 (Frame, 2010, p. 95). If it is not possible to obtain a Form 104 then a written complaint can still be submitted to the magistrates' court, although it should contain certain and important information. The complaint should include a statement that it is made under Section 17 of the Party

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Wall etc. Act 1996 and most certainly should include the parties' full names and addresses and identify them as either the defendant or claimant. It would be wise to also include the claimant's contact telephone number.

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A signed copy of the award must be appended to the complaint together with any supporting documentation such as the letter of service. However, this is not universally accepted, "an unsigned copy and a photocopy of the signature page will do" (Ainsworth, 2011). The author believes it is unwise to put before any court a completed but unsigned award, and then to produce a photocopy of a single detached page, claiming the signed document is related to the award. The court would be wise to view such documentation as suspicious. The complaint should also include any pre-action letters requesting payment and/or correspondence which advises the defendants of the consequences should they continue to ignore the award and fail to pay the sums so awarded.

The complaint should be clear and concise stating all of the applicable sections of the Act to assist the magistrates in identifying the appropriate statute and the relevant paragraphs of the Award that deal with for example, hourly rates charged by the appointed surveyors, and or any sums so awarded, with an explanation of why they have been awarded. A clear reference to "other contingencies" within the award is important if the claimant wants to successfully recover their costs for solicitor's, and counsel's fees and attendance at court. It would be wise to include the total amount that the claimant seeks to recover supported with a breakdown of those costs.

The magistrates' court will charge £200 to process the complaint (which is a fixed fee) irrespective of the amount contained within the complaint. The magistrates will then issue the summons upon the defendants stating the date of the hearing, which will be set relatively quickly (certainly substantially quicker than the county court). It is important to note that the hearing of the complaint will not be high on the magistrates' list, whose duty is to deal with the matters that involve custodial sentences or bail applications first. It would be wrong to detain a person in custody longer than is necessary simply because they are dealing with a civil complaint. The matter is likely to be deferred to the end of the court list. The parties will be asked to give evidence under Oath (*Antino v Russo*, 2011). However, if the defendant (defaulting debtor) fails to attend, the matter will still proceed in their absence.

If the complaint is found proved the court will make the relevant order and consider any relevant costs and on the principle that they are just and reasonable under Section 64(1) of the Magistrates' Court Act 1980 make such an award in favour of the claimant and these will be added to the sum stated in the complaint.

The claimant has a duty to submit the claim promptly and is therefore governed by a limitation period. There are time limits within which a claimant must commence an action (*Wood et al.*, 2011, p. 90) and these are governed by the Limitation Act 1980, the magistrates' court is no exception, and enforcement of a civil debt must be commenced within six months which commences on the date that the debt falls due which is generally the date of the award.

4. The county court

The use of the magistrates' court is not universally recognised or adopted for the recovery of sums following an award. The more commonly adopted approach is through the county court. For actions on an award, it is recommended to start

proceedings under the Civil Procedure Rules (CPR) Part 7 or 8, since the presence of an uncontested award as the basis of the action should mean there is no substantial dispute of the facts (Bickford-Smith and Sydenham, 2009, p. 106). Section 16 of the County Court Act 1984 allows actions by virtue of any enactment upon receipt of a claims form. The appropriate form in respect of a county court action to enforce an award is N322A (application to enforce an award).

The jurisdiction of the county court and indeed the high court are governed by the CPR, however by virtue of CPR PD 7 paragraph 21, a claim cannot be started in the high court unless it has a value in excess of £25,000. In essence most claims for sums in a Party Wall Award will be less than the £5,000 which is the upper limit for a small claims action. If the sum is greater than £5,000 the case may continue within the county court but be allocated to either the multi-track or fast track route.

The procedures involved in the county court are substantially different from the magistrates' court insofar as the county court would require the claimant to submit a statement of claim, and witness statements with supporting documents. Furthermore, the defendant (defaulting debtor) is entitled to have the matter heard in their local county court which could have significant implications on the party enforcing the debt, because they may have to travel considerable distances to participate in the hearing.

The claimant is required to pay a fee calculated on the value of the claim and the process could therefore be more expensive than that in the magistrates' court. The claim will be processed and a copy of the claim together with any supporting documentation will be sent to the defendant with a summons. It is open to the claimant to apply for summary judgement under CPR Part 24. This will prevent the defendant from going through the motions in order to delay the impending judgement. It should be noted that the application for a summary judgement can only be made after the defendant has filed an acknowledgement of service (Frame, 2010, p. 97). However, it is important to remember that for the purposes of this paper, we are explaining the procedures to recover sums of a valid award which has not been appealed. It would therefore be unusual for someone to try and formulate and express a supportable defence against what is quite clearly a valid award.

The defendants have the opportunity to accept the award and make an offer to settle the matter. Alternatively, they may contest any part and/or the entire award. Nonetheless, the defendants are entitled to submit a defence, challenging the validity of the award, claiming that an action brought on the back of an invalid award can be defended purely on that basis – i.e. the award is invalid, and “I am not therefore bound by it”. If the defendants cannot prove that the award is invalid, the defence will be struck out. Proving the award is invalid is very different from arguing that the awarded sum is unreasonable. The recipient of the award should have filed an appeal within 14 days with immediate order to stay proceedings if they wanted to challenge the award on that basis. This would allow the appellant and respondent time to negotiate a settlement.

However, returning to the process of enforcing payment of a debt through the county court, the claimants will have to be aware of the limitations with regards to county court actions. Whilst it may be possible to recover the court fees, the court has the discretion to award costs, and where the sum claimed is less than £5,000 in value the claimant is unlikely to recover all, if any of their costs. Costs are considered under CPR Part 27.14, it is at the county court's discretion to award legal costs against a defendant in a small claims matter. It is worth noting that the principle of not being

able to recover costs for small claims matters with a value of less than £5,000 works both ways. If a party initiating a claim is ultimately unsuccessful, then they are not necessarily exposed to the costs of the other side. Accordingly, when two parties engaged in a small claims action, they have to accept that win or lose, their legal costs could be substantially greater than the sum in dispute and only partly recovered. The court can award interest under Section 69 of the County Court Act 1984.

5. Selecting the correct procedure

The magistrates' and county court are the two options usually available (for larger value claims the high court is available) for the claimant to recover an awarded sum. The Act is very helpful, offering guidance under Section 17, "Any sum payable in pursuance of this Act (otherwise than by way of a fine) shall be recoverable summarily as a civil debt". This is a unique attribute of the Act, providing benefits that simply do not exist within the county court.

However, this approach is not universally acknowledged, Bickford-Smith and Sydenham (2009, p. 106) suggest "It is thought that in general the more straightforward course is to utilise the county court (or high court if appropriate) rather than the magistrates' court". Ainsworth (2011) promotes the use of Part 70.5 of the CPR (enforcement of an award of a tribunal or other body) suggesting it works very well in securing a court order from the county court against the owner determined responsible for the costs. It is without notice procedure and costs only £35, which is added to the sum owed. This is not an approach recommended by the author for the reasons explained in this paper.

6. Frustration

The first time that the author attempted to adopt the magistrates' court, the justice's clerk refused to take the complaint and referred him to the county court. Having been left thoroughly confused and anxious to commence proceedings a claim was subsequently filed within the county court and some 15 months later and after many frustrating attempts by the debtor to delay and prevent the matter from being heard, judgement was ultimately obtained. However, the time incurred by the author in pursuing this debt and its associated costs, substantially outweighed the value of the claim, and then of course, the defendant was allowed six months to pay. Whilst the court fee, interest, and travelling subsistence were awarded, the author's legal costs were only partially awarded and none of his time for attendance.

7. Conclusion

This paper has considered the procedures under the various sections of the Party Wall etc. Act 1996, which, allow the surveyor(s) to determine and award costs, compensation, and/or other contingencies which are considered reasonable and in pursuance of the Act, together with a powerful procedure that ensures swift enforcement should the award be disregarded.

The two primary options have been discussed and compared, and although the author accepts that either procedure (subject to following the correct CPR) is available, there are certain important benefits from adopting the magistrates' court, which simply do not arise within the county court process. In contrast the Magistrates' Court is a significantly different process. Whilst the author would accept that the justice's clerk will initially attempt to reject the complaint, providing the procedure above has been followed and the claimant or his legal advisors direct the justice's clerk to the

relevant statutory act's provisions and procedures, the clerk will have to accept the complaint. However, once this first complaint has been initiated, and a relationship established with the justice's clerk, the next complaint should be a relatively straightforward process because the justice's clerk will be aware of the procedures. Furthermore, the trial date will be allocated on the day the complaint is laid with the magistrate's court and will normally be within two or three weeks, which is significantly quicker than the county court where it can be several months to get a hearing date.

In comparison, some practitioners (legal and surveying) advocate the use of CPR 70.5 in the county court as the correct and/or their preferred option to recover an awarded sum "summarily as a civil debt", this view is not in the author's opinion persuasive and he is minded to consider the judgement in *Zissis v Lukomski* (2006) EWCA Civ 341, at paragraph 58 of the court of appeal judgement, Lord Justice Brooke said, "*CPR 70.5 creates a procedure, which can be initiated by a court officer without the intervention of a judge, for the enforcement of an award of a sum of money made by any court, tribunal, body or person other than the High Court or a county court so long as an enactment provides that the award may be enforced as if it were a court order. The 1996 Act contains no such provision, so that an award made under that Act cannot be enforced through the CPR 70.5 procedure*" (emphasis added).

Lord Justice Brooke's comments seem fairly unambiguous to the author. If a county court judge on a previous occasion has gone against this, then perhaps he did so because he was merely trying to achieve justice in the situation, but the judge is technically wrong in law. It is surprising that some professionals prefer to be bound by a county court judge rather than by a very well-respected judge of the court of appeal. Further, the fact that the county court continues to allow Party Wall awards to be enforced in this way merely demonstrates that they remain ignorant of the relevant law. Any award enforced under CPR 70.5 would remain susceptible to a legal challenge, and setting the enforcement order aside, and the costs of doing so would most likely be recoverable against the person who has enforced the award in such a manner. Any surveyor having knowledge of the court of appeal's disapproval in *Zissis v Lukomski* of the use of CPR 70.5 for such matters, and who nevertheless continues to advise his clients to follow such a route seems to me to be treading on very perilous ground. The author's opinion is supported by Chinn (2011) "any surveyor who continues to advise clients to use CPR 70.5 for direct enforcement of awards should dust off his PI policy".

As Chinn suggests, deviating from the correct procedure could expose the surveyor to a negligence claim. Avoiding such a situation requires legal advice, let the experts do it for you, after all, the costs are recoverable and why invite further problems? The author suggests that enforcement should really bring the matter to a conclusion, not expose them to further issues and costs. Accordingly, the author maintains that the appropriate course of action must be to adopt Section 17 and recover the money through the magistrate's court summarily as a civil debt.

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