Case No: E00BN332

IN THE COUNTY COURT AT BRIGHTON

Date: 5th November 2018

Before His Honour Judge Simpkiss

Between :

LION HOMES (SUSSEX) LIMITED

Appellant

- and –

BRIGHTON & HOVE CITY COUNCIL

Respondent

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Mr. Harry Smith (instructed by ODT Solicitors) for the **Claimant**
Mr. Nicholas Issac (instructed by Brighton & Hove CC Legal Department) for the **Defendant**

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APPROVED JUDGMENT

Introduction

1. This is a statutory appeal under s. 10(7) of the **Party Wall etc Act 1996** ("The Act"). It was listed for 1 day on the last Friday before I went on summer leave. At the start of the hearing I indicated that I thought that 1 day was insufficient, and repeated this later in the day when I suggested splitting the hearing and arranging a second day. The parties were adamant that it should be dealt with in one day but we finished late without any opportunity for me to give judgment. This is the reason that it has not been possible for me to hand down judgment before today. It is important that parties give realistic estimates for hearings and that they provide enough time for a judgment to be considered

and handed down. In this case the parties should have kept the original estimate of one day under review as it should clearly have been dealt with over 2 days (with or without judgment).

2. The Appellant is the owner of 27 New Road, Brighton ("the Property") which is occupied by Halls Estate Agents. The Respondent is the local authority and owner of the Brighton Royal Pavilion. The rear of the Property adjoins the Royal Pavilion and the two properties are separated by a bungaroosh wall which belongs to the Appellant.

3. On 28th September 2016, the Respondent notified the Appellant under s. 6 of the Act of its intention to carry out works between the properties, and the parties appointed Mr. Redler and Mr. Crowther as their respective surveyors.

4. On 27th June 2017 the two surveyors signed and award ("1st Award") permitting the Respondent to:

   "(a) Excavate within 3m of the [Appellant's} premises to contract new mass concrete foundations as required to refurbish the Corn Exchange.

   (b) Safeguard the [Appellant's] property by underpinning the external wall as shown on the attached structural engineer's drawings and as described in the contractor's method statement".

5. In addition to the 1st Award, the parties agreed, by deed dated 15th August 2017 ("the Deed") that the Respondent would be permitted to carry out certain further works not set out in the 1st Award. Clause 9.3.3 of the deed provides that any damage caused by the Respondent to the Appellant's property will be made good to the Appellant's "*reasonable satisfaction*". Clause 14 gives the courts exclusive jurisdiction over disputes arising out of or in connection with the Deed.

6. On 28th July 2017 a party structure notice was served under s. 2(2) of the Act and on 5th September 2017 the surveyors made a second award ("2nd Award"), which made provision for the Respondent to install fixings and flashings to weatherproof the parties' respective properties.
7. On 12th October 2017, as a result of excavation works being undertaken by the Respondent to the rear of the Property, a rear wall partially collapsed. Emergency works were undertaken to shore up the rear of the Property. Communications followed between the parties and their solicitors and the Respondent indicated that it wished to secure a quick resolution of the problem for the benefit of both parties. The works which led to the damage were being carried out by the Respondent's contractors and insurers acting for the Appellant and for the contractors have been in contact.
8. On 28th February 2018 the surveyors signed a 3rd Award ("the 3rd Award"), described as an addendum party wall award. It is this award which is the subject of this appeal.

Grounds of Appeal (as articulated by the skeleton)

(1) The 3rd Award was made in the absence of a "*dispute*" under s. 10 of the Act, and, therefore without jurisdiction as:

   a. by the Deed the parties opted to contract out of the Act and agreed that the Court would have exclusive jurisdiction over disputes;
   b. no actual or deemed dispute capable of being settled under the Act had arisen in fact or in law.

(2) The 3rd Award is unjust as a result of serious procedural irregularity, namely:

a. the Appellant was not given a fair opportunity to make submissions to it own appointed surveyor, Mr. Crowther, prior to its publication, was not shown the final remedial scheme set out in the 3rd Award or the full drawings and method statement appended thereto and given no opportunity to obtain or submit expert advice;

b. the Appellant was given no opportunity to make submissions to Mr. Redler, who wrongly delegated his role to Ms. Waldron, a colleague. The representations made to Mr. Crowther were not passed on to Mr. Redler or Ms. Waldron, depriving the Appellant of the right to make submissions to and have its case considered by the full tribunal (ie both surveyors).

(3) The 3rd Award was wrong in that it makes no provision for the Respondent to repair any further damage which may arise during the course of the prescribed remedial works.

<u>Preliminary</u>

9. Mr. Isaac submitted that 2 points had been raised in the skeleton argument which had not been raised in the grounds of appeal:

   a. 1(a) above, that the parties had opted out of the Act by entering into the Deed; and

   b. the allegation that Ms. Walden acted improperly as a quasi-party wall surveyor when Mr. Redler was appointed.

10. Mr. Isaac accepted that the first point could be argued without the need for any new evidence, but said that if the second point was going to be run, then he would need to obtain evidence from Ms. Walden and Mr. Redler.

11. I indicated that I would hear the arguments on both grounds and then decide whether these grounds were admissible without amendment in the course of deciding this appeal. Neither counsel requested any adjournment to deal with any new points of law raised by these grounds. I also indicated that if I decided that the evidence of Ms. Waldon or Mr. Redler might be relevant, and I admitted the new ground, then I would not decide this ground without a further hearing. I will return to this point later.

12. I also gave the parties an opportunity to put in further written submissions if they wished, by 10th September 2018 and I received them on 7th September 2018.

Ground 1: (a) (have the parties opted out by deed?

Amendment of grounds of appeal

13. There can be no doubt that this ground was not in the grounds of appeal issued on 12th March 2018. There is no mention of it and no application was made to amend at the Review and Directions hearing before me on 26th June 2018. It did not appear until Mr. Smith's note for the hearing on 3rd August 2018, written the day before (although the skeleton was served in accordance with the tight timetable I set at the earlier hearing).

14. Applying the principles of **Denton v TC White**, by analogy, there can be no doubt that there has been a serious and significant delay in not pleading it earlier, at least. Because of the very short time limit for appealing a Party Wall award (14 days) an application to amend made shortly after the expiration would not have been significant, but this length of delay is.

15. Nor is there any good reason put forward for the delay. Presumably, counsel decided that it was a point worth taking only after the original grounds had

been drafted, but I am given no reasons (good or otherwise) why is was not raised earlier.

16. This leaves the third limb of the test, whether it is in the interests of overall justice and the overriding objective to permit it to be argued at the hearing. In my judgment it is. This is a point of law raised on facts that were already fully covered in the documentation and evidence. It did not add a significant amount of time to the length of the hearing, being a short point, and it would be unfair and unjust to decide the case without dealing with this important issue. I therefore permit the amendment but will hear argument later about the costs implications. If it had been necessary for further evidence to have been adduced, for example by explaining what precise works were being carried out when the accident happened, or precisely which wall was damaged, then I would have refused the application to add an additional ground at this late stage.

1(a) – contracting out

17. Section 10 of the Act provides:

"(1) Where a dispute arises or is deemed to arise between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either –

a. Both parties shall concur in the appointment of one surveyor (in this section referred to as an "agreed surveyor"; or

b. Each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in the section referred to as "the three surveyors").

(10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter –

(a) which is connected with any work to which this Act relates; and

(b) which is in dispute between the building owner and the adjoining owner."

18. As no statutory notice was given in relation to the issues that were dealt with in the 3rd Award (in which case a deemed dispute would arise under ss. 5 and 6 of the Act), Mr. Smith submits that for the Act to apply, there must be an actual dispute falling within the scope of section 10(10).

19. Mr. Smith relies on the following clauses of the Deed:

"9.3.3 The Council shall use reasonable endeavours to avoid damaging the Grantor's Property and shall as soon as reasonably possible make good any damage caused to the Grantor's reasonable satisfaction and fully indemnify the Grantor in the event of any breach of this clause".

14 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this deed or its subject matter or formation (including non-contractual disputes or claims)".

20. Mr. Smith's submission is that the parties agreed to contract out of the dispute resolution mechanism of the Act because the provision for repairs in the Deed is that they be made to the "*reasonable satisfaction of the [Appellant]*". This, he says, is inconsistent with there being a resolution under the Act. He also says that the exclusive jurisdiction clause is cast in the widest possible terms and leaves no room for disputes to be resolved under the Act other than by the Court.

21. It is common ground that parties may, in principle, contract out of the Act (**Dillard v F & C Commercial Property Holdings Ltd** [2014 EWHC 1219 (QB) at paragraph 17(j)). HHJ Bailey explains the position at paragraphs 32 onwards in **Mohamed v Antino No 2** (2017) sitting in the Central London Technology and Construction List:

"33. The issue between the parties ... may be formulated in this way: is it open to the owners to proceed on the basis that there is no dispute for the purposes of section 10 because they have agreed between themselves to settle any differences they may have by way of some form of alternative dispute resolution? This question falls to be considered in two different contexts.

33. The first context, first because it is more likely to arise, is an agreement to deal in a particular way with any differences between the parties which may arise in the future. In such cases I see no difficulty in answering the question formulated in the affirmative. The officious bystander might insist that there is a dispute between the parties, however they might wish to call it, and that s. 10 must be engaged. However, the parties may properly respond that there is no dispute for the purpose of s. 10 because, they having made contractual arrangements for the dispute to be determined, it must be considered as determined and therefore not in dispute".

34. The second context is where the parties reach an agreement only after the dispute has arisen and where the statutory dispute resolution procedure has been brought into action, but as yet no Award has been made. In this context the party wall surveyors are in place and their task is governed by s. 10(10)(11) of the 1996 Act. B y virtue of s. 10(10) the surveyors .... are to settle by award any matter which is connected to any work to which the 1996

Act relates and "which is in dispute between the building owner and the adjoining owner" … These matters must relate back to any other matter described in s. 10(10). Accordingly, a consideration of the present argument does not need to differentiate between s. 10(10) settlements or s. 10(11) determinations".

35. The present tense is used in s. 10(10). What has to be settled by award is any relevant matter which ***is*** *in dispute between the owners, not any matter in respect of which the surveyors have been appointed or selected under s. 10(1). It follows that if a matter ceases to be in dispute there is no dispute remaining to be settled by the surveyors".*

22. The judge then goes on to say that he does not consider that there is a valid distinction between those cases where the parties conclude a substantive resolution of the parties' differences and those which do not resolve those differences but provide for the differences to be determined outside the Act. He sees no basis for the argument that, having been appointed, the surveyors must proceed with their award regardless of what the parties agree or makes unlawful any agreement they make to prevent them making an award.

23. I agree with Judge Bailey's analysis and conclusion. This would apply *a fortiori* in the present case where the surveyors completed the 1st Award by the time the Deed was entered into.

24. Mr. Issaac had not covered ground 1(a) in his skeleton because he was unaware that it was being taken until he received Mr. Smith's written note. His skeleton covered ground 1(b) and some of these submissions are relevant to both points.

25. Clause 4(c) of the 1st Award provides as follows:

"4. That if the Building Owner commences the works [ie those referred to in clause 2] it shall:

(c) Make good all structural or decorative damage to the Adjoining Owner's property occasioned by the works in material to match the existing fabric and finishes, to the reasonable satisfaction of the two Surveyors, such that making good be executed upon completion of the works, or at any earlier time deemed appropriate by the two Surveyors. If so required by the Adjoining owner, make payment in lieu of carrying out the work to make the damage good, such sum to be agreed between the owners or determined by the Surveyors."

26. S. 7(2) of the Act also confers jurisdiction on the Surveyors to make an award of compensation "*for any loss or damage which may result to [any adjoining owner and any adjoining occupier] by reason of any work executed in pursuance of the Act*".

27. Clause 11 of the 1st Award is in the following terms:

"11. That the said Surveyors reserve the right to make and issue any further Award or Awards that may be necessary, as provided in the Act. That the weatherproofing detail will be the subject of a further award".

28. The weatherproofing details appear to have been settled by the 2nd Award as contemplated by the 1st Award.

29. Mr. Isaac's principle argument in his oral submissions was that the Deed related to different works and therefore did not have any relevance to the issue that has now arisen as a result of the collapse of the wall.

30. In my judgment, ground 1(a) turns on the construction of the Deed. The issue to be decided is whether, on its true construction, the parties have agreed to

contract out of the dispute resolution process which followed from the reference to the two Surveyors and under the 1st Award and the Act – either (1) because they contracted out in respect of all works and damage to the Appellant's property or (2) because the indemnity under Clause 9.3.3 of the Deed applies to the works that led to this damage.

31. In relation to (1), it is common ground that there is no express term to that effect. If the Deed was intended to contract out of the Award and the Act in general terms for the purposes of all further disputes relating to all the Respondent's works, then it should have been explicitly clear. It is also difficult to see what purpose Clause 12 of the Deed serves, since it clearly states that the Party Wall Award shall continue to apply to Retained Wall and provides an indemnity for the costs of matters relating to the Party Wall Award.

32. Clause 4 of the Deed provides an indemnity by the Respondent in respect of damage caused by the "*Works*" as defined in the Deed. These are the works permitted under the Deed and not those covered by the 1st Award.

33. Clause 12 of the Deed provides as follows:

"*The parties hereby agree and acknowledge that nothing in the agreement and/or the carrying out of the Works by the Council shall constitute a breach of the terms of the Party Wall Award and further that the terms of the Party Wall Award shall continue to apply in full to the Retained Wall and that Council shall indemnify the Grantor in full against all/any costs incurred by the Grantor in connection with any amendments, variations, addenda or any other matter relating to the Party Wall Award occasioned by this agreement*".

34. Mr. Smith submits that Clause 9.3.3 is in clear terms. The covenant is couched in wide and general terms so as to cover all damage caused to the Appellant's property and is therefore sufficient to cover the damage with which this case is concerned.
35. Clause 14 is clearly applicable to all disputes arising out of the subject matter of the Deed. This must mean any dispute arising from the Deed and is therefore includes disputes arising out of the indemnity provision in Clause 9.3.3. Therefore, if 9.3.3 amounts to an indemnity in relation to the damage covered by the 3rd Award, the Party Wall surveyors had no jurisdiction to make the 3rd Award.
36. I now turn to 9.3.3 which is the only basis upon which Mr. Smith argues that the parties have contracted out of the Act. If there is any other argument based on the construction of the Deed, then it was not articulated in Mr. Smith's skeleton argument and it would be unfair on Mr. Isaac and the Respondent to permit it to be argued at this late stage.
37. In order to determine this question, it is necessary to examine the Deed in more detail. Its purpose was for the Appellant to grant the Respondent a licence to enter its property in order to carry out works specified in Annex B. Clause 3 provides that during a defined period ("the Works Period") the Respondent could enter a defined area of land ("the Works Land") shown edged red on the plan at Annex A to the agreement.
38. During the Works Period the Respondent is under the obligations set out in Clause 3. These include observing the "*Work Conditions*" as defined by reference to the list of conditions in Clause 6 and which relate to the execution of the Works.

39. Clause 9 is the grant of an easement by the Appellant to the Respondent in fee simple to access "*the Licensed Area*" which is defined as an area of land shown blue on the plan and which is a different area from the Works Area. This grant is a right to access the Licenced Area through the Appellant's property all reasonable times "*not more than once per calendar year*" in order to inspect any walls, fences roofs gutters or other boundary features or fixtures and fittings on the Respondent's land. Having carried out inspections, access is then granted to the Licenced Area to carry out maintenance works and replace walls, fences roofs gutters etc.

40. Clauses 9.1.1 to 9.2.3 are covenants by the Appellant in relation to the easement. Clause 9.3 comprises covenants by the Respondent for itself and its successors in title to the Licenced Area and is as follows:

    "9.3 The Council covenants with the Grantor for the benefit of the Grantor's Property that the Council and its successors in title and anyone authorised by it to use the Rights shall at all time observe and perform the following covenants: ..."

41. This provision therefore arises in a completely different context and does not relate to the works comprised in the 1st Award nor to those defined as "*Works*" in the Deed. It does not relate to the Respondent's activities on the Works Land but as a consequence of the exercise of the Rights (as defined and relating to the Licenced Area. The use of the word "works" in clause 9.3.2 is not by reference to the defined word, as a capital W would have been used.

42. I am therefore satisfied that Mr. Smith's submission on this ground fails and the parties have not contracted out of the Act so far as the damage to the wall to which case relates. The indemnity does not relate to the Clause 3 Works.

43. If I am wrong about this, then there is no evidence, or at least adequate evidence, to show that the damage suffered was caused by carrying out the Works the subject of the Deed. For this to happen further evidence would probably have been necessary, but at this late stage it was far too late to admit any (even if it had been presented and an application to rely on it made).

Ground 1(b) is there a dispute?

44. Mr. Smith's second argument is that there was no dispute between the parties at the time the surveyors produced the 3rd Award as the parties were undertaking constructive discussions with a view to reaching an agreement.

45. Following notification of the damage to the Appellant's wall/property on 12th October 2017 (sent by Mr. Crowther to Mr. Waldron) Mr. Barnes (the Appellant's solicitor) sent an email to the Respondent's legal department setting out the facts and stating that his client intended to enforce the terms of the agreement in the Deed and to claim damages. The letter ended with a reference to resolving "*the dispute*" by ADR. The parties' engineers then discussed how best to remedy the problem that had arisen. Mr Asha (for the Respondent, wrote on 20th October 2017 informing Mr. Barnes that the Party Wall surveyors "*are looking into dealing with the remedial work by way of a further party wall award*".

46. Mr. Barnes interpreted this email, and a later meeting, correctly, as a statement of the Respondent's intent to make good the damage and to that end proposals were being drawn up. In his letter of 24th November 2018 Mr. Barnes emphasised that it was not a "*letter before action*" but that if the matter could not be "*satisfactorily resolved*" a letter before action would be sent. Resolution

of the issues was complicated by the involvement of insurers (either for the Respondent or for its contractor).

47. In the meantime, the Party Wall surveyors were in discussions. On 29th November 2017 Mr. Crowther emailed Ms. Waldron in response to her email sending him the "*temporary works proposals*" which had been prepared by the Respondent's engineer. She said that this was intended to "*start discussions*". Mr. Crowther's response included the following:

    "Although I appreciate we should continue with the party wall matter without taking instructions from our respective owners, I do think given the history we need to have then on board as regards their agreement to the proposed remedials – especially as they are being advised on the matter by solicitors, so doubtless a new dispute would quickly be raised if they do not accept the proposal".

48. By early January 2018 a draft award was passing between Mr. Crowther and Ms. Waldron and they were discussing its terms. By 27th January 2018 Ms. Waldron was writing to Mr. Crowther enclosing 2 fair copies of an addendum award and stating that it had been agreed between them. On 8th February 2018 Mr. Crowther emailed the Appellant saying that "*we are close to having the party wall side of it finished*". He made clear that the courtyard wall would not be reinstated and that it would eventually run right up to the new wall of the Corn Exchange. This would necessitate the drawing up of a new licence agreement (presumably to replace the Deed).

49. There is an email in the hearing bundle dated 21 November 2017 from Mr. Crowther to Mr. Wiseman attaching a letter to be signed on behalf of the Appellant authorising Mr. Crowther to "*sign receive and respond to any*

notices in connection with the works proposed at the above address [the Appellant's property]. In the event of a dispute arising, we appoint you, Mr. Patrick Crowther, as our Surveyor in accordance with Section 10 of the above Act and authorise you to make any necessary appointments on our behalf'.

50. I have not been shown any signed version of the above, nor any notices given under the Act in relation to any dispute other than the original notices which led to the 1st Award. It has not been suggested that any notices have been served. In his email Mr. Crowther said that it would be necessary for these documents to be signed "*for the rebuilding of the wall at 27 New Road as a result of the damage caused by the Council's contractors*". It was not made clear to me whether this was required in relation to a party wall dispute with the Respondent or with another neighbour and the template refers to "*adjoining properties*".
51. On 28th February 2018 Mr. Crowther sent a letter to the Appellant as follows: "*Further to the recent conclusion of formalities under the above Act, I now hereby issue you with your copy of the signed Party Wall Award relating to the works proposed above*". This was a reference to the remedial works as a result of the damaged wall. A letter in similar terms was sent on the same day to Mr. Redler with a signed copy of the 3rd Award. The 3rd Award is signed by Mr. Crowther and Mr. Redler.
52. Mr. Smith submits that the surveyors "*jumped the gun*" and produced an award before the parties were properly in dispute. At no time did either party request that an addendum award should be made. The surveyors agreed between themselves that they would make an addendum award. This appears

to be what Mr. Crowther envisaged in his letter of 29th November 2017, although he appears to anticipate a "*dispute being raised*".

53. Mr. Isaac submits that under clause 10(12)(c) of the Act surveyors regularly produce awards in relation to matters arising out of the original award. No authority has been produced, either before or since the hearing, in which an addendum award has been produced without some indication from the parties (or at least one of them) that the surveyors should produce an award. Mr. Isaac accepted my suggestion that even in these circumstances a fresh dispute is necessary and the surveyors can't produce awards "*willy nilly*".
54. Mr. Smith referred to a number of authorities.
55. In **Monmouth County Council v Costelloe & Kemple Ltd** (1965) 5 BLR 83 at 89 Lord Denning MR said this in relation to the terms of a contractual arbitration award:

    "The first point is this: Was there any dispute or difference arising between the contractors and the engineer? It is accepted that, in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractor. Until that claim is rejected, you cannot say that there is a dispute or difference. There must be both a claim and a rejection of it in order to constitute a dispute or difference."
56. In **Fastrack Contractors Ltd v Morrison Construction Ltd.** [2000] BLR 168 HHJ Anthony Thornton QC (sitting in the Technology and Construction Court) dealt with a similar issue under the **Housing, Grants, Construction and Regeneration Act 1996**.

    "27. A "dispute" can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that

party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion.

…The Court of Appeal [in the Monmouth case] held that a rejection of a claim does not necessarily occur when the claim is submitted to an engineer or during subsequent exchanges of views in relation to that claim. A dispute only arises when the claim is rejected in clear language. An obvious refusal to consider the claim or to answer it can, however constitute such objection."

57. I agree with Mr. Smith that it is not established that there was any dispute between the parties which could have satisfied that part of the requirement. In the present case there are 3 problems for the Respondent. Firstly, when the Appellant intimated that it would seek redress for the damage from the Respondent, Mr. Barnes made quite clear that he was not sending a letter before action and that at the relevant stage one would be sent. That has not yet happened. Secondly, the parties have since then been discussing, with the contractors and their engineers, the various means of remedying the defect. There has not been, in my judgment, any clear rejection of the claim by the Respondent, on the contrary, it made clear that it would remedy the damage and was keen to agree the way forward as soon as possible. If the one of the parties had been dissatisfied with the rate of progress, then it would have been a simple matter for it to send the other a letter indicating that if satisfactory terms had not been put forward by a certain date it would consider that there was a dispute and refer the matter to the surveyors. Thirdly, it is not clear what the extent of the alleged "*dispute*" is. For example, whether liability is in dispute or simply quantum or the steps required to remedy the defect.

58. The 3rd Award is also informative on this issue. It refers to a "*deemed dispute*" but this can only relate to the original "*deemed dispute*" upon which the 1st Award was made. Nowhere does it refer to the "*actual dispute*" that it is purporting to resolve. Nor is liability dealt with, presumably because it is assumed by the surveyors not to be in dispute.

59. The 1st Award make specific reference to the dispute dealt with, and although the 2nd Award does not, the 1st Award makes clear that an addendum award will be published later dealing with the weatherproofing, which was the purpose of the 2nd Award.

60. Mr. Isaac referred to **R (Farrs Lane Developments Ltd) v Bristol Magistrates Court (ex p McAllister** [2016] EWHC 982 (Admin). This was a judicial review application against the decision of magistrates to enforce a costs order made by a party wall surveyor. Mr. McAllister, an interested party, was a party wall surveyor, appointed by one of the parties in relation to a dispute about various construction works. A number of awards were issued and one of them required the interested party's fees to be paid by the building owner. No appeal was made and the interested party brought proceedings under s. 17 of the Act to enforce payment.

61. Mr. Isaac represented the building owner, and submitted (amongst other things) that the award was ultra vires because no dispute arose between the parties in relation to fees. The dispute was with Mr. McAllister. Holgate J rejected Mr. Isaac's argument that if there was no dispute about the fees there could be no jurisdiction under s. 10(12)(c) of the Act and said that the section should be construed more widely. The word "*determine*" in the section meant that the party wall surveyors could make an award in relation to "*matters*

arising out of or incidental to the dispute" even if a dispute had not arisen in relation to the particular matter which was the subject of that award.

62. This case therefore appears to be authority for the proposition that an issue arising after the original award can be determined without the parties being in dispute, provided it can come within the terms of s. 10(12)(c) of the Act, even if the parties cannot be said to be in dispute. The authorities cited by Mr. Smith only deal with cases where the test is that there is a dispute.

63. Early on during the hearing Mr. Isaac conceded that there would have to be a dispute for the surveyors to make an addendum award and that they couldn't do it simply off their own bat. I consider that concession to have been rightly made in the context of this case. If a determination is to be made then it makes not sense, outside the context of McAllister itself, for the surveyors to make an award without there being any reference to them by at least one of the parties. That appears to have been what Mr. Crowther expected to happen. For something to require "*determination*" by the surveyors under s. 10(12)(c) may or may not require a dispute, but there is a world of difference from the incidence of costs and matters which are a natural consequence of the completion of the works (such as the environmental scheme contemplated by Holgate J as being a necessary part of starting the works authorised by the award) and significant works consequential on a subsequent accident to other property.

64. If I am wrong about the need for there to be a dispute, then Mr. Smith counters this point by submitting that the 3rd Award does not arise out of or is not incidental to the dispute. This is because the "*deemed dispute*" arose as a result of a notice served under s.6 of the Act and not under s.2(e). The right to

require reinstatement or remedial works only arises under s. 2(4) and does not arise under section 6, where compensation can be awarded under s.7 of the Act.

65. I accept this submission. The 3rd Award does not deal with compensation – only remedial works. It is perfectly sensible for the parties to agree remedial works, and may have seemed sensible to the surveyors, but they agreed that the structure damaged or worked on was not a party wall and have not produced any compensation figure.

66. The Respondent argued in its position statement that the surveyors had agreed (on behalf of the parties) that the issue would be dealt with by a party wall award. There is no evidence that any of them had actual authority to do so. It is trite law that party wall surveyors reported under the Act are in a "*quasi-judicial position*" (**Gyle-Thompson v Wall St (Properties) Ltd** [1974] 1 WLR 123 at 131. Ostensible authority would also fail to bind the parties, because each must be taken to have been well aware of the nature of responsibilities of the party wall surveyors and they could not act as agents for the party appointing them. At the hearing it was clear that this wasn't a substantive point because the issue being put forward related to authority to make the 3rd Award under the terms of the Act and the 1st Award and not because of any further agreement between the parties.

67. I therefore conclude that the 3rd Award was made without jurisdiction because no actual dispute had arisen and the matter of the damaged wall belonging to the Appellant is not within the ambit of s.10(12(c).

68. It is important to have clarity and therefore if surveyors are to produce awards of their own initiative, they must make sure that there is clear evidence of a

dispute, within the meaning set out above. In many cases the absence of a clear dispute may not be a problem, but if, as in this case, one party takes the point then the route to avoiding this lies in obtaining written acknowledgment of the parties that a dispute has arisen requiring an award, or a clear letter leading to a clear dispute if it is not responded to in its terms.

69. That is sufficient to dispose of this appeal, which must result in the 3rd Award being quashed. I will deal briefly with the remaining grounds of appeal.

Ground 2 – Serious procedural or other irregularity

70. Mr. Smith submits that because they occupy a quasi-judicial role, the party wall surveyors are bound by the rules of natural justice. He quoted from **Mills v Savage** (2016 Central London County Court Technology and Construction List at paragraph 131). It cannot be seriously disputed that a party wall surveyor should enable the parties to make submissions if they want to. This means that they should give them a specific opportunity of doing so, and if they wish to rely on expert evidence.

71. The short answer to this ground is that I have simply too little information with which to decide it in any meaningful way. Mr. Isaac points out that there were communications between Mr. Crowther and the Appellant. There were also meetings. Mr. Crowther appears to have taken on a role with the Appellant of discussing a way of resolving the problem that had arisen. Mr. Wiseman's witness statement refers to Mr. Crowther "*bringing in a structural engineer ... to act for us*". The negotiation side, with both sides trying to find an agreed solution, seems to have run alongside Ms. Waldron and Mr. Crowther's discussions towards producing the 3rd Award. This may have

clouded the differences between their respective roles as surveyors acting for clients and party wall surveyors.

72. This and the other outstanding grounds of appeal do not arise in the light of my earlier decision. Having spent a good deal of time considering this case, I have concluded that 1 day was grossly inadequate to dispose of this type of issue properly. There is no real evidence about the transmissions of submissions, we don't know what the party wall surveyors say about the allegations that they did not give the Appellant an opportunity to make submissions and the court is expected to work out what actually happened by reading bundles containing more than 650 pages without much guidance about the content.

73. I am not therefore prepared to make any decisions about the remaining grounds which would require a much more substantive hearing.

Conclusion

74. I decide ground 1(a) against the Appellant. The agreement contained in the Deed does not provide the court with exclusive jurisdiction in relation to the damage to the wall and the parties have not opted out of the Act so far as this aspect of the dispute is concerned.

75. I decide ground 1(b) in favour of the Appellant. At the time of the 3rd Award there was no dispute between the parties giving the party wall surveyors jurisdiction to make the award.

76. That disposes of the appeal. I decline to deal with grounds 2 and 3. It was agreed that ground 3 would be dealt with later. It is impossible for me to decide ground 2 on the basis of the evidence before me and in the time allotted for the hearing. There was time only for a cursory examination of the

communications which led to the 3rd Award and while there was no formal invitation by the surveyors for submissions, there was clearly a great deal of communication between the parties and their respective appointees.

77. I refuse permission to amend the grounds of appeal to add the ground advanced in paragraphs 49 to 52 of Mr. Smith's skeleton. There was a serious and significant delay in making the application and in telling the Respondent of his intentions to run the argument. While there was a good reason for the delay up to, at latest, June 2018 when there was a directions hearing, there is no explanation why it wasn't raised by then. There was no formal application to add grounds and no evidence in support. Mr. Smith says that his side only became aware of the degree of Ms. Waldron's involvement when they received disclosure, but in the absence of any formal evidence, it is as difficult to get to the bottom of this issue as many of the others in this case.

78. In the absence of any evidence that it was not possible to identify this as an issue until late in the day, I cannot find that there is a good reason for the delay. Turning to the third limb of *Denton*, and looking at the overall justice of the matter, this is a party wall dispute with works in progress. The merits of the point are, at best, unclear at this stage. Any resolution of this issue would require evidence from Mr. Crowther and Mr. Redler. I would probably also need evidence about the general practices in making these awards and the use of assistants in the firm. It is far too late for this and would delay the resolution of this appeal further.

79. I will hear further argument about the consequential directions. In the meantime, I urge the parties strongly to re-double their efforts to reach a

speedy and satisfactory solution to the issues that follow from the collapse of the wall.