Claim No: F00WC082

IN THE COUNTY COURT AT NEWPORT
IN THE MATTER OF AN APPEAL UNDER THE PARTY WALL ETC. ACT 1996

B E T W E E N:

Mr ROBERTO MARINO REGA

Appellant

- and -

(1) Mr STEPHEN BRIAN MILLS
(2) Mrs MICHELLE MARGARITA MILLS

Respondents

JUDGMENT ON
PRELIMINARY ISSUES

---

1. This is my judgment in relation to three preliminary issues which were set down as such by an Order of DJ Stewart of 6 August 2019. The preliminary issues to be heard relate to Grounds 1, 3 and 4 of Grounds of Appeal lodged by the Appellant following a Party Wall Etc. Act Award dated 2 April 2019 made by the two surveyors appointed by the parties in respect of a wall between their properties at 4 and 6 Shide Road, Newport, Isle of Wight ("the Award"). Mr Woolford had been appointed by the Respondents as their party surveyor; Mr Tombleson was appointed by the Appellant as his; between them, they appointed Mr Smart as the third surveyor.

2. Counsel appeared before me as follows: Mr Stuart Frame for the Appellant and Mr James Frampton for the Respondents. I am grateful to them both for their written skeleton arguments and their helpful oral submissions.

3. The Grounds of Appeal are in narrative form, but DJ Stewart ordered that the questions to be considered by the court for the purposes of the preliminary issues are as follows:

> In re: Ground 1: Whether, in the particular circumstances of the case, the two party appointed surveyors had jurisdiction to make the award they did, or whether the dispute between the parties should have been settled instead by a third surveyor making an award pursuant to section 10(11) of the 1996 Act?

In re: Ground 3: Whether or not the works purported to be authorised by Clause 2 of the Award, and as shown in drawing number 222065/3, were outside of those indicated in the party structure notice and therefore whether the surveyors have exceeded their jurisdiction in that regard?

In re: Ground 4: Whether the parties' surveyors had the relevant jurisdiction under the Act to award the Respondent's surveyor access over the Appellant's land in the terms that they did in clause 6 of the Award?

4. There is also an application from the Appellant to amend his Grounds of Appeal in the event that Grounds 1 and 3 are found in the Respondents' favour.

5. As was suggested by Counsel that I might do if I had dealt with the matter on an *ex tempore* basis at the hearing, I intend to deal with each preliminary issue in turn because if either Grounds 1 or 3 are successful, that will be sufficient to deal with the entire appeal.

6. It should be noted that Ground 2 of the Grounds of Appeal asserts that the Award is invalid because at paragraph 1(a) it provides:-

> *That the wall separating the Two Properties is a party wall within the meaning of the Act.*

That issue (which I shall refer to as the boundary/party wall issue) is not one that I am being asked to determine. Whilst the idea of separating out preliminary issues has some *prima facie* attractions, it seems to me that it might have been misconceived in this case: if the Appellant is unsuccessful in the Preliminary Issues, the boundary/party wall issue will have to be determined. If the Appellant is successful and the matter is remitted to the surveyors, whatever the outcome of the revisited award, it is likely that one party or the other will appeal on the boundary/party wall issue (that is not to read as an encouragement to do so). Be that is it may, I will proceed to decide the Preliminary Issues as determined.

7. The background and factual narrative are uncontroversial. Accordingly, in setting out the factual history of this matter below, I have drawn extensively on Mr Frame's Skeleton Argument prepared for this hearing, and I would like to acknowledge the assistance that having that available has given to the Court. I have retained some of the references to the trial bundle for ease of reference in relation to Ground 3, in case the matter goes further.

8. There is a preliminary matter that I should deal with: although Mr Rega is the Appellant in this matter, presumably because he is the sole legal owner of No. 4, a good deal of the correspondence has emanated from his wife, Mrs Claire Rega. The Appellant and his legal team have always treated Mrs Rega as acting in effect as Mr Rega's agent, and no point has ever been taken against that by the Respondents (quite rightly in my judgment), and so I do not distinguish between emails being sent to or from Mrs Rega as distinct from the Appellant.

Background Facts

9. The Respondents are 'Building Owners' for the purposes of the Party Wall etc. Act 1996 ('the Act') and own and reside at 6 Shide Road, Newport, Isle of Wight, PO30 1YQ, a detached house ("No. 6".)

10. The Appellant is an 'Adjoining Owner' for the purposes of the Act and owns and resides (together with his family) at 4 Shide Road, Newport, Isle of Wight, PO30 1YQ, also a detached house ("No. 4").

11. No. 4 and No. 6 share a common boundary along the entire length of which runs a solid brick wall ("the boundary wall"). The flank wall of the house of No.4 runs parallel to the boundary wall, tightly abutting it.

12. The Respondents wish to conduct building works, some of which fall within the remit of the Act, albeit there is a dispute between the parties as to the extent that the works do fall within the Act's remit. The primary issue between the parties relates to the status of the boundary wall, and whether it is a wall to which the Party Wall etc. Act 1996 applies.

13. The Respondents' proposed works involve a new extension being built alongside the boundary wall and the flank wall of the house at No. 4. Accordingly, the Respondents served notices under ss.1, 3, and 6 of the Act on the Appellant. Up until the service of the notice under section 3, on or around 30 January 2020, the Respondents' proposed works showed no interference with the boundary wall. Instead, a free-standing cavity wall was proposed to be built, the outer skin of which was to be constructed of blockwork, and running alongside the boundary wall, with an independent rainwater gutter attached to the flat roof. **[1/67].**

14. The notice served under section 3 of the Act ('the party structure notice') **[1/74-75]** had a sectional drawing appended to it (No. 222065/1) **[1/75]** demonstrating the works that were proposed by the Respondents to the boundary wall, and on the basis that the boundary wall was a 'party wall'. The notice cited section 2(2) (a), (b), (f), (g), (k) and (l) of the Act and described the proposed works as follows:

> *The proposed works are: Increasing the height of the party fence wall to a consistent level, and undertake appropriate weatherproofing as permissible under the Party Wall etc. Act 1996 as shown in drawing number 222065/1, attached* **[1/74]**

15. Following service of the notices, and in accordance with statutory regime, party wall surveyors were appointed under section 10(1)(b) of the Act (as referred to above), in order to settle by way of an award the Respondents' right (or otherwise) to conduct their proposed works, the time and manner of execution of those works, and any other incidental matters.

16. Following the service of the section 3 notice, the Appellant, and his wife, took issue with the right of the Respondents to conduct the works they were proposing, and on the basis that the wall was not a party fence wall or a party wall. On 11 February 2019, the Appellant emailed the Respondents' party wall surveyor, Mr Woolford querying amongst other matters, the status of the boundary wall:

In regards to the party wall dispute reference No 6 Shide Rd/No 4 Shide Rd, can you categorically prove that this wall is in fact a "Party Wall" and not a wall built entirely on our land?

17. Mr Woolford's emailed reply of the same day did not answer the query raised and ended with, *"Please stop emailing me."*

18. On 19 February 2019, Mrs Rega met with the Appellant's appointed surveyor, Mr Tombleson. Tombleson's time sheet recorded the fact that at that meeting there was a "Boundary Concern".

19. Consequently, on 25 February 2019, Mr Tombleson emailed the Respondents' Architect, Mr Ben Vernon ("the Architect"), stating,

I have now been appointed to assist Party Wall matters for number 4 Shide Road.

The owners of Number 4 believe the wall (as proposed to be raised in height) is theirs, not your Clients' wall. If this is the case (which I don't know fully) there is no obligation to allow works under the Party Wall Act.... [missing from my copy] *avoiding either a boundary dispute or a lengthy battle which will only cause a rift between the owners, is there an alternative solution that can be adopted?*

Mr Tombleson attached a sketched-out proposed solution.

20. The second respondent, Mrs. Mills, emailed the Architect the next day on 26 February 2019, stating,

There are no boundary ownerships with ours or adjacent owners I have checked with our solicitors no boundary ownership was ever written in.

21. Mr Tombleson engaged with the other professionals and tried to negotiate a variation to the works that he thought would be acceptable to the Appellant and his wife, and sent details of the variation to them by email on 20 March 2019 **[1/91, 93]**. Responding by email the next day on 21 March 2019, Mrs Rega stated,

Our requirements from the start have always and only ever been to leave our property and home etc. completely and utterly alone.

The email did, however, conclude that the Appellant and his wife would consider the proposal and revert.

22. The following morning on 22 March 2019, the Appellant emailed Mr Tombleson:

We categorically do not give permission for the works as proposed. This is our Boundary Wall located completely on our land. Their proposed plans should be completed legally and wholly on their land leaving all our property, our wall, home and fixtures etc. alone.

...

As I am sure you are already aware any changes they are trying to make would mean our boundary wall would become a new party wall of which we absolutely do not give permission for. Our boundary wall will remain precisely that, our boundary wall.

23. Notwithstanding that email, by 28 March 2019, a copy of the draft award had been sent to the Appellant and his wife for comment. The draft award showed the same proposed construction detail to the boundary wall that the Appellant and his wife had objected to in the email set out above.

24. On the morning of 29 March 2019, the Appellant sent the following email in which, it is the Appellant's case, he sought to exercise his statutory right under section 10(11) of the Act to have the matter determined by the third surveyor. The email was sent at 09.07 by Mrs Rega to the selected third surveyor, Mr Smart. The email stated:-

We would like you to assist with this problem

[the appellant sets out that his assertion (based on advice from a different surveyor) that the notices are] "*incorrect and invalid*"

The line of Junction notice under s1(5) is not applicable and the party structure notice section 2 also contains work that is not applicable.

The wall in question is not a party fence wall but a boundary wall in our possession...We understand that an award is to be served imminently and we do not want to have to appeal the award which will incur legal costs for both parties.

We are exercising this right under section 10(11) of the act.

Shaun/Paul on the basis of this email please do not serve an award at this present time. [emphasis as per the original email]

As I read it, that email based the invalidity of the notices on the assertion that the boundary wall was not a party wall under the 1996 Act, rather than on any technical objection to the form of the notices.

25. Mr Smart replied shortly afterwards:-

Dear Claire

I am the selected third surveyor in this matter and I confirm that I have been consulted on various matters by the appointed surveyors. I have also spoken with you. It is up to the appointed Surveyors to agree an award, or any two of the three surveyors, and serve on the parties. Either the building owner or the adjoining owner can appeal said award if they consider it has been made incorrectly.... I have not visited site but understand that there is no factual or physical evidence to prove ownership of the boundary wall. If you believe you have good evidence then I suggest you speak with Paul Tombleson.

To date I have not made any charge and have treated my involvement as guidance. If I am asked to consider matters in dispute then I will make a charge which will be at £125 an hour

I trust the appointed Surveyors will find a way forward in accordance with the Act without the matter having to be referred to me.

26. It is this email which the Appellant relies on in support of his argument that the third surveyor "refused" to act under s10(9)(a).

27. The above emails sent on 28 March 2019 were copied in to the two surveyors, Mr Woolford and Mr Tombleson.

28. Mr Tombleson emailed the Appellant and his wife at 17:04 on 29 March 2019, stating:-

> *Thank you for your email respectively* [sic]. *I have read through these and noted your comments.*
>
> *I have discussed this situation at length with Tim Smart and also the Pyramus and Thisbe Club representative. I have also seen Tim Smart's email response from earlier today* [which I presume is the one set out above]. *In essence, based upon the definitions within the act and all available information to me, we are of the opinion that the Notices are in accordance with the Party Wall Act and therefore, acting as Party Wall Surveyor only, I am content to sign off the Award in accordance with my obligations as the Appointed Surveyor. I fully appreciate this is not what you may want to hear, but I have my duty to follow in accordance with the Act.*
>
> *As discussed, there may be a potential matter relating to boundary dispute which you may wish to pursue privately, but this does not form part of my instructions at this stage.*
>
> *An Award has been drafted and will be issued out on Monday....*

As I read it, the reference to the Notices must be to the query raised by the Appellant with Mr Smart set out at paragraph 24 (email 29 March 9:07) above.

29. The Appellant responded at 17:54 on 29 March, asking Mr Tombleson to clarify the status of the boundary wall:-

> *In order for me to understand your comments and reasoning earlier today please can you clarify in your professional opinion which of the definitions below accurately describe our wall and explain?*
>
> ***Type A***
>
> *A Type A Party Wall forms ...* [the appellant sets out the three types of wall under the Act]

If you are standing by what you state in regards to the wall I hope you have not failed to incorporate costs due, in the draft award, in relation to enclosure as per the requirements of s11(11)of the Party Wall Etc. Act 1996?

30. I should point out that I heard no evidence at this hearing, and I do not know whether the "*comments and reasoning earlier today*" to which the Appellant was referring to in that email went beyond the 17:04 email set out above, or whether there had in addition been an oral discussion.

31. No reply was received from Mr Tombleson to the 17:54 email. Mr Woolford did however reply, by email of 30 March 2019, in which he denied that enclosure costs were appropriate, and stating, *"In any event the wall has not been determined as being yours"*.

32. Although the emails in the bundle are incomplete (cured partly by the supplemental bundle), it appears that Mrs Rega further emailed both Mr Woolford and Mr Tombleson on 30 March 2019 providing photographs and further "submissions" as to why the wall was on the Appellant's land.

33. On 31 March 2019, Mrs Rega emailed Mr Woolford and Mr Tombleson averring that the Appellant had been entitled to a s3 Notice in respect of the status of the boundary wall, and enquiring as to its whereabouts. but again without reply. She also asked Mr Woolford to ask his clients to:-

refrain from touching our wall and our home. Trespass and criminal damage. We will see them in court as you both seem content on serving an award which will be invalid.

34. Mr Woolford replied rather pithily with "*Done my job*".

35. The parties' surveyors made and served an award on 2nd April 2019 ('the Award').

36. Following service of the Award, Mrs Rega again asked for clarification as to the status of the wall. Mr Tombleson responded by requesting proof or evidence that the boundary wall belonged solely to the Appellant and his wife. The Appellant's wife countered by

asking what evidence had been provided by the Respondents, *"to claim the wall"* and went on to request disclosure of, *"...the communication and correspondence which backs up both of your decision on the definition of the wall?*

37. Following an appeal against the Award being lodged at Winchester County Court, the Architect sent an email sent to the Respondents on 30 April 2019, stating, *"Regarding the Party Wall, we are working on the basis that the 'garden' wall abutting the adjoining property is not owned by anyone"*.

Preliminary Issue 1

The Legislative Framework

38. Section 10(11) of the Act provides for either of the parties or the surveyors to refer matters in dispute to the third surveyor:

> *(11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary award.*

39. Mr Frame cited *Hansard* 31 January 1996, page 1536: *"The aims of the Bill are to extend the tried and trusted provisions of the London Building Acts to England and Wales*". The predecessor legislation to the Act was the London Building Acts (Amendment) Act 1939 ("the 1939 Act"). Whilst much of the Act replicates the 1939 Act, the two Acts are not identical. In particular, Section 10(11) of the Act finds its equivalent predecessor in section 55(j) of the 1939 Act, which provides:

> *(j) If no two of the three surveyors are in agreement the third surveyor selected in pursuance of this section shall make the award within fourteen days after he is called upon to do so;*

40. Section 10(9) of the Act provides:

> *(9) If a third surveyor selected under section 10(1)(b)-*

(a) *refuses to act;*

(b) *neglects to act for a period of ten days beginning with the day on which either party or the surveyor appointed by either party serves a request on him; or*

(c) *dies, or becomes or deems himself incapable of acting, before the dispute is settled,*

the other two of the three surveyors shall forthwith select another surveyor in his place with the same power and authority.

41. Section 10(10) of the Act provides:

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.

Submissions

42. The parties' submissions are very well set out in their respective skeleton arguments, and so I shall summarise them only here.

The Appellant

43. Mr Frame's primary submission is that Mr Smart was under an obligation to make an award because the Appellant had invoked s10(11). He submitted that the parties' surveyors were clearly refusing to address the Appellant's concerns with the Appellant; instead they were proceeding and agreeing privately between themselves. In those circumstances, it is not surprising, he said, that the Appellant sought to invoke s10(11), and did so specifically, even citing the subsection in the email of 29 March 2019 to Mr Smart.

44. Mr Frame submitted that the issue of the status of the wall was a "disputed matter" for the purposes of s10(11); the email constituted the invocation of s10(11), in which case it was incumbent upon him to act without more, and make an award under the sub-section. Mr Frame accepted and averred that that award would and should have been limited to the one disputed matter (and thus did not disagree with Mr Frampton as per *Goulandris v Knight* CLCC 26 May 206 ¶84); and once resolved, the balance of issues could be dealt with by the parties' surveyors.

45. Anticipating Mr Frampton's argument, from his written skeleton argument, that a building owner cannot refer a matter to the third surveyor unless there is a dispute between the surveyors, Mr Frame pointed out in his submissions that there was no such fetter in s10(11) whose words should be read in their plain and ordinary way and, particularly when the removal from the legislation of the requirement that "*no two of the three surveyors are in agreement*" before the third surveyor can make an award is taken into account, the right of a building owner to refer the matter to a third surveyor is unfettered.

46. In support of his submissions, Mr Frame cited ¶10.1 of the RICS Guidance to "*Party wall legislation and procedure*", 7th Ed. (effective from 1 December 2019, but no point was taken on this) which states that in its editors' opinion, the owners' direct access to the third surveyor is "*not dependent on there being a dispute between the party-appointed surveyors*". He also cited the 3rd Edition of the Pyramus & Thisbe Club's Guide to the Act relating to s10(11), which is of the same opinion.

47. Once Mr Smart had been seized of the matter, submitted Mr Frame, the parties' surveyors had no jurisdiction to make an award and the Award is thus invalid.

48. Mr Frame's secondary submission is that Mr Smart's email of 29 March amounted to a refusal to act under s10(9) of the Act. In those circumstances, he argued, the two parties' surveyors were under a positive duty to "forthwith" appoint a new third surveyor in order to resolve the disputed matter, and until such time as they had done so, and the new third surveyor had resolved that dispute, they similarly had no jurisdiction to make an award.

The Respondents

49. Mr Frampton's primary position was that the Appellant had no right to call upon Mr Smart to act. He submitted that the two surveyors had not disagreed on anything and there were no "disputed matters" to resolve: "disputed matters" in s10(11) must be interpreted to apply only where the two party-surveyors are in dispute, he argued, and that "disputed matters" in s10(11) was to be contrasted to the singular dispute referred to in s10(1). He submitted that the scheme of the Act was that the two surveyors were to resolve disputes, leaving the third surveyor as the "ultimate arbiter". The parties must be taken, submitted Mr Frampton, to have agreed to be bound by what the two surveyors agreed on: to allow "leap-frogging" would be to undermine the whole purpose of the Act.

50. Mr Frampton's secondary position was that, in any event, there was no valid request for Mr Smart's intervention. The Appellant's wife's email dated 29 March referring to the notices having been "*incorrect and invalid*" was not clear: it did not set out the dispute with sufficient clarity.

51. Turning to the Appellant's allegation that Mr Smart had refused to act thereby engaging s10(9), Mr Frampton submitted that the very highest that Mr Smart's acts or omissions could be put would be a neglect to act under s10(9)(b), and the award had been made less than 10 days after his reply, so that paragraph could not apply. He further submitted that Mr Smart's reply was anything but a refusal; instead it was a suggestion that the Appellant and his wife should talk again to Mr Tombleson, but accompanied by 'an invitation to treat' (my phrase) by offering to act at £125 per hour should he be needed to resolve the dispute.

52. I was referred to *Patel v Peters* [2015] EWCA Civ 335, @ ¶¶14, 15, 29 and 30. In that case, one surveyor had refused to 'plough through' the other surveyor's time sheets in order to decide whether the claimed level of costs was excessive, for reasons which he articulated. Instead he proposed an alternative way of assessing the costs. It was held that that approach meant that he had not refused, nor had he neglected, to act: he had "*engaged head-on with the subject matter of the request and set out his position in respect of it*" and thus it came "*nowhere near to a refusal or reflect to act effectively*".

Mr Frampton submitted that that was exactly what Mr Smart had done in his email of 29 March 2019. It should be noted that s10(6) with which that case was concerned has the added gloss of the word "effectively" to the expression refusing or neglecting to act, which s10(9) does not, which presumably is something less than an outright refusal.

53. Mr Frampton so categorises Mr Smart's response based on his engagement with the issue by identifying it; by implying that a site visit would not be necessary because there was nothing physically on site to assist in identifying its ownership; by his positive suggestion that any evidence be provided to Mr Tombleson. Furthermore, Mr Frampton submits, Mr Smart positively leaves the door open by reference to his hourly rate "***if*** *I am asked to consider matters in dispute*" [my emphasis]. Even if it was a misunderstanding, Mr Frampton submitted orally, it does not amount to a refusal; and in any event, why, Mr Frampton asked rhetorically, was there not a follow-up email or response from the Appellant or his wife if they really did want to engage him after his hourly rate had been quoted?

54. Further or in the alternative, Mr Frampton submitted that, even if the Appellant had been entitled to, and had successfully referred the disputed matters to Mr Smart, the two party-surveyors remained entitled to make an award pursuant to s10(10). He referred me to *Party Walls: Law and Practice*, @ ¶8.30(d) fn 48, that:

> "*this* [a referral to a third surveyor] *does not preclude the parties' surveyors from making an award before the disputed matters are settled by the third surveyor.*"

He also cited *Mills v Savage*, unrep., a decision of HHJ Bailey at CCCL in 2016, at [127]:

> *It would be a rare case where the court would uphold a complaint that the two party-appointed surveyors proceeded without involving the third surveyor.*

55. In the final alternative on this Preliminary Issue, Mr Frampton submitted that the Appellant's conduct, through his own surveyor, amounted to a waiver of the appointment of Mr Smart and/or that he was estopped from denying that the party-appointed surveyors had jurisdiction to make the Award. He relied on the emails passing between the Appellant/ his wife and Mr Tombleson on 29 and 30 March 2019, all of which were copied into Mr Woolford, submitting that Mr Tombleson was acting

on behalf of the Appellant and thus their combined conduct gave rise to the estoppel/waiver. The estoppel was completed, he said, by the Respondents and their surveyor proceeding to complete and sign off the Award.

56. As additional material upon which to base his argument, Mr Frampton referred me to an email in the Respondents' supplemental bundle (p.282) from Mrs Rega to Mr Tombleson (and, I am told, copied into Mr Woolford) timed at 08:36 on 30 March which reads:-

> *You are welcome to come on Wednesday at 11.*
>
> *The award should contain enclosure costs as per section 11 of the Party Wall Act, I'm assuming yourself and Shaun have discussed this.*
>
> *The award should obviously also contain proposed working hours of which none have been discussed – bearing in mind they would be working directly under a childs* [sic] *bedroom, this is important and needs clarifying. How does that work?*
>
> *And obviously contain a schedule of condition.*

57. As a result of all of this material, Mr Frampton submitted that it would have come as a great surprise to any of the parties' surveyors, and indeed Mr Smart, that the Appellant was not submitting to the jurisdiction of the two party-appointed surveyors.

Discussion and Decision on Preliminary Issue 1

Appointing Party's Reference to Third Surveyor

58. The first issue is the very ability of the Appellant to refer the matter to Mr Smart. There appears to be no authority on the operation of the owners' ability to refer "disputed matters" to the third surveyor. I will therefore have to approach the question by applying basic principles.

59. I accept that there has been a significant change in the law from the 1939 Act to the 1996 Act in this regard. However, s55(j) of the 1939 Act is not an entirely comparable or derivative provision to s10(11) of the 1996 Act: it provides for the third surveyor to take precedence where no two out of the three surveyors can agree. It is really relating

to one step further down the line of dispute than the mere disagreement between the two party-appointed surveyors, but I accept Mr Frame's proposition that the 1939 legislation to have required a disagreement *between the surveyors* before the third surveyor could get involved, which is a prerequisite no longer referenced in the 1996 Act.

60. But more importantly, s10(11) of the 1996 Act makes no reference whatever to a dispute between the surveyors: on its face it appears to give an unfettered right for an owner to refer "disputed matters" to the third surveyor. Which leads me to consider to what the term "disputed matters" refers in s10(11). The root of every subsection in section 10 is s10(1) (as one might expect). That refers to a dispute between a building owner and adjoining owner. (I accept that that is a reference to a singular dispute, but in the context of this exercise, that is a *de minimis* observation). Sub-paragraphs (2) – (9) all refer back by inference to sub-s(1). Sub-paragraph (10) then reinforces that reference to again referring to disputes between the two owners. It is inconceivable in my judgment, looking at s10 as a whole, that Parliament could have intended to limit sub-s(11) to disputes between surveyors alone. Not only is there no basis for that conclusion on the plain face of the words, but there is no rule of statutory interpretation which would lead me to that conclusion, and the context suggests strongly the opposite.

61. In addition, the editors of both the RICS guidance and the Pyramus and Thisbe Club Guidance seem to concur.

62. Mr Frampton's reference to *Lea Valley* is inapposite for the purposes for which it is advanced: the very short passage cited is the most general of introductions to the scheme of the Act in a very different context. I cannot imagine that HHJ Bailey intended it as a comprehensive reference to the operation of s10(11).

63. Whilst on the statutory framework, it is convenient to jump a little to Mr Frampton's objection to the Appellant's case on the basis that the Respondents can rely on s10(10), namely the ability of any two of the three surveyors to "*settle by award any matter*". I take into account the footnote referred to above, and HHJ Bailey's remarks in *Mills v Savage*, but in my judgment the generalised proposition advanced by Mr Frampton that

the two surveyors can nevertheless agree an award despite a reference by an owner to the third surveyor, cannot be correct. I say so for two principle reasons.

64. First, it would drive a coach and horses through the owners' ability to refer a matter to the third surveyor in circumstances where they were in genuine dispute with the parties' surveyors (as here) if, in the meantime, those two same surveyors could simply issue an award regardless. Secondly, the simple juxtaposition of the two subsections leads me inexorably to the conclusion that sub-s(10) only applies unless and until sub-s(11) is invoked. Once sub-s(11) is invoked, the third surveyor is the sole arbiter on the "matter in dispute", and not any two of the three. It would be irrational to give the owners the ability to refer a disputed matter to the third surveyor, and in the next sub-section to render that ability toothless in circumstances where the owner is in disagreement with their own party-appointed surveyor and that surveyor being in agreement with the other party's appointed surveyor.

65. That does leave one question in practice: what if the two surveyors had been in dispute and therefore invoked sub-s(10), but subsequently resolved their differences? Would my conclusions above prevent the dispute being resolved without recourse to the third surveyor (thereby wasting time and resources)? The answer is clear: the matter would be settled by consensus, and almost certainly in writing, whether it be by the third surveyor condoning the newly formed agreement or the parties agreeing to revoke the reference to the third surveyor. Either way, it could not possibly lie in the mouth of a party to subsequently claim a lack of jurisdiction.

Was s10(11) In Fact Invoked?

66. I turn, then, to whether the Appellant successfully invoked s10(11) and, if so, what effect that had on the jurisdiction of the party-surveyors.

67. Mr Frampton's argument at ¶21.2 of his written skeleton that the email dated 29 March 2019 was not limited to matters which could reasonably be said to have been in dispute in my judgment applies too legalistic a test, and fails to take into account (i) the fact that it was intended that the owners may well be lay-people of little experience of such matters, and (ii) the context of the communications between the all three surveyors up

until that time. It was clear that the Appellant, through his wife, was questioning whether the notices were valid on the basis that the boundary wall was not a party wall within the Act. The point was drilled home by the sentence, "*The wall in question is not a party fence wall but a boundary wall in our possession*".

68. Similarly, if the objection was that the way the reference to the third surveyor was phrased as "*We would like you to assist with this problem*" was unclear, it was, if it were necessary, clarified by the reference to s10(11) later in the email.

Mr Frampton in his written submissions argued that Mrs Rega's email sought to replace the two party-surveyors with Mr Smart "entirely" does not bear scrutiny. As stated, it is clear that there was a discrete basis upon which the Appellant was raising a dispute and, furthermore, the request to the party-appointed surveyors not to issue an award "*at this present time*", clearly implies that they will be called upon to issue an award once the dispute has been resolved.

Conclusion on s10(11) Reference

69. I therefore find that the Appellant was able to, and had, successfully invoked the reference to Mr Smart by the email of 29 March 2019 timed at 9:07. The matter in dispute was whether the boundary wall was a party wall under the Act. Subject to what follows, therefore, it was Mr Smart who had jurisdiction to resolve the matter in dispute.

Estoppel/Waiver/Rescission of Request

70. Mr Frampton put his case in two ways: (i) Mrs Rega's conduct subsequent to Mr Smart's email amounted to a rescission of any referral to Mr Smart, and (ii) that the Appellant and his wife's conduct, together with Mr Tombleson's conduct in issuing the award was such that all three were representing that the two surveyors had jurisdiction, which was relied upon by Mr Woolford in proceeding to finalise and issue the Award.

71. There is a distinction to be drawn between the acts of the Appellant and Mrs Rega on the one hand, and Mr Tombleson on the other (whether taken in combination or not).

72. The issues of waiver and estoppel were raised and explored in the case of *Manu v Euroview Estates Ltd.* [2008] 1 EGLR a case in the Central London County Court heard by HHJ Marshall QC. As such it is, of course, of persuasive authority only, but nevertheless it was cited to me and I should deal with it. First, it was acknowledged by HHJ Marshall that a party-appointed surveyor is not normally to be regarded as the agent of the appointing party, although it was held that there could be exceptions. HHJ Marshall held @ ¶113 of her judgment:-

> *[113] With regard to the question of Mr Lai's authority, I fully accept that, in the context of deciding on and negotiating an appropriate award, a party wall surveyor is acting as an independent expert and not as the agent for his appointing party. However, in my judgment, his functions are mixed. Given that he will also conduct the procedural aspects of the party wall procedure, he does there, in my judgment, act as the agent of his appointing owner in the sense that the appointing owner effectively authorises him to take procedural decisions that will bind the appointing owner in that context. In my judgment, therefore, a party wall surveyor can by his acts or conduct in appropriate circumstances waive a defect in a notice or create an estoppel that would bind his appointing owner by accepting to act as though the notice were valid, notwithstanding.*

73. In that case, there was a defective, and therefore invalid, notice served on a party, but the party's surveyor did not raise the issue until after five months of extensive negotiations had taken place. The other surveyor decided that the first surveyor had refused to act "effectively" under s10(6) and proceeded to make an *ex parte* award. The award was appealed on various grounds, but it was also argued on appeal that the first surveyor had waived the defect by continuing to make enquiries and negotiations for so long without raising it; alternatively that his appointing party was estopped (via the surveyor) from raising the deficiency as a result of his failure to raise the defect earlier.

74. The headnote reads:-

> *A party wall surveyor can waive a defect in a notice by accepting to act as if the notice were valid. L had waived the invalidity of part of the August 2005 notice, or estopped himself from asserting that invalidity, by failing to raise the matter immediately and waiting five months to deploy the matter as a negotiating tool. That was not conduct that should be condoned in the context of operating party wall procedures, given the purpose*

of the Act and the normal conduct of professionals operating its provisions. Failure to object at the earliest practicable moment could and would reasonably be interpreted by the other party as an election to proceed under the notice in any event.

75. The full reasoning of HHJ Marshall QC is set out in ¶¶114-116. There were three reasons for finding as she did. First, in the context of what is intended to be a speedy resolution process, any point on defects in notices must be taken promptly, as soon as they are apparent. Second the surveyor's delay had been deliberate, and the timing of the defect being raised was calculated to exert maximum pressure in negotiations, which behaviour was not to be condoned and which amounted to unacceptable conduct by professionals in a dispute resolution context. Third was the surveyor's conduct in seeking out the information missing from the notice and then proceeding to negotiate, was so similar to a professional who *in fact* was waiving the defect, that the server of the defective notice was entitled to infer that there was such a waiver unless it was made expressly clear that no such waiver was being made.

76. HHJ Marshall QC concluded:-

[117] In my judgment, therefore, in the context of the purpose of the 1996 Act and the normal conduct of professionals operating the Act, Mr Lai's conduct, in studiously avoiding stating that he was going to take a point on the validity of the notice, amounted to a waiver of the deficiencies of this notice. Alternatively, it created an estoppel against Mr Manu subsequently seeking to assert the invalidity of the notice, when he eventually did (through Mr Lai).

77. The facts of each case need only to be stated to see the stark contrast between them.

78. Here, the surveyors issued the Award a mere 3 days after Mrs Rega's email referring the matter to Mr Smart under s10(11). During that period, Mrs Rega and the Appellant maintained their position that the wall was theirs: throughout 29 March (see the Appellant's email timed at 17:54). The emails regarding enclosure costs on 30 March were predicated on the wall belonging to the Appellant. The emails attaching the photographs were arguing that the wall belonged to the Appellant. Mrs Rega's email of 31 March 2019 referring to trespass and criminal damage maintained that position.

79. The Appellant's email which states "*If you are standing by what you state in regards to the wall...*" was one questioning the basis for the wall being a party wall, and it is not surprising that the Appellant was nevertheless protecting his position as regards the costs. I take that as being on a 'without prejudice to my primary position' type of comment. I take the same view of Mrs Rega's email of 30 March at 08:36. If there had been any doubt about the Appellant and his wife's position, that was indisputably clarified by Mrs Rega's email of 31 March at 18:55 making reference to trespass and criminal damage.

80. In my judgment, there can be no question that the Appellant and his wife's position that the wall was theirs was maintained throughout. They could not themselves be said to have waived their objection to the basis of the Award, nor could they be said to have rescinded the referral to Mr Smart. The Appellant and his wife were two lay-people faced with the closed ranks of three professionals about whose choice of conduct they could do nothing except assert their perceived rights. They had attempted to refer the matter to Mr Smart who had refused to intervene (see below) and so they were left with making protests to the two surveyors, who did not engage meaningfully with them, except on the basis that the award was going to be made come what may. It is not surprising that they engaged with them on that basis to at least ensure that whatever award was made was to their best advantage. That is not to be read as abandoning their primary objection to that award.

81. In light of the same facts, there is no basis to argue for an estoppel to have arisen by the Appellant's conduct; nor was there any real detrimental reliance on any such conduct: the issuing of an already-drafted award is simply insufficient in my judgment.

82. Turning to *Mr Tombleson's* actions relied on by the Respondents: namely his warning to the Appellant that the Award would be issued out three days later, and then signing the Award. It is the case that Mr Tombleson so acted in the face of the Appellant's and Mrs Rega's clear and repeated objections to its basis, namely the status of the wall as a party wall. All emails appear to have been copied to Mr Woolford. If the Appellant's position remained clear, as I have found it to have been, it is fanciful to suggest that Mr Tombleson's actions could possibly amount to representations made to Mr Woolford that the Appellant considered the referral to Mr Smart as rescinded or that he had

conceded that the wall was a party wall. Furthermore, in those circumstances, there is no possible basis for a finding that Mr Tombleson was acting as the Appellant's agent in that regard. He would have considered himself to be acting, and was purporting to act (I am not suggesting that he was not) in his capacity as an independent surveyor. In fact, he said so in terms: see his email of 29 March 17:04, *viz*, "*I fully appreciate this is not what you want to hear, but I have my duty to follow in accordance with the Act*".

83. I therefore conclude that there is no basis for finding that the Appellant's invocation of s10(11) was rescinded, or that he waived his ability to challenge the jurisdiction of the "tribunal" of the two party-surveyors, or that he is estopped from denying that jurisdiction. The preponderance of authority is that a party wall surveyor is not an agent of the appointing owner. It has been accepted at County Court level that there can be exceptional circumstances where that general position may not apply. I do not seek to disagree with the reasoning of HHJ Marshall QC in that case. But this case is a far cry from *Manu*.

84. I therefore find that Appellant made a valid referral of the disputed matter of the ownership of the boundary wall to Mr Smart pursuant to s10(11) of the Act, which referral was not rescinded by the Appellant's, his wife's and/or Mr Tombleson's subsequent acts or omissions; nor are they estopped from relying on that referral in challenging the jurisdiction of the surveyors making the Award.

Refusal?

85. The alternative way that the Appellant claims that the two party-appointed surveyors had no jurisdiction was on the basis that Mr Smart had refused to act for the purposes of s10(9) of the Act, rendering it incumbent upon the two surveyors to forthwith appoint a new third surveyor, and that they could not proceed until that had been done. The Appellant relies on Mr Smart's reply in his email of 29 March 2019 timed at 10:31.

86. I accept that there is a distinction between a refusal under s10(9)(a) and a neglect to act under s10(9)(b). The Appellant relies on a "refusal", probably not least because less than 10 days had expired before the Award was issued, and so I shall not consider whether Mr Smart had "neglected to act".

87. I also acknowledge the fact that the refusal under s10(9) has to be more than an "effective" refusal as referred to elsewhere in the section, e.g. s10(6).

88. In my judgment, there is a distinction in the engagement of the surveyor in *Patel* (*supra*) and Mr Smart's response in his email. In *Patel*, the surveyor clearly accepted that he had been asked to take certain steps and acknowledged the other surveyor's right to do so; more importantly, he refused to act, and he gave a reasoned response as to why he had refused to act, and then made clear his proposal for the resolution of the dispute. A careful reading of Mr Smart's response reveals, in my judgment, that he did indeed decline to act in accordance with the referral made by Mrs Rega on behalf of the Appellant. It appears in my judgment that he may well have been under the misapprehension that his engagement to decide matters in dispute could only come from a party-appointed surveyor; or at the very least that it required a "dispute" between the surveyors to have been declared, so to speak, before an owner could require the third party surveyor to act under s10(11). On the basis of my judgment above, that was a misunderstanding of the law.

89. There are three telling aspects to the email. First, the advice that any evidence in support of the Appellant's proposition should be referred to Mr Tombleson. Secondly, the reference to his involvement to date (notably only with the surveyors) followed by the phrase "*If I am asked to consider the matters in dispute*" (a) rather bypasses the express request in Mrs Rega's email and (b) suggests that his interest is only in what the surveyors are saying. This conclusion is bolstered when combined with the third aspect arising from the sentence "*I trust the appointed Surveyors ...*": the clear implication, in my judgment, is that Mr Smart is looking to the surveyors to sort things out, and it was only if they could not that he would get involved. It seems that he would expect one of the surveyors to make the referral if one was going to be made.

90. Further evidence of Mr Smart's email being a refusal to engage is the bald statement therein that: "*Either the building owner or the adjoining owner can appeal said award if they consider it has been made incorrectly*". Not only does this derogate from the principle of the Act as intending to provide a scheme for dispute resolution without recourse to the law (see *Reeves v Blake* [2009] EWCA Civ 611), it is a clear signal that

Mr Smart did not intend to act to resolve the dispute raised by Mrs Rega: an owner's recourse was by way of an appeal, not by a reference to him.

91. In my judgment Mr Smart refused to act on Mrs Rega's email sent specifically pursuant to s10(11) of the Act and which was one which "called upon" the third surveyor to determine the matters in dispute between the parties, namely whether the boundary wall was a party wall within the Act.

92. I do not accept Mr Frampton's distinction that a misunderstanding cannot amount to a refusal for the purposes of s10(9)(a). The refusal may have *arisen* from a misunderstanding, but that does not prevent it from being a refusal to act in accordance with Mrs Rega's request.

Conclusion

93. I therefore find that the Appellant made a valid referral of the disputed matter of the ownership of the boundary wall to Mr Smart pursuant to s10(11) of the Act, which referral was not rescinded by the Appellant's, his wife's and/or Mr Tombleson's subsequent acts or omissions.

94. The 1939 Act set up a distinct and quasi-judicial regime (see *Gyle Thompson v Wall Street Properties Ltd* [1974] 1 All ER 295). The Party Wall Etc. Act replaces and was intended for these purposes to reproduce such a system. The consequences of the foregoing findings can be seen from two perspectives: Mr Smart was under an obligation to issue an award under s10(11) (limited to the dispute raised by the Appellant), and so (i) the Appellant had the right to expect a determination from Mr Smart and (ii) until such time as he had done so, the party-surveyors had no jurisdiction and were not entitled to rely on s10(10) to combine to issue their own award. On either basis the Award was made without jurisdiction.

95. I find further that Mr Smart refused to act on that referral, and that in those circumstances the two party-surveyors were under a duty to appoint a new third surveyor. Until such time as they had done, they had no jurisdiction to issue the Award.

96. Furthermore, the Appellant is not estopped either from relying on the s10(11) referral or Mr Smart's refusal to act in this appeal, nor the consequences which follow as regards jurisdiction of the tribunal which made the Award. Nor did he waive the right to do so. And neither did he rescind the s10(11) referral by his/his wife's conduct, even when combined with that of Mr Tombleson.

97. As a result, the Award was made without jurisdiction by Mr Tombleson and Mr Woolford, and I so declare. Accordingly, the Award is a nullity and it is hereby set aside.

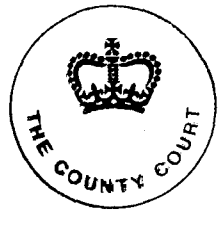
98. That is sufficient to dispose of the appeal, and in the interests of brevity and efficient use of judicial time, I will not deal with the other preliminary issues. I mean no disrespect to Counsel in not doing so, and I thank them for their industry and assistance in presenting their arguments. If this matter is to go any further, I do not need to make any findings of fact in relation to the other preliminary issues, and so in those circumstances the appeal tribunal can, if necessary, deal with those matters itself.

99. Finally, I have, of course, made no findings as to the correctness or otherwise of the decision that Mr Tombleson and Mr Woolford came to i.e. that the wall <u>was</u> a party wall under the Act, and nothing in this judgment should be read as indicating anything at all in that regard.

100. I would be grateful if Counsel could agree a form of an Order, any consequential directions and, if possible, the position on costs. If any of these matters require further determination by the Court, please let my diary manager know by email, including whether a hearing (probably by telephone) is required or whether written submissions will suffice.

HHJ Berkley

20 April 2020



5-5-20.