Claim No. E20CL041

In the County Court at Central London

Before His Honour Judge Parfitt

(1) MUHAMMAD YAMIN

(2) KHADIJA NASREEN YAMIN

Claimants

v

(1) CHRISTINE EDWARDS
(2) JAMES EDWARDS
(3) KENNETH ROBERT POWER
(4) LEE KYSON

Defendants

JUDGMENT

Dates: 21 & 22 November 2019

Zeeshan Mian directly instructed by the Claimants

Stuart J Frame directly instructed by the 1st to 3rd Defendants

Lee Kyson represented himself

Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

HHJ Parfitt:

Introduction

1. The Claimants own and live at 160 Mitcham Road ("No. 160"). The First and Second Defendants own and at least the First Defendant lives at 158 Mitcham Road ("No. 158"). The Third and Fourth Defendants are surveyors who made an award pursuant to the Party Wall Etc Act 1996 ("The Act") dated 28 June 2017 ("the Award"). The Claimants failed to appeal the Award in time and in these proceedings they want the Award set aside.

2. At paragraph 1-29 of his book "The Law and Practice of Party Walls" (2014) Mr Nicholas Isaac stated: *Of course, many owners of property carry out more or less minor works to party walls each year in blissful ignorance of the Act…For the unfortunate few, however, learning about the Act can become a painful and expensive process*". I have little doubt that the lay parties to this dispute have the misfortune to find that a comparatively minor dispute that arose at the end of everyday improvement works to the Claimants' home should have involved them in the waste of time and resources that is the subject of this judgment. I had previously encouraged ADR and/or settlement of this case and it is a matter of regret that this has not occurred.

3. I set out the necessary narrative below. The Claimants' refurbishment work involved two separate projects (a) a loft conversion, which included work to the party wall between the two properties and (b) an extension into the garden of No. 160 which among other things involved new building on the boundary line and new foundations. There were separate planning permissions.

4. The core of the Claimants' case, presented by Mr Mian on their behalf, is that the Award is invalid because the Claimants and the First Defendant reached an oral agreement in July 2014 that the Act would not apply to the works. It was, says Mr Mian, accordingly not open to the First and Second Defendants to appoint the Fourth Defendant and the Third Defendant to act as surveyors under sections 10(1) and 10(4) of the Act. Mr Mian's alternative argument, so far as challenging the surveyor's jurisdiction is concerned, is that the surveyors could not have jurisdiction once the works had been substantially completed. I note that no other jurisdiction based arguments were put forward.

5. The Defendants say that there was no agreement that the Act should not apply and the First Defendant was concerned in July 2014 only with the conversion works to the loft. Mr Frame says, in any event, the admitted informal discussions of July 2014 should be categorised in a similar way to the over the garden fence chat in *Seeff v Ho* [2011] EWCA Civ 186 and that while the extension works were not complete at the date of appointment this would not matter anyway because surveyors appointed under the Act commonly deal with matters retrospectively and determine disputes about compensation long after works have completed.

6. Mr Kyson made similar submissions to Mr Frame.

7. It was unfortunate that Mr Mian was unwell in the lead up to the trial and was unable to share his skeleton argument with the parties until the morning of the trial or the court until

the trial was about to begin. I have summarised his primary arguments above, but he did raise other points and in deference to him I said I would produce this judgment in writing and address each of the points that he made in his written submissions. The only factual issue of substance is the nature and extent of the discussion between the Claimants and the First Defendant in July 2014.

Narrative and Factual Findings

8. By the summer of July 2014, the Claimants intended to carry out building works to No. 160. Those building works involved converting the loft ("the conversion works") and building an extension into their garden ("the extension works"). The First Claimant told the court that both sets of works required planning permission but the only permission included in the bundle related to the extension works. It is apparent from the extension works permission that the application for the extension works was made on 31 July 2014 and permission granted on 24 September 2014.

9. In general terms the Claimants say there was an agreement between themselves and the First Defendant in July 2014 that the Act should not apply on the basis that the Claimants would compensate the Defendants for any damage to No. 158 and they rely on photographs which they say were handed to them by the First Defendant following that meeting which evidence the agreement.

10. There are two other documents which are relevant to the parties discussions in July 2014. The Claimants' case about those documents is not clear but I make the following findings.

11. The first document is undated and was written by the First Defendant and given to the First Claimant. The document shows the First Defendant had been doing internet research at least about the conversion works and had found out from the local authority website about the Act and was concerned that the Claimants' works should be done properly and lawfully. I refer to this document as the First Defendant's note.

12. The second document was the First Claimant's response to the First Defendant's note. It is dated 8 July 2014. I set out here the relevant parts (in italics) and make comment:

    a. *Thanks for sending me the information…*This is plainly a reference to the First Defendant's research note and enables the finding that the note predated the letter.

    b. *I am informing you in written that my building work will be starting in three weeks time according to the planning permission…*I address below the faint argument that this was notice under the Act but it demonstrates that planning was obtained for the conversion works and is consistent with the subject at this stage being the conversion works and not the extension works because there was no planning permission for the extension until September 2014.

    c. *I shall make sure that planned work goes inch by inch accordingly and I shall take care of your legal and moral comfort…*The First Claimant was saying he would build according to his planning permission and within the law.

13. I note that the First Defendant signed this document as having been received. This suggests that the parties intended the contents of that note to have some greater importance in terms of their dealings with each other: i.e. that it was important to each to be able to show that the document was agreed to have been exchanged.

14. It is trite that any oral agreement will involve words exchanged between the parties and that the necessary particulars of an oral agreement will normally include the occasion of the conversation (there is no difficulty with that here), when it occurred (in July 2014 and after 8 July 2014 appears to be common ground) and at least the gist of the words said to contain and bring about the agreement.

15. In this case, the Claimants' case about the agreement is hopelessly inconsistent and lacking relevant details about what was said.

16. In the particulars of claim it is said that the 8 July 2014 document was informing the First Defendant that the First Claimant was applying for planning permission and that the rear extension construction would commence within 3 weeks (subject to the grant of planning permission). It was then said that the First Defendant responded by her note regarding the Act and that then an oral agreement was reached in the last week of July "that the requirements of the formalities of the Notice and the appointment of surveyor under the Party Wall Act should be dispensed with". There was no reference to the photographs.

17. In the First Claimant's witness statement, he gave the following chronology: (a) planning permission obtained for both the conversion works and the extension works (b) 8 July 2014 notice given to the First Defendant (c) First Defendant responds with her note (d) meeting at the Defendant's house at which it was agreed to waive the requirements to appoint a surveyor under the Act and the First Defendant would produce pictures of the conditions of the party wall and area surrounding the wall and the First Claimant would comply with planning and put right any damage to the Defendants' property. Subsequently the First Defendant handed over certain photographs which were exhibited.

18. The First Claimant's oral evidence was difficult to follow but I make considerable allowance in his favour in this respect because he is hard of hearing following a health event and English is not his first language. However, the gist of his oral evidence was that the First Defendant knew about the planned building works before they spoke, he thought he had applied for planning permission but might have been confused and that while he accepted that the work referred to in his note could only be the loft, he did think another application had already been made. The Claimant also said that he only spoke to the First Defendant about the loft but before he started to do the extension knocked on the door of No. 158 and told the Second Defendant he was starting work.

19. The Defendants' case on this area also merits considerable criticism. The defence does not plead to the assertion of an agreement beyond a non-admission. This is inappropriate and inconsistent with the rules. Furthermore, there was no witness statement served by the First or Second Defendants or on their behalf. However, at the outset of the trial (I suspect Mr Frame realised the problem), Mr Frame sought permission to rely on a brief statement from the First Defendant. Mr Mian, who wanted to cross-examine the First Defendant, was

happy for the statement to be allowed and so I gave permission. The statement denied any agreement that any works should be dealt with outside the Act and said that before the conversion works started the First Defendant took photos and after those works were completed there was no damage so she was happy.

20. In oral evidence, the First Defendant said that in the July 2014 period her and the First Claimant only spoke about the loft works and that she only took and provided photographs of the loft works.

21. The First Claimant exhibited certain colour photographs which appeared to be of the inside of No. 158's loft and other upstairs rooms and two black and white photos which were of the outside of No. 158. So far as the colour copy photographs were concerned, the First Defendant identified all but two as those that she had taken in July 2014 and handed to the First Claimant. However, she did not recognise the other two colour photos and said that she had not handed the black and white photos to the First Claimant. I asked the Claimants to produce the original of the photographs and only the colour photographs were produced. So far as the photos are concerned, I find that the colour photographs identified by the First Defendant as being taken by her and of No. 158 were handed over by her to the First Claimant at the material but no others.

22. I add that even if I was satisfied the photos of the garden had been handed over that would make no difference to my findings because if the First Defendant had wanted to provide photos to evidence what the areas of her property that might be impacted by the extension works looked like before the works she would have taken new photos and not relied on old ones which did not show the current state of the property.

23. Mr Mian asked me to find that the First Defendant was lying to the court about the two black and white photographs and part of her witness statement where she said the extension works had started a year after the July 2014 conversation (it was common ground that the conversion works started in June 2015). I make no such finding. On the contrary, the First Defendant struck me as a truthful witness albeit one who was distressed about the current situation (as were the Claimants).

24. The Second Claimant gave evidence that she was with her husband at a meeting with the First Defendant in the First Defendant's house and the First Defendant knew about the conversion works and the extension works and everything was agreed. I did not get any assistance from her evidence as to the details – it was too obviously merely giving her settled conclusion consistent with the Claimants' overall case.

25. In light of all the evidence relevant to this issue (I have borne in mind the later correspondence as well but there is nothing that materially assists), I make the findings that follow about the alleged agreement in July 2014.

26. The First Defendant knew in the Summer of 2014 that the Claimants were planning to do works and that those works included the conversion works. I suspect, there is no evidence about this, that the First Defendant would have received notice of the planning application for the conversion works and this prompted her to look on the Local Authority website.

27. The First Defendant's research informed her about the Act and prompted her to write her note to the First Claimant. The gist of the note was that she wanted everything done properly.

28. The Claimant's document dated 8 July 2014 came after the First Defendant's note and was a response to it. He was telling the First Defendant that the conversion works would start in three weeks and that she could trust him to behave in a neighbourly fashion.

29. Following the 8 July 2014 document there was a meeting at No. 158 between the Claimants and the First Defendant. The First Claimant told the First Defendant that the Claimants did not want the cost of a surveyor and she could take photos of her loft and so on and he would make sure any damage was put right. The First Defendant was content to proceed on that basis and signed the 8 July 2014 accordingly. This was a wholly informal arrangement based on neighbourliness and in so far as there was any scope to this arrangement it related only to the conversion works because that was the only planning consent that had been given at that time (or application made). I will refer to this as the July 2014 Agreement.

30. The conversion works then went ahead without any further formalities. They were completed in December 2014 and are of no further relevance. The First Defendant accepts no damage was caused to No. 158 and she, as far as I know, has never sought any compensation in respect of those works.

31. The Claimants could not afford to carry out the extension works until June 2015. They made no attempt to reach any further understanding with the Defendants regarding the extension works (and do not claim to have done so) beyond telling them that the works were about to begin. No notices pursuant to the Act were served by the Claimants in respect of the extension works.

32. There was no dispute between the parties before me that notices would have been required. The Award refers to the extension works requiring notices under section 1 (building on the junction line between the properties) and section 6 (foundations). I raised at the trial that the extension works appeared likely to have involved section 2 (various rights to do works to and on the adjoining owner's property) and nobody suggested to the contrary.

33. There were disputes between the parties in the evidence before me as to the extent to which the First Defendant was unhappy about the existing garden fence being taken down. The Claimants called Mr Singh, a builder, who said in evidence that she was happy and cooperated. The First Defendant said she was unhappy and screamed at the builders. I do not need to resolve this dispute but what is clear is that by July of 2015 the First Defendant was sufficiently unhappy about what was occurring regarding the extension works to take steps to protect her rights. This is in marked contrast to the previous conversion works. If I had to make a finding, I would have found that the First Defendant's evidence is to be preferred about the removal of the fence.

34. On 31 July 2015 the First Defendant appointed Mr Kyson to be her party wall surveyor. On 5 August 2015 solicitors on her behalf wrote to the Claimants and raised a number of

issues including not complying with the Act and building outside of the planning permission. Threats of injunctions were made if the works continued.

35. On 5 August 2015 Mr Kyson wrote to the Claimants and suggested that works stop until an agreement was reached or an award made under the Act.

36. I can summarise what happened afterwards more briefly. The Claimants finished the works apart from rendering to the external face of the new boundary wall which could not be done without access from No. 158 which was refused. The Claimants instructed solicitors who replied on 19 August 2015 that their clients did not serve a party wall notice but had consulted the Defendants throughout and had finished their works and the appointment of Mr Kyson was only done to antagonise.

37. The First Defendant did not make an injunction application. I suspect (but don't know) that she was concerned about the potential cost. What she did do was make use of legal expenses insurance she had and instructed Irwin Mitchell who wrote letters attempting to seek and agree financial compensation (in sums of £6,045 (21 April 2016) and £1,200 (21 July 2016) and costs). These offers were rejected. The Claimants ultimately offered £700 inclusive of costs. It is not least this difference of £500 plus costs which prompts my concerns about proportionality expressed at the outset of this judgment.

38. In the meantime, Mr Kyson was carrying out his role as a surveyor appointed under the Act to deal with a dispute about "work to which this Act relates". There was no cooperation in this respect from the Claimants and so he acted unilaterally. Mr Power was than appointed on behalf of the Claimants (but not by the Claimants but by the Defendants in a letter dated 23 September 2016 based on the Claimants' refusal to appoint a surveyor). Mr Power and Mr Kyson than nominated a third surveyor as they were required to do by the Act. Subsequently Mr Power and Mr Kyson produced the Award.

39. The Award required the Claimants to pay: compensation of £2,700 and Mr Kyson's fees in the sum of £2,500 plus Vat and Mr Power's fees in the sum of £3,435.70 plus Vat.

40. Once the Award was received by the Claimants they attempted to appeal it but the appeal was brought out of time (the time limit to appeal is 14 days and cannot be extended).

41. Mr Power sought to enforce his fees in the Magistrates Court and a final hearing was set for 5 February 2018. On 2 February 2018 the present claim was issued by which the Claimant's seek a declaration that the Award was invalid.

42. In a directions order made on 5 July 2019 it was noted that the parties had agreed the issues for trial. The Claimants' skeleton sets out the Claimants case, as supplemented by Mr Mian during his brief closing submissions, on each of those issues. I take the arguments raised in the order addressed by Mr Mian. I have taken account of Mr Frame's skeleton and Mr Kyson's skeleton but have not needed to make such extensive reference to them as I have to Mr Mian's submissions.

My Discussion and Conclusion on the Claimant's Case

43. *Was there a valid notice?* Mr Mian invites the court to find that there was a notice under the Act "because [the First Defendant's undated note about party wall procedures] is a response to some Notice or conversation whereby the First Defendant required Claimant's to give a notice in writing". The suggestion of a missing notice was not pursued further. It is hopeless. There was no notice served by the Claimants pursuant to the Act. In particular so far as the extension works were concerned there was a failure to comply with the notice requirements in section 1(2) and 6(5) of the Act. These would have required notices one month before works commenced so before sometime in May 2015.

44. If the point is that the 8 July 2014 countersigned letter is a notice under the Act: (a) it cannot be on its face because it does not give the required information but (b) in any event its subject matter is the conversion works and not the extension works.

45. *Were the notice requirements waived?* The Claimants' case is that during the conversation in July 2014, the Defendants waived the notice requirements. Since I have found that the understanding between the parties in July 2014 was limited to the conversion works there is no factual foundation for any waiver of the notice and other requirements in respect of the extension works.

46. It is also doubtful the extent to which parties could waive in an informal conversation the requirements of the Act. Mr Mian referred me to *Dillard v F&C Commercial Property Holdings Ltd* [2014] EWHC 1219. *Dillard* concerned adjoining properties in Soho. The parties entered into a bespoke deed drafted with the benefit of professional advisors regarding the development of the Defendant's land. The deed provided (among many other things) for the parties to comply with the Act (and appoint surveyors if necessary) but at the same time provided for defined disputes to go to expert determination rather than be determined under s. 10 of the Act. The court found that the parties particular dispute resolution mechanism did operate to exclude s. 10 of the Act so far as those defined disputes were concerned (but not otherwise).

47. I agree with Mr Frame that the facts of that case are so far from the circumstances of the present that it provides no assistance. This might have been more of a *Seeff v Ho* case if the subject matter of the informal discussion that led to the July Agreement was the extension works. On the facts I have found, there was no agreement to waive the requirements of the Act so far as the extension works were concerned. There was no understanding or relevant discussion of the extension works at all.

48. A further problem with the waiver allegation is that the evidenced discussions seem most concerned with the Claimants not having to appoint a surveyor but that is not a necessary requirement of the Act in any event. A surveyor need only be appointed where there is a dispute or deemed dispute. A relevant working example is regarding foundations: ss 6(5) and (6) require a notice with proposals and plans and sections (a party might choose to use a surveyor to prepare the documents but that is not an appointment under the Act); then under section s6(7) the adjoining owner could consent by serving a notice indicating consent or not in which case there would be a "dispute" and at that point only a surveyor

or surveyors would be required under section 10. So if the discussions between the First Claimant and the First Defendant had been about the Claimants not wanting to incur the costs of surveyors of itself that would not lead to the conclusion that the parties had agreed to waive or step aside from the Act. This is a further illustration of why this is a *Seeff* type case – the court should be slow to find that casual conversations between neighbours have the consequence of agreeing that building works should be carried on without any of the protections given by the Act.

49. *The validity of the appointment of the Third and Fourth Defendant / works carried out before the Award was made*. The Claimants' argument is that the validity of the appointment is dependent on the Act applying and the Act did not apply because (i) the parties agreed to apply the common law to settle their disputes and not the Act and (ii) there was no dispute about related work at the time of the appointment of the surveyors because the work had been done apart from the rendering to the wall which the Defendants were preventing from being completed.

50. I have already found that any understanding reached in July 2014 related to the conversion works only but the Award is only concerned with the extension works. So Mr Mian's first point fails at the outset.

51. The Claimants also rely on the solicitors' correspondence indicating that the Defendants wanted to resolve matters through the common law and not by surveyors under the Act. This is hopeless for a number of reasons. If it is intended to be relied on as evidence of what was agreed in July 2014, it does not do so. The correspondence starts from the assertion that the Claimants have wrongly failed to comply with their duties under the Act and so can be no platform for an assertion that the Act was not relevant to the parties' legal relationship. Equally at the same time as pursuing the solicitors correspondence, Mr Kyson had already written to the Claimants on behalf of the Defendants under the Act. There is simply no evidence of any agreement which would have the consequence of the parties "agreeing to apply the common law".

52. I also disagree with the argument that there was no dispute about related work because the work was all done apart from the rendering. I was not referred to any section of the Act that would mean that section 10, which is the section dealing with the resolution of disputes or deemed disputes "in respect of any matter connected with any work to which this Act relates", is limited in application to circumstances where work had yet to be completed. Mr Kyson rightly pointed out in his own submissions that it is common for awards to deal with compensation claims which might arise years after work has been completed.

53. In neither Mr Mian's skeleton nor in his submissions did he address <u>why</u> the conclusion of the work (of itself) would mean that the surveyors did not have jurisdiction. On the contrary his argument assumed that would be the position and then asserted that it would be unfair for the Defendants to rely on the rendering not having been done when the Claimants could not carry out the rendering without getting access to the Defendants' property.

54. Mr Mian also had some difficulty in explaining how, if the Act did not apply and the parties were proceeding under the "common law" only, what right the Claimants might have to

enter the Defendants' land. The only apparent answer would be an implied term of the July 2014 Agreement but since I have found that the extension works were not within the scope of that agreement there can be no platform for such an implied term.

55. Mr Kyson also pointed out the practical advantage of the Award in these circumstances. The rendering work was outstanding. The Award provided for it to take place in a manner that would protect the interests of both parties and solved the access issue. Again, I agree with Mr Kyson.

56. I also agree with Mr Frame that the decision in *Rodrigues v Sokal* [2008] EWHC 2005 that the selected surveyor was able to determine no damage was caused by works that arose before and after the parties' surveyors appointment is inconsistent with the argument that the surveyors cannot have jurisdiction at all if the works are complete (or almost complete as in the present case).

57. There are also particular examples of "dispute" under the Act which would not arise until works had completed (e.g. the responsibility for expenses under s.11(2) and the expense of making good damage caused by the building owner's works under s11(8)). It cannot be the case at the level of generality being asserted by the Claimants that the surveyors under the Act can have no jurisdiction once works have completed.

58. So the second limb of this argument fails both on the facts (the works had not completed) and on the principle (surveyors can be appointed to resolve disputes under the Act after the completion of works).

59. *Did the dispute raised fall to be determined by an Award* Mr Mian relies again on the July Agreement and the access issue regarding the rendering. I have already addressed those matters above.

60. It was pointed out by Mr Kyson, that in making this head of argument in his written submissions, Mr Mian complained that the Defendants had failed to comply with their obligation under section 8 of the Act to give access. As I've addressed above, it was for the Claimants to make use of the Act if they wanted to get the benefit of it.

61. *The Third Defendant was not impartial*. It is said that Mr Power did not seek the Claimants' views and that the award did not address the Defendants' refusing access. These are bad arguments: Mr Power wrote to the Claimants on 26 September 2016 after his appointment and said: "However, to date I have only heard one side of the story…and I would like to understand your position and views so I can incorporate them into the Determination where appropriate". The Claimants did not respond and Mr Power chased them by letter dated 14 October 2016 saying "I would prefer to have your input into the process…". The First Claimant responded but only to say he did not recognise Mr Power's appointment and would appeal any award. The premise of Mr Mian's argument that Mr Power did not invite the Claimants' views is false. He did. I have already addressed the point about access.

62. *Is the Award Valid?* Mr Mian repeats the points about the Act being ousted by agreement.

63. *If the Award is valid, can the Claimants' challenge its substance?* Mr Mien, rightly since section 10(16) of the Act says the award shall be conclusive save for appeal to the county court, only relies on his seeking a declaration of invalidity because of the arguments about ouster by agreement and the works being substantially completed.

Conclusion

64. The claim is dismissed: there was no agreement between the parties that the Act would not apply to the extension works and I reject the Claimants' arguments as to why the Award is invalid.

HHJ Parfitt