



CONSTRUCTION CASE NOTES

SUSAN LINDSEY



The majority of Susan's practice is focused on building related matters. She has experience of a wide spectrum of construction and engineering disputes, and of professional negligence and fee recovery of engineers, architects and surveyors. Susan is a chartered arbitrator and has undertaken appointments to act as adjudicator. She also has experience of acting as party representative in adjudication and mediation. Before coming to the Bar Susan practised as an architect. She has practical experience of design and build procurement and acting as a certifying architect in traditional contracting arrangements.

Susan Lindsey regularly writes the 'Legal Matters' column in The Architect's Journal, which is published on a weekly basis. The column seeks to explain a variety of topical construction law issues to the Journal's non-lawyer readership of about 16 thousand.

Grouped together here are two articles which deal with the interpretation of statutory provisions that are of interest to construction professionals. The first, *Perrin v Ramage*, concerns the interpretation of s.198(6)(b) of the Town and Country Planning Act 1980, and the effect of Tree Preservation Orders that has been placed on a tree that is causing nuisance. In the second, *Zissis v Lukomski*, the court grappled with the Party Wall etc Act 1996, and how a party wall award should be appealed.

Zissis v Lukomski

Party wall procedures are all very well so long as everyone knows what they are doing, and gets on with it properly. But when things go awry, the provisions in the Party Wall etc Act are not as clear as they might be. The Court of Appeal has recently picked up the pieces between party wall owners in Ealing (*Zissis v Lukomski* 5 April 2006), and given us guidance on how an appeal against a party wall award should be pursued.

The third surveyor made an award that did not deal with the fees of one owner's surveyor, a Mr Carter. The third surveyor then declared himself 'incapable of acting'. The Act provides that under such circumstances the owners' surveyors should agree on a new third surveyor. Mr Carter wrote to his opposite number asking for his proposals. When none were received, Mr Carter made an award alone. He awarded himself £15k that he said Mrs Zissis had to pay.

Mrs Zissis did what section 10(17) of the Act told her to if she disagreed with an award, and appealed to the County Court. She did so under Part 8 of the Civil Procedure Rules, a procedure used for starting new claims. The judge found that Mr Carter's award was invalid, but overall he found against Mrs Zissis because he said the Part 8 procedure was the wrong one to use. He said that Part 52, the appeal procedure, should have been used, because Mrs Zissis was pursuing a statutory appeal in challenging the award.

The Court of Appeal, having been shown 3 textbooks giving conflicting guidance on whether Part 8 or Part 52 is the correct procedure, seized the chance to make the position clear. The answer is that Part 52 applies to appeals under section 10(17) of the Party Wall Act. Furthermore the Court clarified that the appeal to the County Court under Part 52 is a rehearing. That means the County Court can hear all the evidence and reach its own decision unconstrained by the findings of the award. (This means that the appeal to the Court of Appeal from the County Court was what is called a second appeal, which is an appeal from a decision made on appeal.)

Of comfort to anyone currently pursuing a party wall appeal in the County Court under Part 8 (as wrongly recommended by 2 of 3 text book their Lordships looked at) will be that the Court of Appeal held that the County Court judge should not have dismissed Mrs Zissis's claim because of the incorrect procedure. He should have either allowed an amendment or let the matter continue under Part 52.

There are 2 likely sequels to this case. First, the parties are going back to the Court of Appeal to deal with whether Mr Carter's award is valid. Second, Lord Justice Brooke has asked the Deputy Head of Civil Justice to consider whether directions are needed about the level of judge who should hear challenges under the Party Wall Act, and whether more formal guidance is needed as to the appeal procedure under the Act.

Perrin and Ramage

A large oak tree growing in Mr and Mrs Shephard's garden in Northamptonshire was said to be damaging the house next door by means of the familiar pattern of root encroachment and extraction of water; in legal jargon, a nuisance. But the Shephards were powerless to do anything to help their neighbours, Ms Perrin and Mr Ramage, as the tree was protected by a Tree Preservation Order (TPO). Breaching a TPO is a criminal offence. Perrin and Ramage made the proper application to the local authority for permission to fell the tree, but it was refused. Their appeal to the Secretary of State was dismissed, as even though the oak was implicated in the damage, there was an alternative engineering solution that would avoid the need to fell it.

But could Perrin and Ramage rely on section 198(6)(b) of the Town and Country Planning Act 1990, which provides that a TPO does not apply to the cutting down, uprooting, topping or lopping of any trees so far as that is necessary for the prevention or abatement of a nuisance? Anyone carrying out works allowed by section 198(6)(b) is protected from being prosecuted. The local authority argued that because there were engineering works that would solve the problem, works to the tree were not necessary, hence there was no section 198(6)(b) protection. What is more, they argued that Perrin and Ramage should pay for the engineering works themselves.

Perrin and Ramage went to court to find out if the local authority was right¹. On the basis of assumed facts, the judge decided the preliminary legal question whether it is relevant for the purposes of section 198(6)(b) that there are other works that could prevent the same nuisance.

The judge focussed on two words in the section in order to interpret it; 'nuisance' and 'necessary'.

He concluded that 'nuisance' means an actionable nuisance that either had caused or would shortly cause damage. So the section does not permit tree works that abate mere encroachment by roots or branches.

As for 'necessary', that refers to the extent of works needed to abate the nuisance. The judge concluded that in deciding what are necessary tree works, there is no need to take into account that there may be alternative works, including engineering, that might achieve the same result. His reasoning included that section 198(6)(b) does not mention any considerations other than works to the tree itself. Also, as there are probably engineering solutions to most tree problems, if those needed to be taken into account the section would in practice never apply. But the judge emphasised that section 198(6)(b) only allows the minimum works necessary to abate the nuisance; to go further would be an offence.

So while someone planning on relying on section 198(6)(b) need not take into account that there may be alternative effective ways of controlling damage being caused by a protected tree, it seems that before reaching for their chain saws they would be wise to consider taking

¹*Perrin & Ramage v Northampton Borough Council* 26 September 2006

advice both as to whether works to the tree will be effective in abating a nuisance, and also the minimum necessary work.