Neutral Citation Number: [2018] EWCA Civ 237

Case No: A1/2016/3438

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
(TECHNOLOGY AND CONSTRUCTION COURT)
HH Judge Bailey
B20CL129

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 February 2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HENDERSON

- -

Between :

NICHOLAS JOHN KNIGHT	**Appellant**
- and -	
BASIL CONSTANTINE GOULANDRIS	**Respondent**

- -
- -

Michael Wheater and Ms Emily Betts (instructed by **Fox Williams LLP**) for the **Appellant**
Mr Tom Weekes QC (instructed by **Ward Hadaway**) for the **Respondent**

Hearing date : 1 February 2018

- -

Judgment Approved

Lord Justice Patten :

1. The parties to this appeal are neighbours in Belgravia. In 2013 Mr Knight began work on his house at 19 Chester Square which included the creation of a larger basement. This involved the extension of a party wall. The work to 19 Chester Square took two years to complete after which each party appointed his own surveyor to assess the damage which the works had caused to Mr Goulandris's property at 18 Chester Square. It was common ground that the works had caused some damage but the extent and the cost of remedying the damage were very much in dispute.

2. The surveyor appointed by Mr Goulandris (Mr Nicholas Fenton) considered that, in order to restore 18 Chester Square back to its original condition, it would be necessary to carry out extensive works of cleaning and re-decoration which would necessitate Mr Goulandris and his family moving to alternative accommodation while the work was carried out. He assessed the compensation due to Mr Goulandris as the Adjoining Owner to be £821,210.49 of which £640,000 represented the cost of alternative accommodation.

3. Mr Denis Holley, the surveyor appointed by Mr Knight, disputed that the decorative condition of 18 Chester Square was solely attributable to the works and contended that many, if not most, of the defects fell to be rectified as part of the usual wear and tear in the life of the building. He therefore rejected Mr Fenton's assessment of the compensation payable.

4. In the absence of any agreement between the parties, the surveyors took steps to resolve the matter by selecting a third surveyor (Mr Alistair Redler) under the provisions contained in s.10(1)(b) of the Party Wall etc Act 1996 ("the 1996 Act"). On 2 September 2015 Mr Redler issued his award in which he determined that much of the damage relied on by Mr Fenton such as hairline cracking pre-dated the works to 19 Chester Square and that other defects were comparatively minor. The works for which Mr Knight was responsible were, he decided, not urgent and could reasonably be carried out without the need for Mr Goulandris and his family to vacate their property. Mr Redler assessed the compensation payable under the 1996 Act in the sum of £55,001.61.

5. Mr Goulandris has appealed against the award. The procedure for such an appeal is contained in s.10(14)-(17) as follows:

> "(14) Where the surveyors appointed by the parties make an award the surveyors shall serve it forthwith on the parties.
>
> (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.

> (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."

6. Mr Goulandris issued his appeal in the Central London County Court on 17 September 2015. Mr Knight contends that it was issued out of time because the 14 day period under s.10(17) expired on either 15 or 16 September. The dispute centres on when the third party surveyor's award was served on Mr Goulandris. Mr Redler's award was not served directly on the parties as it could have been under s.10(15)(a). What happened was that on 2 September at 08:45 Mr Redler e-mailed his award to both parties' surveyors. On the same day but at 23:19 Mr Fenton forwarded the e-mail to Mr Goulandris to which was attached the award in a pdf format. It is common ground that Mr Goulandris did not read the e-mail until early the following day. Also on 3 September Mr Fenton received a hard copy of the award in the post but neither he nor Mr Redler ever sent a hard copy of the award to Mr Goulandris.

7. It is, I think, common ground that the references to "serve" and "served" in s.10(15) and 10(17) respectively must have the same meaning so that the issue is whether the receipt by Mr Goulandris of the award in electronic form constituted service of it on him for the purposes of s.10(17) either on 2 September when the e-mail was actually received in his in-box or at least on 3 September when he read it together with the attachment.

8. Service of documents is dealt with in s.15 of the 1996 Act which provides as follows:

> "(1) A notice or other document required or authorised to be served under this Act may be served on a person—
>
> (a) by delivering it to him in person;
>
> (b) by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom; or
>
> (c) in the case of a body corporate, by delivering it to the secretary or clerk of the body corporate at its registered or principal office or sending it by post to the secretary or clerk of that body corporate at that office.
>
> (1A) A notice or other document required or authorised to be served under this Act may also be served on a person ("the

recipient") by means of an electronic communication, but only if—

(a) the recipient has stated a willingness to receive the notice or document by means of an electronic communication,

(b) the statement has not been withdrawn, and

(c) the notice or document was transmitted to an electronic address specified by the recipient.

(1B) A statement under subsection (1A) may be withdrawn by giving a notice to the person to whom the statement was made.

(1C) For the purposes of subsection (1A)—

"electronic address" includes any number or address used for the purposes of receiving electronic communications;

"electronic communication" means an electronic communication within the meaning of the Electronic Communications Act 2000; and

"specified" means specified in a statement made for the purposes of subsection (1A).

(2) In the case of a notice or other document required or authorised to be served under this Act on a person as owner of premises, it may alternatively be served by—

(a) addressing it "the owner" of the premises (naming them), and

(b) delivering it to a person on the premises or, if no person to whom it can be delivered is found there, fixing it to a conspicuous part of the premises.

9. The provisions of subsections (1A)-(1C) were introduced as amendments with effect from 6 April 2016 by the Party Wall etc Act 1996 (Electronic Communications) Order 2016 (2016 No. 335) ("the 2016 Order") pursuant to the power contained in s.8 of the Electronic Communications Act 2000 which allows the Minister by order to modify the provisions of any legislation "for the purpose of authorising or facilitating the use of electronic communications … for any purpose mentioned in subsection (2)". The only purposes specified in s.8(2) that were applicable to s.15 of the 1996 Act were

"(a) the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument;

> (b) the doing of anything which under any such provisions is required to be or may be done by post or other specified means of delivery;"

10. The 2016 Order was preceded by an impact assessment published by the Department for Communities and Local Government which makes clear that the view taken by the Department at the time was that s.15 of the 1996 Act in its original form did not permit documents such as the third party surveyor's award to be served electronically. They had, it said, to be delivered in person or by post. The evidence received by way of responses to the consultation indicated that only about 1% of party wall notices out of an annual total of 226,800 notices were served in person so that the electronic service of documents under the 1996 Act could, according to the assessment, be regarded as an efficient, low-cost alternative which was likely to be taken up in a significant proportion of cases.

11. On 26 May 2016 HH Judge Bailey heard a preliminary issue on the question of whether Mr Goulandris has issued his appellant's notice within the 14-day time limit under s.10(17). The judge held that the service by Mr Redler of his award on Mr Fenton did not constitute service on Mr Goulandris and there has been no challenge to his decision on this point. He therefore considered whether the e-mail which Mr Fenton sent to Mr Goulandris containing the award in pdf format amounted to service under s.10(15)(b) so as to set time running for an appeal under s.10(17). Having referred to some of the relevant authorities which I will come to shortly, he expressed the initial view that s.15 does not provide an exhaustive list of the means by which a document such as an award can be served. At [39] he said:

> "Whatever the merits of this argument, the conclusion must be wrong. 'May' in Section 15 can only be permissive. It is not only a common English word, readily understood, but it is a word commonly used in English statutes. It indicates the permissive not compulsion. It really cannot reasonably be construed as precluding any other form of service."

12. But in the end the judge reached a different conclusion largely based not on the earlier authorities but on the fact that s.15 was amended by the 2016 Order on the assumption that the 1996 Act did not recognise the service of documents by e-mail or other electronic means as constituting service for the purposes of s.10(15). The government's view, as set out in the impact assessment, took into account the views of the profession and was, the judge said, of some assistance at least in identifying the purpose of the proposed amendment. But he rightly recognised that the proper construction of s.15 is in the end a matter for the Court even if that involves saying that the 2016 Order was based upon a misapprehension. Notwithstanding this caveat, the judge seems to have concluded that the generally held view about the limits of s.15 should prevail. He said:

> "[83] It can safely be stated that the party wall surveyor community generally have since 1996 (and before) proceeded upon the basis that electronic communication, while it is a useful way of informing surveyors that an award is coming or indeed the terms of the award which has been made, does not constitute effective service under Section 15 of the 1996 Act.

> [84] It would be strange indeed if the Court were now to hold that for all this time the party wall surveying community, the relevant government department and the members of parliament who show an interest in these matters, had been wrong all along. It may be that they were, and I have noted that there is a cogent argument advanced by Mr Wheater, but in interpreting Section 15 it seems to me to be entirely appropriate to proceed upon the basis that the professionals engaging day by day with the 1996 Act did accurately reflect the intention of Parliament and that it would be dangerous now to throw that understanding to the winds. The advice given by many surveyors as to service under Section 15 would be thrown not only into doubt but shown to be incorrect by a decision of this Court to the effect that pure e-mail sending was permissible under Section 15 and (by necessary implication) that the recent amendment to s.15 was unnecessary. I do not consider that it would be right to so interpret the Act.
>
> [85] Accordingly, while paying the tribute I do to the Respondent's argument, I hold that for the purposes of the preliminary issue the service of the third surveyor's award by e-mail did not constitute good service for the purposes of Section 15 of the Act."

13. With respect to the judge, it seems to me that for the purpose of construing s.15 little or no weight can be attached to the fact that most members of the profession together with the government itself considered that the valid methods of service for the purposes of the 1996 Act were restricted to those set out under s.15 or at least did not include service by electronic means. That is a question of statutory construction on which there is no direct authority and which turns on the wording of s.15 itself looked at in context having regard to the purpose of the provision. The fact that the government or those advising the Minister may have misconstrued the legislation and that they did so in common with the majority of the profession is clearly enough to give the Court reason to pause for thought not least because it may give rise to arguments to the effect that the 2016 Order was not only unnecessary but was also *ultra vires* in so far as it limited the circumstances in which service by electronic means is now permissible. As to that, I express no view. But in itself the position taken by the government provides no additional authority for treating s.15 as an exhaustive code and the judge was wrong in my view if he treated it as persuasive let alone decisive in relation to the question of construction on the preliminary issue.

14. Although the regulation of party walls can be traced back to the Middle Ages, the present scheme has its roots in legislation passed since the Great Fire of London and, in particular, in the London Building Acts. But the 1996 Act was not a consolidating statute and neither side has relied on the earlier legislation in support of their arguments on this appeal. What is evident from the provisions of the 1996 Act and the consultation exercise which preceded the impact assessment in relation to the 2016 Order is that the system is based on the service of party wall notices and counter-notices which are required to be served whenever a building owner proposes to build a wall on the line of the junction between two adjoining properties or to carry

out repairs or other works to an existing party structure: see the 1996 Act ss. 1 and 2. The failure to serve a counter-notice within 14 days indicating that the adjoining owner consents to the proposed works is treated under s.5 as the commencement of a dispute which will necessitate (as in the present case) the appointment of either an agreed surveyor or a third surveyor who can resolve the dispute by making an award. Over and above the notices and awards I have referred to, other documents will be required to be served such as the plans, sections and particulars that will identify the works specified in a party wall notice and form the basis of any agreement between the building owner and the adjoining owner for the carrying out of the works: see s.7(5). It is therefore relevant to bear in mind the range of documents to which the provisions of s.15 can apply; the need for certainty; and the relatively short timeframe allowed for the service of counter-notices or, as in the present case, an appeal from a surveyor's award. The 2016 Order is therefore relevant in so far as it can be said to recognise these factors by making service of documents by e-mail or other electronic means dependent on the consent of the receiving party rather than merely adding to the optional methods of service available to the serving party.

15. The question of whether Mr Redler's award was effectively served by e-mail raises two potential issues. The first is whether s.15 should be treated as an exhaustive statement of the means by which a notice or other document can be validly served for the purposes of the 1996 Act. The second is whether (even assuming that s.15 is permissive only) the sending of an electronic copy can in itself amount to the service of the award within the meaning of s.10(17) or whether the reference in 15(1) to "a notice or other document" should be read as limited to a notice or other document in hard copy: i.e. a physical document.

16. Some support for this latter view can be found in the decision of HH Judge Dight in *Cowthorpe Road 1-1A Freehold Ltd v Wahedally* [2017] L&TR 4 which concerned a lessor's counter-notice served under s.21 of the Leasehold Reform, Housing and Urban Development Act 1993. HH Judge Dight had to construe s.99(1) of the 1993 Act which provides:

> "(1) Any notice required or authorised to be given under this Part —
>
> (a) shall be in writing; and
>
> (b) may be sent by post."

17. He held that the use of the word "may" in subsection (b) meant that the section was permissive but that the requirement that the notice should be in writing excluded service by e-mail. Much of his reasoning turned on the fact that s.13 of the 1993 Act requires a notice to be signed which the judge held indicated that what had to be served was the original and not a copy document. This was, he said, sufficient to evince a contrary intention so as to exclude the definition of "writing" in Schedule 1 to the Interpretation Act which includes:

> "typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form …".

18. Mr Weekes QC, although having referred to Judge Dight's decision in his skeleton argument, abandoned during the hearing any reliance on the argument that a "document" in s.15 of the 1996 Act could not include a document in electronic form and we therefore heard no argument on the point. In the circumstances, I propose to express no view about the correctness of the decision in the *Cowthorpe Road* case which in any event concerned arguably different provisions from those under consideration on this appeal. I can turn then to the question whether s.15 is permissive only.

19. The argument for the appellant starts from the general proposition that unless a statutory provision such as s.15 expressly excludes service by other means, the serving party is entitled to rely on service which took place by any other means provided that it resulted in the relevant document coming to the attention of the receiving party. At common law service requires receipt of the document. In the present case, there is no dispute that Mr Goulandris did access the award on 3 September and read it, albeit in electronic form. The methods of service prescribed by s.15 and similar statutory provisions are there to assist the serving party in that if he uses them then there has been good service of the document for the purposes of the relevant statute even if the intended recipient either refuses to accept or (in cases, for example, of service by post) never in fact receives the document. To that extent, the common law rule is either modified or excluded. But in the case of s.15 this requires some qualification in so far as subsection (1)(b) and (c) provide for service by post. Those provisions must be read as subject to s.7 of the Interpretation Act 1978 which states:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

20. This has the effect of making delivery of the document rather than its sending the point when service is effected but of presuming delivery in the ordinary course of post and of placing on to the receiving party the burden of proving the contrary. In *Freetown Ltd v Assethold Ltd* [2012] EWCA Civ 1657 this Court decided that s.7 of the Interpretation Act 1978 did apply to s.15 of the 1996 Act because there was nothing in the provisions of s.15 that was incompatible with the qualification which s.7 introduces so as to give rise to a contrary intention. Rix LJ, in giving the only reasoned judgment, said that receipt remained the dominant concept within s.15 as exemplified by the provisions of subsections (1)(a) and (1)(c) which both involve service on (and, by implication, receipt by) the receiving party. There was therefore nothing in the scheme of s.15 which by implication ousted the qualification of the s.15 provisions about service by post in the manner effected by s.7:

> "[38] So, is there anything about the language or effect of s 15 which would be incompatible with s 7, if the latter section is imagined as potentially incorporated in the Act? Plainly, there is nothing in the express language which is any way

> incompatible. On the contrary, everything about that language points in the direction of service taking effect on receipt. First, that is the common law rule against which any statutory language must be measured. Secondly, the section speaks of service, which prima facie as a matter of language points to receipt ("A notice . . . to be served . . . may be served . . ."). Thirdly, this requirement built into the concept of service is further emphasised by speaking about service *on* a person ("may be served on a person"). One would not naturally speak of serving a document on another person by long distance. Fourthly, s 15(1)(a) plainly requires such service on a person, for it speaks of the method "by delivering it to him in person". I find it hard to conceive that such a method does not involve receipt by that person. Of course, such a person may decline receipt by casting it from him, but if a notice is delivered by person to another person, I do not see that it can be properly said that the person to whom the notice is delivered can say that he has not received it."

21. For the purposes of the present appeal, the decision in *Freetown* is primarily interesting for what Rix LJ says about the statutory provisions governing service contained in s.23 of the Landlord and Tenant Act 1927 ("LTA"). In *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167 the Court of Appeal had decided, based on an earlier Court of Appeal decision in *Galinski v McHugh* (1988) 57 P&CR 359, that s.7 was excluded by the provisions of s.23 which, by making service by post one of the primary authorised methods of service, threw the risk of non-receipt on the intended recipient. The legislation, the Court held, was therefore incompatible with the introduction of the s.7 qualification which in the case of posting made delivery necessary in order for there to be service.

22. The Court of Appeal decisions in relation to the application of s.7 of the Interpretation Act 1978 to s.23 LTA were distinguished by Rix LJ in *Freetown* simply on the basis that they related to a different statute:

> "[44] Nevertheless, Mr Nicholls submits that the s 23 jurisprudence, at any rate by analogy, necessitates an answer to the same effect, namely that s 7 must be regarded as excluded. Mr Nicholls does not submit that this court is bound by *Webber* to reach the same answer with respect to s 15 of the Act, and accordingly he seeks to dispute any suggestion that Slade J proceeded on the basis that she was bound by the s 23 jurisprudence. Rather he submits that the s 23 jurisprudence, and in particular *Webber*, leads logically to the same result. I disagree. Section 23 is written in different terms from s 15, is to be found in a different statute, and the reasoning of its jurisprudence has developed in large part without consideration of s 7, even if ultimately in *Webber* the inference was drawn that s 7 was excluded.
>
> ….

> [46] I have also been struck at how the s 23 jurisprudence has not proceeded so much by reference to s 7 of the Interpretation Act and its exclusion, as by reference to the construction of s 23 on its own terms. Thus in *Webber* this court reasoned that it was bound by this court's decision in *Galinski*, but *Galinski* did not consider s 7. In such circumstances, I do not consider that it would be appropriate to extend the reasoning applicable to s 23 of the LTA 1927 into a different statute, with different wording, by reference to which it cannot be said that s 7 is excluded on the basis that "the contrary intention appears"."

23. The question whether s.15 (whether or not qualified by s.7 of the Interpretation Act 1978) should be read as an exhaustive code for service or merely as permissive did not arise but it had done so in some of the earlier authorities on s.23 and some reliance has been placed by Mr Wheater on the fact that Rix LJ refers to those decisions in his judgment in *Freetown* without qualification. The starting point is s.23 itself which provides:

> "(1) Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there, or, in the case of a local or public authority or a statutory or a public utility company, to the secretary or other proper officer at the principal office of such authority or company, and in the case of a notice to a landlord, the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf."

24. In *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] 1 Ch 396 a landlord sent a notice under s.25 of the Landlord and Tenant Act 1954 to the registered office of the tenant company in Huddersfield. By then the tenant company had moved to Leeds but the notice was re-directed to their Leeds address by the Post Office and received there. The tenants sought a declaration that because the notice had been sent to an address which was not their principal office or last known place of abode there was not good service. Wynn-Parry J held that the notice had been validly served:

> "On the reasoning of the members of the Court of Appeal in *Tennant v. London County Council* I feel constrained to construe section 23 (1) as being permissive so far as the mode of service is concerned. It is perfectly true, as was pointed out by Mr. Holdsworth, that the requirement that the notice, etc. is to be in writing is imperative - "Any notice, request, demand or other instrument under this Act shall be in writing"; but then when the subsection goes on to deal with service the permissive verb "may" is used, and that is in clear contradistinction to the imperative "shall." I can see no canon of construction which would entitle me to qualify the nature of the verb "may" by anything that has gone before in the subsection. It follows that, although there are certain modes set out in the subsection, they

> are not to be regarded as being exhaustive. It therefore appears to me, apart from the reasoning in *Sharpley v. Manby*, that I am entitled to say, without praying in aid the second method, that is, leaving it for him at his last known place of abode, that it is sufficient if the letter is sent to and received by the plaintiffs. That in fact happened, and it matters not to my mind on this particular reasoning that the letter got to Leeds via Huddersfield, because I am now dealing with a method which is ex hypothesi outside the section. Clearly what did in fact happen achieved the clear intention of the legislature, namely, that the notice should be received by the person intended to receive it."

25. In *Galinski v McHugh* the issue was whether a notice could validly be served on the tenant's duly authorised agent. The tenant's counsel accepted the correctness of the decision in *Stylo* about s.23 being only permissive and so the point was not argued. But there is nothing in the judgment of Slade LJ which casts any doubt on the decision or its reasoning. Similarly in *Webber* the issue was whether s.23 had to be read subject to s.7 of the Interpretation Act and *Stylo* was neither referred to nor considered. Peter Gibson LJ does, however, refer to the methods of service specified in s.23 as the primary methods of service which appears to recognise that they are not the only possible methods. This is confirmed by a passage in the judgment of Rix LJ in *Freetown* where (at [8]) he says:

> "[8] It may be observed that the question could arise as to whether section 23(1) sets out the exclusive alternative means of service for the purposes of the LTA 1927, or whether the methods specified are merely permissive (among others). That question arose in *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396, where Wynn-Parry J decided the issue in favour of a permissive interpretation, at 405-406. That was confirmed, by this court, in *Galinski v McHugh* (1988) 57 P&CR 359 at 365. It is for this reason that the section 23 methods of service have sometimes been spoken of as the "primary methods of service", as in the edition of *Woodfall, Landlord and Tenant* cited by Peter Gibson LJ in this court in *Webber* at [26]."

26. Moving away from s.23 we were taken by Mr Wheater to a number of other cases where in different contexts the question has arisen as to whether provisions governing the service of documents should be treated as exhaustive or permissive.

27. The first of these cases is *Hastie and Jenkerson v McMahon* [1990] 1 WLR 1575 which concerned the service of a list of documents under the terms of a consent order. The list was sent to the defendant's solicitors by fax in legible form prior to the deadline under the order but they refused to accept the fax as proper service under RSC O.65 r.5(1). This stated:

> "service of any document … may be effected — (*a*) by leaving the document at the proper address of the person to be served; or (*b*) by post, or (*c*) where the proper address for service includes a numbered box at a document exchange, by leaving

> the document at that document exchange … or (*d*) in such other manner as the court may direct."

28. The Court of Appeal held that the list had been validly served in compliance with the rule: Woolf LJ (at page 1581) said:

> "Mr. Douthwaite submits that Ord. 65, r. 5 has to be read as a whole and that although Ord. 65, r. 5(1) uses the word "may" the rule is specifying the only means of service which can be used; the effect of the rule being that either service has to be in accordance with one of the four methods specified in Ord. 65, r. 5(1) or by way of personal service or in accordance with a statute. Mr. Douthwaite did concede however that this is subject to the parties agreeing a different means of service. In making this concession, Mr. Douthwaite is giving effect to the statement which Parker L.J. made in *Imprint (Print and Design) Ltd. v. Inkblot Studios Ltd.,* The Times, 23 February 1985; Court of Appeal (Civil Division) Transcript No. 35 of 1985 in which, before Ord. 65, r. 5 was amended to deal with use of the document exchange, this court had to consider the consequence of a document being delivered to the box of another user of the document exchange. The court decided that under the unamended rule service had not been established. However, Parker L.J. stated, at p. 10, that he accepted entirely counsel's submissions "that it is possible for parties to agree to accept service of a document outside the provisions of the rules."
>
> To give effect to Mr. Douthwaite's submissions the word "may" in Ord. 65, r. 5(1) has to be read as "must." Rule 5(1) has also to be read subject to the express exception for personal service under Ord. 65, r. 5(3), and subject to the agreement of the parties. I can find no justification for departing from the normal meaning of the provisions of Ord. 65, r. 5(1) to achieve this result. The purpose of Ord. 65, r. 5 is not to restrict methods of service but to assist the parties to achieve service and if necessary to prove that that service has taken place in the specified circumstances. If, as the note to the rule which has been quoted makes clear, service can be proved to have taken place apart from reliance on the rule, then there is no need to make use of the rule. If, however, unlike this case there is no admission or other evidence of receipt of the document, recourse to the rule may be necessary.
>
> …..
>
> In support of his contention that Ord. 65, r. 5(1) should not be regarded as laying down exhaustive requirements as to service, in addition to *Sharpley v. Manby* [1942] 1 K.B. 217, already cited, Mr. Gilmour relied on *Stylo Shoes Ltd. v. Prices Tailors Ltd.* [1960] Ch. 396. In both those cases a statute specified a

> method of service which "may" be used and the court refused to regard the methods specified in the statute as being exhaustive and regarded them as permissive. There is always danger in seeking to apply decisions on specific statutory provisions to different situations, but those authorities endorse what I regard as the proper approach."

29. In *Ener-G Holdings plc v Hormell* [2012] EWCA Civ 1059 a similar issue arose in relation to service provisions in a contract for the sale of shares. The contract contained machinery to deal with alleged breaches of the agreement under which a notice of any claim had to be given by the second anniversary of completion and the claim was to lapse unless proceedings had been issued and served not later than 12 months after the date of the notice. Clause 13 of the contract provided:

> "13.1 Notice in writing
>
> Any notice or other communication under this Agreement shall be in writing and signed by or on behalf of the party giving it.
>
> 13.2 Service
>
> Any such notice may be served by delivering it personally or by sending it by pre-paid recorded delivery post to each party (in the case of the Buyer, marked "for the attention of directors") at or to the address referred in the Agreement or any other address in England and Wales which he or it may from time to time notify in writing to the other party."

30. An issue arose as to whether a notice had been validly served under clause 13. It was taken by a process server to the defendant's home address but, because no-one was there, the envelope was left on a table in the front porch. Later that day it was found and the notice read by the defendant. The Court of Appeal held that "delivering it personally" in clause 13.2 meant that it had to be served on the defendant in person but that clause 13.2 was permissive only so that the actual receipt of the notice by the defendant later in the day amounted to good service. Lord Neuberger MR said:

> "[29] The argument that it would have been pointless to spell out two methods of service in cl 13.2, unless they were intended to be exclusive, has some initial attraction. However, in my view, on closer analysis, the argument has no force. The purpose of a provision such as cl 13.2, if it is not exclusive, is to shift any risk from the server to the intended recipient: see per Robert Walker LJ in *Blunden*'s case [2002] 2 EGLR 29 at 32. Thus, if a document is served in accordance with cl 13.2, it is treated as served, or delivered, even if it does not come to the attention of, or even if it is not received by, the intended recipient (see the cases cited at [23], above). But if a document is served or delivered in any other way (eg by ordinary post or by being left at the intended recipient's premises rather than being handed personally to him), there is no such presumption.

> …..
>
> [32] In my view, clear words would normally be required before one could ascribe to the parties an intention that a recipient who actually receives a notice in time should nonetheless be treated as not having received the notice at all. In this case, the point is rather reinforced by the point mentioned at [23], above, namely that, if a notice is sent by recorded delivery to the prescribed address, it is deemed to have been served, even if it is not actually received. If that is right, it would seem a little curious to ascribe to the parties an intention that a notice sent or delivered in another way was, in the absence of clear words, deemed not to have been served, even though it was clear that, as a matter of fact, it had been received and read by the intended recipient."

31. An alternative view of the significance and effect of the word "may" was given by Longmore LJ who dissented on the question whether clause 13.2 was permissive. He said:

> "[45] Mr Lavender QC for the defendant relied heavily on the use of the word 'may' in cl 13.2 in contradistinction to the word 'must' or 'shall' as used in other clauses of the contract, notably in cl 13.1 which provides that '[a]ny notice … shall be in writing'. That argument has some, but by no means conclusive, force; it is clear that a notice has to be in writing but if one is then providing for service of such a notice in two possible ways, it is a natural use of language to say that the parties 'may' use one method of service or a second method of service. Such expression does not mean that it is not compulsory to use one method or the other."

32. The same view was taken by Andrews J in *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch), also in a contractual context, where the issue was whether the defendant bank had validly exercised a right to extend the term of a five-year interest rate collar transaction which required it to give notice by a specified time and date. The service of notice was governed by clause 12(a) which stipulated that notice under the agreement "may be given in any manner set forth" and then specified five particular methods of service. The judge said that the arguments in favour of a mandatory construction of the clause were more compelling than in *Ener-G*:

> "[104] In any event, s 12(a) does not say that "notice given by any of the following methods shall be deemed effective as indicated". It says that "notice may be given in any manner set forth" (it then refers to the Schedule) "*and* will be deemed effective as indicated". The "and" is important. It signifies that the section is not exclusively about when a notice is deemed effective; the first part of the section deals with the permitted means of giving notice, and the second deals with the date on which any notice given by each of those permitted methods will

> be deemed to be effective. All the indications are that it is intended to be comprehensive."

33. Mr Weekes, I think, recognises that the use of the word "may" in s.15(1) is some indication that the provisions which follow were intended to be permissive only. But as with any statutory provision it is necessary to have regard to the totality of the relevant provisions and to construe them by reference to the regime which they were intended to facilitate. As part of that process, one needs to take into account any contra-indications in the language of the section itself.

34. One such contra-indication relied on by Mr Goulandris is the use of the word "alternatively" in s.15(2). Subsection 15(2) deals with cases where the document is required under the 1996 Act to be served on a person as owner of premises. Under the 1996 Act most documents must be served on the owner and the exceptions are service on an occupier under s.8 and service on a surveyor under s.10(15). In cases of service on an owner, the document may "alternatively" be served by the method set out in that subsection which is to deliver it to a person at the relevant premises addressed to "the owner". Mr Weekes submits that this suggests that the Act is treating the s.15(1) methods of service as a complete code rather than only a partial account of the possible methods of service otherwise available. Had s.15(2) used the word "also" it might, he submits, have been different.

35. I accept that one could read "alternatively" in that way but, in my view, there are equally plausible arguments the other way. Section 15(2) like s.15(1) is on any view specifying the primary methods of service available under the 1996 Act which, if utilised, will constitute good service of the relevant document regardless of receipt. They are not concerned with service by other means. The use of the word "alternatively" simply recognises that s.15(2) provides additional primary alternatives for the benefit of the serving party. It is not concerned with other possible methods of service in respect of which the burden of proving receipt would lie on the serving party. I do not therefore regard it as a significant contra-indication to a permissive construction of s.15(1) based on the use of the word "may".

36. Mr Weekes also referred to the practical difficulties which might exist were electronic service of documents to be permissible. Service of a hard copy by one of the means listed in s.15(1) promotes, he says, predictability and certainty in the process under a regime with short time limits. A party wall notice may, as mentioned earlier, include plans and drawings which are likely to be large and bulky and are not ideally suitable for electronic transmission. These are, of course, relevant considerations but in my view they are not decisive. Service by e-mail of documents in a pdf format does produce high quality copies of the relevant document, assuming of course that the originals were themselves legible. In one sense the introduction of electronic service as a result of the amendments introduced by the 2016 Order is a recognition of this. But in any event it is difficult to infer that Parliament intended under s.15 to create an exhaustive list of the possible methods of service so as to avoid difficulties inherent in service by e-mail or fax. If the serving party chooses to use a method of service outside s.15 then the burden is on him to establish receipt of the document in a legible form.

37. In my view, the most attractive way of presenting the argument against s.15(1) being merely permissive is the construction of "may" which Longmore LJ adopted in the

Ener-G case. "May" is explicable by reference to the choice which the section gives the serving party between the specified alternative methods of service and does not therefore require to be read as permitting further unspecified methods of service that would satisfy the common law requirement of receipt. But this construction of the word "may" has been rejected in relation to s.23 LTA and more generally by the Court of Appeal in *Hastie and Jenkerson*. It has also failed to be accepted in a contractual context in *Ener-G*. Although one can say that those were decisions in relation to different statutes and contracts, the language under consideration in those cases was sufficiently close to that of s.15 to make that, in my view, an unconvincing ground for distinguishing those cases and they do provide at the very least highly persuasive authority at Court of Appeal level for construing s.15 in the same way. In the absence of any other circumstances or internal indications in the statutory provisions themselves, there is no justification in my view for giving "may" in s.15 a different meaning.

38. I would therefore allow this appeal. In these circumstances, it is unnecessary to consider the further issue of whether and, if so, with what effect Mr Goulandris has waived the protection of s.10(17) by bringing his appeal before service on him of a hard copy of Mr Redler's award.

Lord Justice Hamblen :

39. I agree.

Lord Justice Henderson :

40. I also agree.