IN THE COUNTY COURT AT CENTRAL LONDON Case No.C20CL131

TECHNOLOGY AND CONSTRUCTION LIST

His Honour Judge Edward Bailey

IN THE MATTER OF AN APPEAL
UNDER THE PARTY WALL ACT 1996

Between:

SHAMIM AMIR-SIDDIQUE

Appellant

-and-

(1) TOMASZ KRZYSZTOF KOWALIW
(2) AGNIESZKA ELZBIETA GIGONKOWALIW

Respondents

JUDGMENT

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1. The Appellant, by herself or with her husband, is the freehold owner of the residential property 124 Grand Avenue, Surbiton KT5 9JA ('124'). The Respondents are the owners of 122 Grand Avenue ('122'), which is semi-detached to the Appellant's property, each sharing a party wall. The parties live in their respective properties and have been neighbours for a number of years.

2. The Appellant, Mrs Shamim Amir-Siddique, has represented herself throughout this appeal. She is a solicitor by qualification working for the Government. The Appellant describes herself as a "full time civil servant currently employed as a legal adviser providing strategic litigation advice on legal and policy questions arising from negligence, human rights and public law issues". Party Wall matters are not therefore within her immediate field of expertise. However, the Appellant is clearly an able lawyer and an articulate advocate well able both to get to grips with this esoteric area

of the law and deal with matters of procedure. The Appellant has done both with considerable enthusiasm; the interim stages of this appeal saw a deal of activity.

3. The First Respondent is a builder by trade, and no stranger to the construction aspects of this appeal. He told me in oral evidence that he had completed more than 300 loft and ground floor extensions, and it is evident from the correspondence that the First Respondent had clear views as to aspects of construction relating to the conversion project being undertaken by the Appellant. The Respondents have been represented in this appeal by Mr Stuart Frame of counsel instructed by Child & Child, a specialist firm in this area.

4. In this appeal the Appellant is the building owner and the Respondents the adjoining owner. But the relevant background to the issues in this appeal date back well before the Appellant embarked on her construction project, a loft conversion and associated chimney breast works, at a time when the parties' roles were reversed.

5. In 2008 the Respondents wished to construct a loft conversion at 122 Grand Avenue, works which included the removal of the chimney breast in the first floor back room adjoining the party wall. These are eminently works which engage the provisions of the Party Wall etc Act 1996, and in the ordinary course it might be expected that party wall surveyors would be appointed and the works undertaken under the authority of an Award.

6. The Respondents preferred however to avoid the procedures provided for in the 1996 Act, the requirements of which were known, at least in general terms if not in detail, to the Appellant. The parties do not appear to have been particularly close but they were on perfectly good speaking terms, not untypical of London neighbours, and the Respondents asked the Appellant to agree to their conversion works going ahead without the necessity of a Party Wall Award. To this end the Respondents prepared, or had prepared, a relatively simple written agreement in the form of a letter dated 1 July 2008 ('the proposed agreement'). In this way the Appellant was invited to consent to the Respondents "building on the party wall".

7. The proposed agreement described the loft conversion works which the Respondents intended to carry out by reference to architects plans, which were attached, and confirmed that "the plans will have all the necessary planning consents, building regulation approvals and other approvals required by the London Royal Borough of Kingston upon Thames". The proposed agreement stated that there was appropriate insurance cover in place in case any damage was caused to 124 Grand Avenue during the works. There was also a clause obliging the Respondents to make good any damage to the Appellant's property, with a provision that any dispute would be

resolved by an expert agreed with the parties. The proposed agreement proceeded on the basis that the Appellant's side of the party wall had been photographed so as to provide a record of its condition. Accordingly, although the proposed agreement did not provide for a formal schedule of condition, had the Appellant wished to make a claim for compensation there would have been a photographic record of the condition of her property, 124 Grand Avenue, before the Respondents' works commenced.

8. As already noted the Appellant was aware of the provisions of the Party Wall etc. Act 1996, and, furthermore, she was conscious that the appointment of surveyors would add to the costs of the works planned by the Respondents. The Appellant was prepared to take on trust that all the necessary consents and approvals would be obtained, and she was prepared to enter into an agreement which made due compliance with the 1996 Act unnecessary. Subject to a minor handwritten amendment to the clause requiring the Respondents to make good any damage to the Appellant's property by the Respondents' works, the Appellant signed the agreement on 8 July 2008.

9. The Respondents were able therefore to proceed with their conversion without having to comply with the provisions of the 1996 Act, and they saved themselves the expense of party wall surveyors and an award authorising the works to the party wall. In the event the Respondents' works were carried out satisfactorily. The Appellant reports that the Respondents' works caused some minor cracking to plasterwork in her property, but she was content to let that go without requiring the Respondents to carry out any repair.

10. In 2016 the Appellant decided to convert the loft in her property to provide further habitable space, work which also involved the removal of the chimney breast in the first floor front room. The Appellant hoped that the Respondents would afford her the same courtesy that she had afforded them eight years earlier, and sign an appropriate agreement which would avoid the necessity of engaging party wall surveyors and obtaining a formal award authorising works to the party wall.

11. The Respondents were not as accommodating to the Appellant as she had been to them. On 28 April 2016 the Appellant served a Party Structure notice on the Respondents with a request that they sign a party wall agreement. The Respondents did not respond immediately. They informed her that they wished to look at the plans and obtain details of the engineering calculations behind the proposals. These details were forwarded to them by Mr Kevin Bibby of Regal Builders Ltd, the Appellant's building contractor, on 28 May 2016. The Appellant was by this time rather concerned to progress matters, as she had been hoping that the works could be carried out during the school summer holidays. Unfortunately for the Appellant the

Respondents were leaving for a family holiday on 28 May 2016, and were not able to look at the plans and calculations until after they had returned on 7 June 2016. Indeed even then, as the Second Respondent explains in her witness statement, they were busy catching up with e-mails and so forth and therefore did not 'rush to immediately consider or contact the Appellant'.

12. The Appellant was aware that her neighbours had been away, but formed the view that on their return the Respondents were simply failing to engage with her request that they sign the party wall agreement and open the way for her to start work by early July 2016. On 10 June 2016 the Appellant texted the First Respondent complaining that he was not engaging with her request for an agreement to permit her to carry out her proposed works, and stating that if he did not respond substantively by Sunday 12 June she will start the party wall process, reserving the right to claim "any cost that we incur as a result of your unreasonable conduct".

13. In the event there was communication, and on 19 June 2016 the respective parties met to discuss the project. The Appellant, who was accompanied by her husband, described this meeting as positive. She came away from the meeting with the understanding that four matters stood in the way of the Respondents agreeing to her works: (1) the placing of the Appellant's dormer right on the boundary with the Respondents' property with a specified way of protecting the small gap that there would then be between the respective dormers, (2) further detail as to the works of removal the chimney breast, (3) sight of Mr Bibby's public liability policy, and (4) a photographic record of the Respondents' side of the party wall to take the place of a schedule of condition.

14. After discussing the matter with Mr Bibby, the Appellant e-mailed the Respondents on 22 June 2016 on each of the four matters. With regard to the dormer, the point was made that the plan was to build up to but not on the boundary, and the Respondents' request that it be moved onto the boundary would require planning permission, with consequent delay and cost. Accordingly, on Mr Bibby's advice, the Appellant would not agree to move the position of her dormer. The second matter relating to the chimney stack was dealt with on the basis that Mr Bibby would "not be touching the chimney stack just removing the breast in the bedroom, so this will not affect your structure". The remaining matters were agreed to.

15. On 25 June 2016 the First Respondent sent an e-mail to the Appellant stating that the Respondents were prepared to agree to the Appellant carrying out her works once they had received confirmation on eight specified points relating to the carrying out the works and, a ninth point, that any damages would be met by Mr Bibby as contractor. Replies were sent to each of these points, courtesy of Mr Bibby, within 30 minutes of them being raised by the Respondents. The First Respondent's response

came on 30 June 2016, and two matters of substance were raised. The First Respondent took issue both with the positioning of the new steels involved in the loft conversion as this appeared on the drawings, and he returned to the siting of the dormer.

16. Mr Bibby responded on 1 July 2016. The steel beams were to be placed into the party wall with the spreader plates far away enough to comply with building control. Accordingly, by implication, this was not a matter with which the First Respondent should involve himself. The dormer would be built entirely on the Appellant's land, and therefore, by implication, was not a matter with which the First Respondent was entitled to concern himself. This response was not satisfactory to the First Respondent and he informed the Appellant that there would be no agreement. Communication between the Appellant and Mr Bibby the same day suggests that the Appellant had formed the view that the First Respondent was just wasting their time.

17. Later on in the afternoon or early evening of 1 July 2016 (or on the Second Respondent's account the 2 July 2016) Mr Muhin Siddique, the Appellant's husband, went round next door to the Respondents' house knowing, having heard his voice, that the First Respondent was in. Mr Siddique was hoping that, even then, he might persuade the Respondents to sign a party wall agreement and, in effect, reciprocate what he and his wife had done for them eight years previously. There is considerable dispute as to the tone of voice Mr Siddique employed. The Respondents complain that Mr Siddique banged on the door and when the door was opened shouted such that he frightened their six year old daughter. Mr Siddique insists that he was measured in tone and demeanour despite the fact that he had been kept waiting some five minutes on the door step, and that Mrs Kowaliw told him that Mr Kowaliw was occupied upstairs and could not see him. Mr Siddique maintains that Mrs Kowaliw told him that her husband would not sign an agreement until he got what he wanted. For their part the Respondents maintain that they were raising perfectly reasonable points for discussion.

17. No issue in this appeal turns on the precise events of that evening. It seems unlikely that Mr Siddique was quite as calm and measured as he maintains nor that he behaved quite as badly as the Respondents assert. The hard fact of the matter was that the Appellant and her husband were frustrated that the Respondents had not behaved towards them as they had to the Respondents, and that the project they dearly wished to start was being delayed. Further, the project risked becoming rather more expensive because the Respondents would not simply agree, in effect, to leave matters in the hands of the Appellant's builder and designer. It was doubtless an uncomfortable meeting, with nothing achieved.

18. It is evident that the Appellant appreciated that there was little if any chance of progress, as earlier on 1 July 2016 she had consulted Mr Rhys Owen of Acre Building

Consultants as a possible building owner appointed party wall surveyor. Mr Owen advised the Appellant that the First Respondents requirements were unreasonable and would not find their way into a party wall award. The Appellant appointed Mr Owen (although whether formally for the purposes of s10(2) of the Act is unclear) and in doing so she was clearly concerned to keep cost to a minimum. Mr Owen served a party structure notice under s2(2)(f) and (g) on the Respondents on 11 July 2016. The Respondents dated their acknowledgment 18 July 2016 but, as recorded by the Appellant in her e-mail of 27 July 2016, only delivered the acknowledgement after 7pm on 27 July 2016. The acknowledgement dissented from the works and stated that Mr M.H.Godwin FRICS of Scott Godwin Associates was appointed as the adjoining owners' surveyor.

19. The Appellant remained very concerned as to the cost of the party wall process. On 28 or 29 July 2016 she telephoned Mr Godwin to ask him as to the potential cost involved in his acting as a party wall surveyor. What Mr Godwin said was far from reassuring. Mr Godwin would not be drawn on total cost but he warned the Appellant that the costs could be "considerable" and that "the process could take months". His charges would be at an hourly rate of £220 plus vat, a rate which would result in a considerably higher cost than that which Mr Owen was prepared to charge. The Appellant requested that he consider acting as an agreed surveyor. This was a proposal Mr Godwin appeared reluctant to accept, and he indicated that he would not be willing to act as an agreed surveyor unless the Respondents agreed to him doing so.

20. Mr Godwin had in fact been without formal instructions when he spoke to the Appellant, as he made clear to her at the time. Alarmed, as she puts it, by Mr Godwin's comments as to cost and the time the process would take, the Appellant wrote to him on 30 July 2016 to ask him for the legal basis for his decision not to act as agreed surveyor in the absence of agreement to such an appointment by the Respondents, a concern of the Appellant's which she later took up with the RICS.

21. On 3 August 2016 the Appellant spoke to the Second Respondent and asked her to agree to the appointment of Mr Godwin as an agreed surveyor in order to keep costs down. This was a matter which the Second Respondent wished to discuss with her husband. The following day, 4 August 2016, Mr Godwin wrote to the Appellant informing her that he was now formally appointed as their surveyor by the adjoining owners and that "your neighbours have informed me that they prefer a two surveyor route and with that in mind I am not prepared to accept an Agreed Surveyor appointment in this matter." In her witness statement the Second Respondent confirms that Mr Godwin did explain to the Respondents that the Appellant had requested that he be appointed as an agreed surveyor but states that it was the Respondents' preference that Mr Godwin represent them alone. She also suggests that

Mr Godwin was not willing to take on an agreed surveyor role so the point was 'academic', but, so far as it may be necessary, I accept the oral evidence given by Mr Godwin that he would have acted as agreed surveyor had the Respondents been agreeable to him doing so.

22. Undaunted, the Appellant wrote to Mr Godwin complaining that he had failed to give a reasonable explanation for refusing to act as agreed surveyor (other than the fact the Respondents did not consent to it) and suggesting that he was refusing to act effectively for the purposes of s 10(6) of the 1996 Act (as agreed surveyor) such that her appointed surveyor (Mr Owen) might make an ex parte award. This was all very muddled thinking indeed and, as Mr Godwin pointed out, the Appellant's repeated emails were achieving no more than increase the time needed for him to deal with the matter, time for which he would be charging by the hour at a rate which was not negotiable by the Appellant. Nevertheless it is as plain as plain can be that the Appellant was very concerned indeed to keep professional costs down.

23. It is not necessary for the purposes of this appeal to consider subsequent events in any detail. Mr Owen and the Appellant agreed that it would be preferable that he, Mr Owen, deemed himself incapable of acting. This allowed the Appellant to appoint Mr Karmjit Grewal of Coburns Party Wall as the building owner's party wall surveyor. Between them Mr Godwin and Mr Grewal proceeded to an Award dated 14 October 2016 authorising what may fairly be described as a fairly standard loft conversion involving the insertion of steel beams into pockets no more than half the thickness of the party wall with associated padstones and steel spreader plates, and the cutting away of a chimney breast with associated making good of the party wall brickwork.

24. The Award, at paragraph 8, requires the Appellant as building owner to pay Mr Godwin as adjoining owner's surveyor the sum of £1,250 plus VAT by way of surveyor's fees, fees incidentally calculated at the rate of £210 per hour, a concession made by Mr Godwin to help out Mr Grewal. At paragraph 9 the Award requires the Appellant to pay Mr Grewal's fees, calculated at £125 per hour.

25. The Appellant was able to commence her building works in the second half of October 2016, and the loft conversion and associated works were completed in mid January 2017.

26. The Appellant appealed the costs element of the Award on 29 October 2016, within the 14 day period after service of the Award as provided by s 10(17) of the 1996 Act. In her notice of appeal the Appellant seeks an order that the Respondents pay Mr Godwin's costs of £1,500 rather than herself. In addition, the Appellant seeks an order that the Respondents should pay the costs of £595 and £180 she has incurred to Mr

Grewal and Mr Owen respectively while acting as the building owner appointed party wall surveyor.

27. The Appellant is concerned at the level of Mr Godwin's fees, but she did not adduce evidence on which the court could act to reduce these fees, either as a whole or as to the hourly rate by which the fees were calculated. Rather the Appellant left it to the court to determine an appropriate fee for the work.

Given the sum at stake, and the cost of mounting an evidence-based challenge to the fees the Appellant's approach is understandable, but it puts the court in an impossible position. The jurisdiction of the court under s 10(17) of the 1996 Act is plainly wide enough to vary that part of an Award which covers the fees of the party wall surveyor. But the court has to act on evidence and give reasons for any decision. There is an additional complication where a party wall surveyor's fees are challenged by an appellant. The respondent to the appeal will often have no particular interest in the outcome of the challenge to the surveyor's fees. Accordingly the party wall surveyor whose fees are being challenged may find that his interests are not being properly protected. Where a party wall award appeal includes a challenge to a surveyor's fees it is important that this is flagged up in the interim stages of the appeal. The surveyor concerned should then be given an opportunity to apply to be joined to the appeal as a second respondent so that he may take part in the appeal, be required to give disclosure where appropriate, and be permitted to adduce any evidence he wishes in support of his fees. Although Mr Godwin was called to give evidence in this appeal, the evidence he gave was in support of the Respondents' case. Mr Godwin was neither challenged on his fees nor given the opportunity to adduce evidence or make submissions in support of the level of fees he charged for this particular work. The court cannot in these circumstances properly interfere with that part of the Award which covers the quantum of Mr Godwin's fees. I should make the following additional observations:

(a) A successful challenge to the hourly rate element of a party wall surveyor's fees will usually require evidence as to what a reasonable party wall surveyor will charge for the work in question. This is evidence that will almost certainly have to be given by an 'expert', ie a witness who is allowed to express an opinion as to the proper rate for the work in question. Although the court, having determined many party wall appeals brought to the County Court at Central London, has a fair amount of experience as to what party wall surveyors in London charge for making awards, this is not experience of which the court can take judicial notice. The general rule applies. The court may only act in any particular party wall appeal on the evidence adduced in the course of that appeal. There is, incidentally, no clear guidance from any authoritative source on charging rates for party wall surveyors, in contrast to the position in other professions.

(b) A successful challenge to the hours spent by a party wall surveyor in making an award will usually require a careful examination of all the various items of the precise work undertaken by the surveyor and the time spent on each such item. Unless there are one or two obvious points of challenge, an investigation into the work undertaken by the surveyor whose fees are under review will of necessity be a painstaking process. It will usually require expert party wall surveyor evidence. The expense of such an exercise will often be out of all proportion to the sum at stake. That is not to say that a litigant who feels strongly about a bill should not be entitled to challenge it in court. Far from it; such a litigant must have the right to mount such a challenge although there may be a risk as to costs in the outcome. But, in the ordinary course, in order to mount the challenge it will be necessary for an appellant to seek a third party disclosure order against the party wall surveyor to obtain his time sheets, documents, workings and other relevant papers. It will then be necessary to instruct a party wall surveyor (preferably with suitable authority in the field) to go through the work and comment on the time taken for each element. The court will then have to reach a conclusion as to the reasonableness of the time taken having heard evidence from both parties, or, more likely, from the appellant on one side and the party wall surveyor whose fees are under attack on the other (the party wall surveyor having been joined as a second respondent to the appeal).

(c) In the course of an investigation into a surveyor's fees it would be possible for the appellant to argue that the respondent owner had failed to act reasonably, for example in giving instructions to the party wall surveyor. Were this found to be the case an order might be made making the respondent owner individually liable for an appropriate part of the surveyor's fees, even though responsibility for paying the fees generally remained with the appellant owner.

(d) The difficulty and expense involved in mounting a proper and successful challenge to the fees of a party wall surveyor may well, from time to time, result in an element of unreasonable fee being 'lost in the wash'. But what cannot happen is that the Judge, sitting under the proverbial palm tree, dictates a lesser fee than that charged because in all the circumstances he considers that a reasonable thing to do.

28. Merely stating the figures involved shows how disproportionate in terms of cost is the bringing of this appeal. For the Appellant, the unreasonable behaviour of her neighbours, contrasting starkly with her good-neighbourliness to them in 2008, has put the economic aspects of the matter in the shade. The Respondents see things very differently, and are reluctant to accept that their concerns as to aspects of the Appellant's project which did not immediately touch on the party wall were unreasonable matters to raise before agreeing to forgo formal party wall procedures.

29. The provisions of the Party Wall etc Act 1996 governing the resolution of disputes are contained in section 10 which provides:

> "(12) An award may determine –
>
> (a) the right to execute any work;
>
> (b) the time and manner of executing any work; and
>
> (c) any other matter arising out of or incidental to the dispute including the costs of making the award;
>
> …..
>
> (13) The reasonable costs incurred in –
>
> (a) making or obtaining an award under this section;
>
> (b) reasonable inspections of work to which the award relates; and
>
> (c) any other matter arising out of the dispute,
>
> shall be paid by such of the parties as the surveyor or surveyors making the award determine."

The Act does not prescribe any principles upon which the surveyor or surveyors should act when making awards of costs.

30. The 1996 Act therefore leaves all issues of costs wholly within the discretion of the surveyor or surveyors making the award. It is standard practice however for the award to require the building owner to pay both the fees of his appointed surveyor but also the fees of the surveyor appointed by the adjoining owner. This practice is in accordance with the general principle that the owner for whose benefit the work is being carried out should bear the costs associated with the work. In this regard the Act provides, in s 11(1), that except where there is specific provision to the contrary "expenses of work under this Act shall be defrayed by the building owner".

31. The standard practice of requiring the building owner to pay the fees both of his and of the adjoining owner's party wall surveyor must be subject to two provisos. First the fees in question must be reasonable, see s 10(13). The building owner need not pay the adjoining owner's surveyor's fees where they are unreasonable in amount because, for example, the surveyor has sought to charge too high a hourly rate, or has

charged for unnecessary work, or has taken an unreasonable amount of time to do the work that he has done.

32. Secondly, the building owner will not be required to pay the adjoining owner's surveyor's costs when these have resulted from unreasonable conduct either on the part of the adjoining owner or the surveyor. The adjoining owner must act reasonably. In *Manu v Euroview Estates Ltd* [2008] 1 EGLR 165, 176G, the court found that there had been unreasonable conduct on the part of the adjoining owner in taking pedantic and difficult points, making repeated requests for unnecessary information, insisting on obtaining unnecessary or unnecessarily extensive reports from structural engineers, and in conduct apparently designed to hinder or delay the making of an award. To the extent that there had been unreasonable conduct the adjoining owner was not entitled to recover the relevant fees from the building owner.

33. There can be no comprehensive definition of unreasonable conduct for these purposes. The reasonableness or otherwise of any person's conduct is to be determined against the background of the relevant facts. There must however always be an objective element in the determination. The conduct of any individual has to be set against the standards to be expected generally throughout society.

34. The Appellant's complaints in this appeal may be viewed under three separate heads:

(1) the failure of the Respondents to afford her the same consideration that she afforded them in 2008;

(2) the raising by the Respondents of matters on which they required satisfaction before entering an agreement outside the 1996 Act that were not properly raised in the context of a party wall award;

(3) the refusal of the Respondents to agree to their appointed surveyor, Mr Godwin, acting as agreed surveyor.

I must consider each in turn.

35. *(1) the failure of the Respondents to afford her the same consideration that she afforded them in 2008.*

The Appellant felt this keenly, and this is understandable. The work which she proposed to undertake was so similar in nature to that to which she had agreed, and no proper objection could be taken to her overall scheme or choice of contractor, that the lack of reciprocity shown by the Respondents, with its attendant delay and increase in cost of the overall project, was hurtful. But it should be pointed out that in acting as she had done in 2008 the Appellant was going significantly further than she need in acting as a reasonable person.

36. The Appellant, very kindly, was conscious of the potential cost to the Respondents of the party wall procedures. Certainly the party wall process involves cost, and a property owner, particularly one engaging in a building project wishes to avoid cost, but there is a good purpose behind the provisions of the Act. The fact that plans have been given planning permission or even building regulation consent does not necessarily mean that they are appropriate or satisfactory for both the building owner's and adjoining owner's properties. Having a party wall surveyor consider the proposed works, if necessary with engineering assistance, may be of real benefit. An adjoining owner, acting reasonably, should be entitled to the reassurance that comes from the making of an award. This is all the more important where, as is almost invariably the case, the adjoining owner has had no say in the choice of designer, whether architect or other professional, or contractor.

37. In short, while the Appellant might have hoped for reciprocity on the part of the Respondents she was not entitled to it. The Respondents were not acting unreasonably in not signing an agreement similar to that signed by the Appellant. When the Appellant entered into the agreement proposed by the Respondents in 2008 she relied on the competence and professionalism of the Respondents' architect and contractors. There was no obligation on the Respondents in 2016 to place similar reliance on the Appellant's professionals.

38. (*2) the raising by the Respondents of matters on which they required satisfaction that were not properly raised in the context of a party wall award.*

In the event the Respondents did not simply say that they wanted an award, they, or rather the First Respondent, engaged with the Appellant, holding out the prospect that they would enter into an agreement outside the formal procedures of the Act. In doing so the First Respondent raised a number of perfectly reasonable matters, such as detail of the works of removal of the chimney stack, sight of the contractor's public liability policy, when the work would start and how long it was expected to take, where the scaffolding was to be placed.

39. In addition however, the First Respondent went beyond the matters which he could reasonably raise with the Appellant in his concern as to the positioning of the Appellant's dormer. The consequence of both owners having loft conversions each with a dormer window was that there would be two such windows in close proximity. As the Appellant's project was designed there would be a narrow gap between the dormers. The First Respondent would have preferred that there be no gap, or at least provision made to cover and enclose the gap. This would involve changing the Appellant's plans, possibly requiring amendment to her planning permission. It is understandable that the First Respondent should have concerns about the gap (which he described on 30 June 2016 as a "water/snow trap or nesting opportunity") but once it was made plain that the Appellant wished to proceed with her existing plans to refuse to proceed with an agreement outside the Act was unreasonable. The dormer was being built entirely on the Appellant's land, and could not ever be part of a party wall process, or its positioning the subject of a party wall award.

40. In the result the Appellant appreciated that she had formally to engage the Act and she instructed Mr Rhys Owen, incurring fees of £180. However, although this was the result of the First Respondent attempting to gain an advantage not open to him in a party wall context, what the Appellant lost was the chance that the Respondents would enter into an agreement outside the 1996 Act. There was no obligation on the Respondents to enter into such an agreement, and accordingly in seeking an advantage not open to him in a party wall context as a condition of entering into an agreement outside the Act, the First Respondent was not acting unreasonably within the context of the Act. I do not consider that it is open to me to allow the appeal in this respect.

41. *(3) the refusal of the Respondents to agree to their appointed surveyor, Mr Godwin, acting as agreed surveyor*.

As I have found above it was the Respondents rather than Mr Godwin who insisted on the "two-surveyor route" as the Respondents termed it. This was unreasonable behaviour on the part of the Respondents. They were well aware that the Appellant wished to keep surveyor's costs to a minimum. The Appellant was prepared to accept the Respondents' choice of surveyor to act as Agreed Surveyor. The Respondents could be assured that their interests would be looked after by Mr Godwin acting as agreed surveyor as adjoining owner appointed surveyor. There can be no obvious reason for the Respondents to insist that Mr Godwin acted only as their party wall surveyor with the inevitable consequence that the Appellant had to incur the cost of a second party wall surveyor, and they offered none. The Respondents felt entitled to insist on the "two-surveyor route" but not, in my judgment, on the basis that the Appellant had to pay all the additional costs.

42. In these circumstances the Appellant cannot avoid liability for Mr Godwin's fees in the sum of £1,500 inclusive of vat. These fees would have been incurred and would have been payable by her had Mr Godwin been acting as agreed surveyor. However, in light of the fact that the unreasonable behaviour of the Respondents has caused the Appellant to incur the wholly unnecessary cost of Mr Grewal's fees of £595, I consider that it is just to allow the appeal so as to provide that the Respondents are liable to pay Mr Grewal's fees.

43. The Appellant has paid Mr Grewal's fees and has undertaken to pay Mr Godwin's fees within 7 days of the Order consequent on this judgment. The more appropriate way forward is to make an Order requiring the Respondents to pay £595 to the Appellant. Strictly, however, such an Order is outside the scope of s 10(17) of the 1996 Act by which the court may 'rescind the award or modify it in such manner as the court thinks fit'. It is first necessary to modify the Award, and then it will, I trust, be open to the court to make consequential orders.

44. Paragraph 9 of the award reads:

> "That the building owner shall pay upon the service of this award her appointed surveyor's fees of an agreed sum in connection with the obtaining and making of this award. In the event of damage being caused, or other contingencies or variations arising, a further reasonable fee shall be payable by reference to an hourly rate of £125 + vat (where applicable)."

I would amend this paragraph to read:

> "That the adjoining owner shall pay upon the service of this award the building owner's appointed surveyor's fees of an agreed sum in connection with the obtaining and making of this award. In the event of damage being caused, or other contingencies or variations arising, a further reasonable fee shall be payable by the building owner by reference to an hourly rate of £125 + vat (where applicable)."

45. I propose therefore to order the above modification to the Award, record that the Appellant, as building owner, has undertaken to pay the building owner's appointed surveyor's fees in the agreed sum of £595, and then make the consequential order that the Respondents pay the sum of £595 to the Appellant.

46. Matters of costs will have to be dealt with separately, preferably by e-mail, but at an oral hearing if required by either party.

HHJ Edward Bailey

18 May 2018