Claim Nos. A20CL126 / A20CL070

IN THE COUNTY COURT AT CENTRAL LONDON
TECHNOLOGY AND CONSTRUCTION COURT

Thomas More Building
Royal Courts of Justice
The Strand WC2A 2LL

Date: Thursday, 23rd July 2015

Before:

HIS HONOUR JUDGE BAILEY

- -

Between:

RUSSELL GRAY

Claimant

- and -

ELITE TOWN MANAGEMENT LIMITED

Defendant

- -
- -

MR NICK ISAAC (instructed by **Messrs Morrisons Solicitors LLP)** appeared on behalf of the **Appellant/Claimant.**

MR CRISPIN WINSER (instructed by **Messrs Child & Child)** appeared for the **Respondent/Defendant.**

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Approved Judgment

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HIS HONOUR JUDGE BAILEY :

1. This is the hearing of both a party wall award appeal and a Part 7 claim originally for various forms of relief but now restricted to damages. Mr Russell Gray is both appellant and claimant. Elite Town Management Limited ("Elite Town"), the respondent and defendant, is a company incorporated under the law of the British Virgin Islands. The director and shareholder is Mr Nick Hill. Mr Gray is the owner of 7 Ennismore Mews, London SW7 1AP, Elite Town the owner of the adjoining property, 9 Ennismore Mews.

Background

2. Mr Gray is far more engaged in both the process and the proposed construction detail of the works proposed by Elite Town as building owner than is the usual adjoining owner. Building, both construction and restoration, is his work. As he explains in his witness statement:

> "(7) For the past 30 years I have been involved in restoration and refurbishment of, mostly non-residential, buildings of historic or architectural interest. I have worked exclusively on buildings either listed or where conservation is a guiding principle in refurbishment. High levels of craftsmanship are invariably required and I work closely with craftsmen in all traditional building methods.
>
> (8) This experience has of course informed my approach to repairs and interventions in old buildings. For me, as well as for many others with involvement with historic buildings there are certain "articles of faith" to be abided by. These include
>
> > (a) Interventions of buildings worthy of preservation should be kept to a minimum for the purpose intended and should be as reversible as possible.
> >
> > (b) All repairs and interventions should be carried out either in original materials or in materials as close in physical properties to the original as possible.
>
> (9) I have spent large amounts of time and money rectifying damage to buildings resulting from insensitive interventions thought appropriate by earlier generations but now recognised as highly insignificant."

3. Mr Gray has firm views. He says, at the start of his witness statement:

> "(1) I have lived in Ennismore Mews on-and-off for the past 32 years. I own both No. 5 and No. 7 Ennismore Mews, the former having been acquired by one side of my family in the early 1980s and the latter by the other side in the late 1980s. The properties therefore have a significance to me and my

> family that goes beyond being just a transient place to live or an investment.
>
> (2) In recent years, the Mews has seen a steady transition from owner occupiers to absent offshore corporate investors or developers looking to sell to such entities. This transition has led to the near universal construction of basements in those houses that don't already have them with every change of ownership. Overseas investors are not affected by their investments being uninhabitable or by the disruption of the building works involved and have no relationship with their neighbours to consider. The development profit potential from the building of a basement is therefore the decisive consideration.
>
> (3) My properties, taken together, have now suffered damage from such basement construction on four separate occasions and from three separate developments."

4. As for the work which Mr Gray himself has carried out in constructing a basement at No. 7, he described it in his own particular way when making submissions to Mr Crowley, then the third surveyor, when Mr Crowley was considering an award under the 1996 Act. On 22nd August 2014, Mr Gray made submissions to Mr Crowley. He described the party wall history in this way:

> "In 2001, long before the recent rush to build basements by virtually every owner in Ennismore Mews, I constructed a basement in No. 7. I did not use the services of what I now call the one-stop-basement-shops whereby a specialist company takes complete control of the project, as is almost universal now. Instead I instructed engineers, architects, a party wall surveyor, and subsequently piling and general contractors independently. Following research and evaluation of the risks of movement of the party wall I considered that the inevitable movement associated with underpinning constituted an unacceptable risk in the particular circumstances. Consequently, I adopted a more costly but less risky construction method, namely contiguous piling. This involved no undermining of the foundations of the party wall but, against that, it entailed a loss of floor space in the basement of approximately 500mm around the perimeter.'

The construction method of contiguous piling is apparent from the 2001 party wall award, which Mr Gray obtained, which is in the trial bundle.

5. I have considerable sympathy with Mr Gray with his approach, keeping the basement construction independent of the party wall so as to avoid the need for underpinning and reducing the impact on the overall structure of underground movement. Two unfortunate circumstances, however, have conspired to spoil his efforts and expense.

6. First, Ennismore Mews, unusually for London, does not have not a uniform clay subsoil. Ennismore Mews is shown on the Westminster Geological Survey as being an area of transition from clay to gravel subsoil. This gives rise to variations well described by Mr Gray in his witness statement at paragraph 19. He says:

> "From my own experience, during the piling operations at No. 7, I recall surprising variation in subsoil in the boring operations across the very short distances, with different spoil produced between piles only a few metres from each other. This is consistent with the Westminster map indicating Ennismore Mews as being in an area of transition from clay to gravel subsoil."

As soon as there are gravel deposits over any significant part of the subsoil, the point of protection against heave or other differential movement by not having underpinning is diminished.

7. Indeed, it was the evidence of Mr Clark, the engineer who gave expert evidence for Mr Gray, that there was no real advantage in the piling approach at 7 Ennismore Mews. There is a likelihood that, in the individual circumstances of Ennismore Mews, there might just as well have been underpinning.

8. The second unfortunate circumstance is that the piling operation itself involves technical difficulty. In carrying out the piling operation in Mr Gray's basement, the contractor cut away the concrete footing to the party wall on the 7 Ennismore Mews side. That is not in accordance with the award which was obtained to authorise such works. Such cutting away of the concrete footing, of course, poses no difficulty while the piles are in place. There is ample lateral support. It does, however, mean that the piles cannot be readily removed. Their removal will necessitate the insertion of alternative satisfactory support.

9. From Mr Gray's perspective, of course, there is a third unfortunate circumstance, namely the desire of Mr Hill to construct a basement and to do so with underpinning rather than piling or any other design approach which does not maximise the available space. 9 Ennismore Mews is after all a mews house and, however desirable given its location, space is at a premium. Now that underpinning is inevitable, Mr Gray too wishes to have a larger basement. That is perfectly understandable. Mr Hill, unfortunately, has to accept that the presence of Mr Gray's piles as inserted, with some deviating well away from the vertical and potentially encroaching on the space underneath the party wall, inconsistent with the scheme for which party wall authorisation was given, results in his proposed basement being some 250mm less wide than it would have been had the piling operation next door been carried out as intended.

10. Elite Town acquired 9 Ennismore Mews in 2006. After its purchase Mr and Mrs Hill lived there a few months each year, renting the property out while they were away. It was in the summer of 2011 that Mr and Mrs Hill decided to construct a basement in order to enlarge the property. They followed a standard course in choosing a specialist basement construction company for both design and construction. A party wall notice was served on 23 February 2012.

11. As for chronology of events which then followed, it is necessary only to read Mr Gray's witness statement to appreciate how difficult life became for all concerned. Mr Gray had suffered bad experiences on three separate previous occasions. He had a natural suspicion of party wall surveyors. His standards may well have been rather higher than those with which London surveyors are used to dealing.

12. Mr Gray's attempts to persuade the surveyors to proceed to a scheme which mirrored his basement at No. 7 were, unsurprisingly, unsuccessful. His fears were confirmed when an award was published which included reinforced underpinning, 'special foundations' within the meaning of the 1996 Act for which his consent had not been sought and, he might be justified in believing, had not been sought because it was appreciated that, if it were explained to him that the Act provided that his consent was required for such foundations, he would never agree to them. Mr Gray considers his party wall surveyor to have acted evasively and in collusion with others to impose a special foundation solution on him.

13. There were recriminations, unsurprisingly if, as Mr Gray says, the party wall surveyors attempted to persuade him that a mass concrete pad under a reinforced concrete structure meant that these were not special foundations for the purposes of the Act. It was put to him that the reinforced concrete structure was merely "a raising of the party wall downwards". The detail of the events as they unfolded present an unhappy tale, which, happily, need not be recounted in this judgment. The salient facts are the following.

14. The first award was published on 21 August 2012. That award purported to authorise underpinning with special foundations. It was not immediately known to Mr Gray that he was in a position to refuse his consent to special foundations. Works of excavation under the first award were commenced. It became clear during October and November 2012from the trial holes and the commencement of the works of excavation that the piles which had been inserted at No. 7 Ennismore Mews, stood to interfere with the proposed construction. There was then discussion with Van Elle, the contractors responsible for the piling, without any conclusion being reached.

15. During December 2012 it became apparent to the party wall surveyors that the scheme authorised under the first award could not proceed as intended because of the presence of Mr Gray's piles and the fact that as the scheme involved special foundations it required Mr Gray's express consent, which had not been obtained.

16. On 15 January 2013 an addendum award was published in an effort to overcome the difficulties being encountered during the excavation of the works authorised by the first award and the discovery that the pile foundations installed at No. 7 had been set eccentrically below the party wall, as shown in a drawing attached to the award. The award purported to authorise the building owner to carry out an amended scheme involving excavation for the formation of a concrete base with shuttering necessary to form a vertical wall formed from a reinforced concrete stem.

17. That award was appealed by Mr Gray on the basis that it comprised a scheme which included special foundations. It was plain that the appeal was well founded and, on 27 June 2013, the parties agreed a consent order declaring the addendum award "*ultra vires* and a nullity".

18. Thereafter the surveyors and engineers involved worked on a scheme involving a simple mass concrete underpin. This proposal was resisted by Mr Gray, who still harboured hopes that the basement construction at No. 9 Ennismore Mews would involve a scheme similar to that which he had adopted for his basement construction. Various meetings took place between the professionals involved during the latter part of 2013 and further party wall notices were served by Elite Town on Mr Gray on 20 November 2013. The proposed works were works of excavation within 3m of 7 Ennismore Mews to enable underpinning of the party wall with a mass fill concrete foundation, together with works to the projecting footings and the concrete piles as may be necessary.

19. Mr Graham North was appointed by Elite Town as the building owner party wall surveyor in November 2013. On 20 December 2013 Mr Gray appointed as his party wall surveyor Miss Nithya Murthy, of whom more later. There was then some difficulty in appointing a third surveyor.

20. On 3 February 2014, in a lengthy letter apparently written by Nithya Murthy but evidently with considerable input from Mr Gray, the suggestion was made that the third surveyor would more profitably be a specialised lawyer rather than a building surveyor. The name of Mr Matthew Hearsum, undoubtedly a specialist in this field who has published in this area, was put forward.

21. Additionally Mr Gray, through Miss Murthy, now accepting that there was a right under the Party Wall Act for a building owner to underpin, and thereby appreciating his attempts to secure on the part of Elite Town a scheme similar to his own would end in failure, put forward a mass concrete scheme. This we now know as scheme D or sketch D. This refers of one of six schemes contained in a plan served with the notice of appeal.

22. The appointment of Mr Hearsum was not one which found favour with the building owner. Recourse had to the local authority, or rather to Westminster which was wrongly thought to be the local authority, to appoint a professionally qualified surveyor as third surveyor. Mr Lawrence Hurst was suggested, but his appointment could not proceed because there was suggested by Mr Gray to be a conflict of interest in his acting. Mr John Hughes was then appointed, but he then resigned, and it was not until 28 April 2014 that Mr James Crowley was successfully appointed as the third surveyor.

23. Meanwhile, Mr Gray was concerned that cracking had appeared to 7 Ennismore Mews, cracking for which he held the excavation at No. 9 Ennismore Mews responsible. There was a series of letters passing between the parties as to this cracking and the need and opportunity for the building owner to inspect it. However, Mr Gray proceeded to remedy the cracking and, on 18 June 2014, he issued the claim form and particulars of claim in the Part 7 action before me. The relief sought included a number of matters other than the claim for damages consequent upon the cracking, but that is the only claim live before me, the claim for injunctive relief under the Part 7 claim having been abandoned.

24. On 18 July 2014 Mr Crowley published an award. Mr Corwley decided that Elite Town, as building owner, had not provided sufficient information to enable him to

make an award as proposed by Elite Town, the matter of concern being the extent to which the piles installed at 7 Ennismore Mews projected beneath the party wall.

25. Following a further communication on 3 October 2014, Mr Crowley felt able to publish his award. This is what we are calling the "third award", which is based essentially on drawings and a mass underpin scheme prepared by Packman Lucas. In publishing his award, Mr Crowley authorised the works of underpinning proposed by Packman Lucas and expresses the opinion that the proposals will not result in unnecessary inconvenience to the adjoining owner. He also made other decisions to which I will need to come in due course. I am conscious that in this short chronology I have not done anything approaching justice to the interplay between the parties in the course of the correspondence. However I consider that it is the better course not to deal with that correspondence in anything more than the slightest of detail, which I have done.

26. I come, therefore, to the issues before me in these proceedings. Counsel have helpfully agreed a list of issues for the court's decision. I propose to consider each of those in turn.

27. I have already made reference to the appendix to the grounds of appeal, the helpful document which sets out on one sheet of paper six possible designs for the basement construction at No. 9 Ennismore Mews at the side adjacent to 7 Ennismore Mews. As to these designs:

Scheme A and B are those in respect of which the first award and the addendum award were made on 21 August 2012 and 15 January 2013 respectively.

Scheme C, dated 27 January 2014 as the date it was first available, forms the basis of Mr Crowley's award, the third award, in October 2014.

Scheme D is that which I have already referred to as being a scheme suggested by Miss Murthy/Mr Gray in February 2014.

Scheme E is a scheme which Mr Gray was advocating at a time when he was hoping that Mr Hill would agree to construct his basement in similar manner to the basement at 7 Ennismore Mews. This retains the subsoil up to the level of the base of the original footings.

Scheme F is a concrete box scheme in common use, at least in the recent past, and one suggested as appropriate for basement development by the Royal Borough of Kensington & Chelsea in their design data generally available to the public. It is a small point, but Ennismore Mews is situated is just within the boundary of the Royal Borough of Kensington & Chelsea. It is not within the City of Westminster.

28. In commenting on and dealing with the various issues I will refer to "the party wall surveyor". By such reference I intend, unless the context suggests otherwise, to refer to any one or more of the party wall surveyors, including the third surveyor, who is or are making an award. Section 10(10) of the Party Wall etc 1996 Act provides that an award may be made either by the agreed surveyor, that is the surveyor agreed by both parties under section 10(1)(a) or, as the case may be, the three surveyors as identified in section 10(1)(b) or any two of them, and section 10(11) provides for the third

surveyor to make an award by himself. By "party wall surveyor" I include all those possibilities, there not of course being an agreed surveyor.

Issue 1

29. The first issue arises in respect of the Part 7 claim, with the relief sought being a declaration that the party wall award of August 2012 is *ultra vires* and invalid. It is formulated in this way:

> "Whether the party wall award dated 21 August 2012:
> (a) purported to authorise special foundations without the consent of Mr Gray and (b) if this is the case, was the award was *ultra vires* or invalid in whole or in part."

30. This first award did purport to authorise special foundations. The award follows a standard format advocated by the Royal Institution of Chartered Surveyors and incorporates "the drawings and method statements listed on the Document Issue Register attached hereto" into the award. In the event, strictly, there are no drawings, only a method statement on the Document Issue Register. The method statement however has appended to it a series of architectural and engineering plans and a site investigation report.

31. The method statement is in sections. After an introduction, the sections are: project overview, site investigation, trial pit investigation, site preparation and engineering works, then a demolition and strip out and, at section 7, under the head "Underpinning", the statement proceeds to the excavation required for the underpinning. At 7.05, it states:

> "At the prescribed level form reinforced concrete foundation based as detailed on Structural Engineer's drawing."

At 7.06:

> "Upon completion of the concrete reinforced foundation prepare to raise in a downwards fashion the reinforced concrete party wall. Construct a temporary formwork shutter to allow the construction of reinforced concrete underpin base all in accordance with Engineer's details."

32. It is clear from this text and from the plan for structural underpinning 6111-A3-01 that the works include reinforced steel foundations. These are special foundations for the purposes of section 7(4) of the Party Wall Act. As Mr Gray as adjoining owner did not consent to those foundations, that part of the award must necessarily be invalid.

33. As to paragraph (b) of the declaration, the more difficult aspect of this issue is whether the inclusion of special foundations rendered the whole of the award invalid. The general question of validity of an entire award where part is invalid was considered by McCardle J in *Selby v Whitbread & Co* [1917] 1 KB 736, albeit in *obiter dicta*. At page 747, the learned judge, in dealing with the principal contentions of the parties, says this:

> "Fifthly: in view of my rulings as already stated, it is not necessary to deal at length with a further contention of the defendants, namely, that the award of January, 1916, is not severable, and that if any part thereof be void the whole award must be treated as bad. But I may say a few words on the point in the event of the case being taken to the Court of Appeal. In former days it was considered that an award void in part was void in toto. That doctrine has been modified, and I think the modern rule is that an award although void as to part may be good as to the remainder, provided the part which is bad can be separated with reasonable clearness from the part which is good: see the cases collected in *Russell on Arbitration* 9th ed., pp.216-218. If, however, the void part is inextricably connected with the other part, then the award will be void in toto: per Blackburn J in *Duke of Buccleuch v Metropolitan Board of Works* [(1878) LR 5 Exch 221 at 229]; and it is not seldom a matter of difficulty to sever the good from the bad: per Lord Denman in *Tomlin v Fordwich Corporation* [(1836) 5 Ad &El 147 at 152]. I think that the Court should approach an award with a desire to support rather than to destroy it. In the present case the award deals with the following distinct matters: (a) the pier to the flank wall; (b) the repairs to the roof; (c) the finishing of verges and bargeboards; (d) the placing on the parapet of a stone coping. In my opinion, heads (b), (c) and (d) are distinct from head (a). Even if head (a) be void, I think that heads (b), (c) and (d) are good and severable from (a)."

The learned judge then goes on to consider the question of costs as being a separate and distinct matter dealt with under the award.

34. The question here therefore is whether that part of the award which purports to authorise special foundations may be severed from the remainder of the award. Paragraph 2(a) of the award authorises excavation for temporary access and 2(b) excavation for the formation of the reinforced concrete slab and to make connections to the party wall. Paragraph 4 in standard form provides that:

> "If the building owner commences the works, the building owner shall (a) execute the whole of the works and to do so at the sole cost of the building owners."

35. It seems clear that even were it permissible to sever parts of the works when an award requires a building owner once he has commenced works to execute them all, there is a difficulty where the invalid part of the works involves the first section of the works of construction that fall to be executed. No underpinning is possible without first carrying out works of excavation. Can these two elements, the excavation and the underpinning, be severed?

36. The immediate difficulty is that the excavation is for temporary access and it would be surprising were that part of the award to be severed and remain valid when the works to be undertaken in those temporary works are invalid works. As a matter of fact the temporary access has remained in position, with props and other protective

measures, for some two or more years now while this dispute has taken its course. But, taking the award by itself, I consider that the excavation cannot be severed from the remainder of the award, certainly not from the underpinning for which the excavation is authorised. Even were subsequent works in theory severable from the reinforced underpinning, no useful purpose could possibly be served by such a severance. As a practical reality, the first award taken by itself is invalid in its entirety.

37. However, the first award does not stand alone. It was followed by a second, (an 'addendum' award), and the third award. The addendum award, made on 15 January 2013, was, as I have noted, appealed and rescinded by agreement. There remains, however, the third award, dated 3 October 2014.

38. This third award followed a reworking of the design. It is made with respect to proposals, drawings and method statement set out on the second page of the award, including the Cranbrook Basements Construction Phase Layouts, the Basement Engineering Method Statement, v3(c), dated 31 July 2014, the Packman Lucas drawing No. 5221/SK/-/01/C6, the Packman Lucas Mass Underpinning Supplemental dated January 2013, sheets 1 and 2, together with other drawings. The third award proceeds upon the basis that the works of excavation already undertaken were duly authorised. The third award does not expressly itself authorise those excavation works for this reason. To the maker of the third award it was unnecessary expressly to authorise the works of excavation in the award.

39. In my judgment, consideration of the validity of any party wall award must take into account any other award with which it forms an overall scheme for the building works. Party wall awards can take many forms and cover many different subjects. It is not unknown for a separate and distinct subject matter to be covered in more than one award, especially where this subject matter is the essential construction project being authorised under the 1996 Act. These awards will be interrelated, by which is meant that the scheme as a whole as authorised by the awards appears only by reference to all the relevant awards. Where this is the case, it is not only permissible but essential that all the interrelated awards are considered together.

40. In this case, the third award works depend on the excavation undertaken under the first award. The true answer to this issue, therefore, appears to me that the first award is valid to the extent that the words undertaken in pursuance of it are subsumed by, or by implication incorporated into, the third award.

41. I would note in passing that Mr Winser argues that, even if the award were invalid as a whole, no declaratory relief should be awarded. That point does not now arise. It is potentially difficult territory and I say no more about it.

Issues 2 and 3

42. Issues 2 and 3 can conveniently be taken together. Issue 2 is whether Elite Town's works to 9 Ennismore Mews caused the crack damage complained of at paragraph 18 of the Particulars of Claim and, if so, 3, what the proper/recoverable cost of repairing that damage is.

43. Paragraph 18 of the Particulars of Claim states:

> "During the course of the Defendant's works, or shortly thereafter, certain cracks appeared in the brickwork of the property at the junctions of the party wall and (1) the front and (2) the rear walls, those at the rear being the more pronounced."

Paragraph 20:

> "As a result of the matters referred to above, the Claimant has suffered the following loss and damage."

(a) is a repetition of the pleading that there was cracking and (b) that the cracking "necessitated the Claimant conducting remedial works at the Claimant's expense". The particulars of loss and damage are stated as £1,320, being the cost of repairs to the property occasioned by the works of repair. The claim is brought in common law, on the basis that the party wall award was invalid.

44. The defendant's stance is that, as the party wall award is valid. Therefore, it submits that the question of damage and the cost of repair should be referred to a party wall surveyor.

45. Given that the quantum of this claim is merely £1,320 and that this quantum itself is not disputed, considerations of proportionality arise in connection with this issue. The defendant has concerns as to how the matter has been presented and the fact that, as it claims, it was not afforded facilities to inspect before the crack was repaired.

46. The chronology to this issue reflects the bad state of the relationship between the parties. I was taken through the relevant correspondence where there are complaints as to the facilities afforded to inspection, whether it was in fact possible for inspection, and whether Mr Clark, the engineer who was due to inspect on behalf of the building owner, did in fact decline an invitation to inspect. As before, it is not necessary to consider in detail this, at times, acerbic correspondence.

47. The defendant, it seems to me, is correct. The matter should have been referred to the party wall surveyors, and the fact that the first award was thought to be invalid by Mr Gray is not a reason for not seeking a separate award. It is not obvious that asking for a second award on a completely different matter to that covered in the first award would in any way serve to validate the first award. Seeking an award from party wall surveyors is a much speedier and more convenient procedure than litigating. However, I ask whether the party wall surveyor should now be asked to make a separate award, as is urged upon by me by Mr Winser for Elite Town. This will involve time and expense, which can be avoided if the matter is dealt with now.

48. At the risk of being over-bold, and relying essentially on the photographs, it seems to me that as there was plainly some cracking (albeit minor) in the later photographs that is not present in the earlier, and as there is no obvious reason for the cracking other than the excavation works carried out at 9 Ennismore Mews, and as the cost of the repair is only £1,320 (I note in parenthesis the concern of the defendant that the work was carried out by a company associated with Mr Gray), the appropriate course for me to take is to find that the cracking was caused by the works and that the cost of the repair (the damage suffered by Mr Gray) was £1,320. I will therefore make an order that Elite Town pay Mr Gray this sum and, although I will hear counsel on the matter, strictly it might more conveniently be by amendment of the award currently under

appeal rather than by judgment on the Part 7 claim. The fact that I make an order for the payment of the £1,320 does not necessarily mean that costs will follow. I make the order as a judge acutely conscious of the disproportionate cost of dealing with this matter in any other way.

Issue 4

49. Issue 4 is whether section 7(1) of the Act operates as a proviso to the right to underpin granted by section 2(2)(a) thereof.

50. Section 2 of the Party Wall etc Act 1996 provides:

> "(1) This section applies where lands of different owners adjoin and at the line of junction the said lands are built on or a boundary wall, being a party fence wall or the external wall of a building, has been erected.
>
> (2) A building owner shall have the following rights—
>
> > (a) to underpin, thicken or raise a party structure, a party fence wall, or an external wall which belongs to the building owner and is built against a party structure or party fence wall …"

This section, therefore, creates rights in a building owner.

51. Section 7(1) of the 1996 Act is in the following terms:

> "A building owner shall not exercise any right conferred on him by this Act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier."

52. For what it is worth, it seems to me inappropriate to describe section 7(1) as operating as a proviso. It is better described (if description is required) as a 'qualification'. The right granted by section 2(2)(a) is not an unfettered right. It has to be exercised so as not to cause unnecessary inconvenience to an adjoining occupier. This leaves open the question of what constitutes "unnecessary inconvenience", which will be fact-sensitive in every case. It can safely be said that exercising the right at all by a building owner cannot amount to unnecessary inconvenience to the adjoining owner. The adjoining owner may not, under section 7(1), prohibit any work in furtherance of the right and render the building owner's right nugatory. It is noted in passing that section 7(1) applies to the building owner's *right* and not to his *works* or the *execution of work*.

Issue 5

53. Issue 5 is whether surveyors appointed under section 10(1) have a duty where various underpinning solutions exist, to adopt a solution which (a) causes least inconvenience

to the adjoining owner or (b) avoids unnecessary inconvenience to the adjoining owner.

54. The argument advanced by Mr Isaac for the appellant is the following. He submits that any scheme which causes more inconvenience to the adjoining owner than an alternative viable scheme must cause unnecessary inconvenience. The alternative scheme causes less inconvenience, it is a viable scheme and, accordingly, the proposed scheme must necessarily cause unnecessary inconvenience. Accordingly the qualification in section 7(1) to the exercise of the building owner's rights must be considered by the party wall surveyor when making an award and thus approving a scheme.

55. The natural consequence of section 7(1), "exercise any right in such manner or at such time as to cause unnecessary inconvenience", is the imposition of a duty on the party wall surveyor not to approve any scheme which causes more inconvenience than a viable alternative scheme. It is not an answer that the alternative scheme is more expensive than that proposed or might otherwise be unattractive to the building owner; for instance, that the alternative scheme leaves him with less useable space than his proposed scheme.

56. Mr Isaac developed his argument by considering what might be required of a party wall surveyor in compliance with this suggested duty. He raised as alternative possibilities that the duty of the party wall surveyor, in his consideration of the matter and in the making of his award, might

(1) be limited to the proposal put before him, the plans and specifications produced by the building owner and for which, we must assume, he has any necessary planning permission and building regulation consent;

(2) extend to any alternative proposal made by the adjoining owner which might be carried out with less inconvenience to the adjoining owner or occupier;

(3) extend to any obvious industry standard or local planning authority preferred solution which might be carried out with less inconvenience to the adjoining owner or occupier; or

(4) require him proactively to consider any alternative proposal which might be carried out with less inconvenience to the adjoining owner or occupier.

Mr Isaac submits that the duty of the party wall surveyor extends to (1), (2) and (3), but he accepts that it does not go so far as to include (4).

57. The relevance of this issue is that it forms an important plank in Mr Gray's argument that Elite Town should not be permitted to construct its basement under scheme C, as authorised in the third award. Rather, Elite Town must be told it may only go ahead with scheme D or F or an equivalent.

58. The concern here is not cost. Of more importance to Mr Hill is the fact that scheme F or an equivalent will result in the loss of about 1m in width of the basement, a loss of space which Mr and Mrs Hill are not prepared to countenance. Scheme F is a scheme which appears in the Royal Borough of Kensington & Chelsea literature as being one

which that local authority will accept and can fairly be said to be an industry standard. That is within Mr Isaac's suggested (3) above.

59. Mr Gray had proposed scheme E (and other similar schemes), but this at a time when he did not appreciate that there was a right to underpin under the 1996 Act. Mr Gray now appreciates that he cannot insist on Elite mirroring his piled construction set within the party wall. More as a matter of realism than anything else, Mr Gray does not pursue scheme E.

60. The right, the subject of the section 7(1) qualification, is the general right to underpin arising under section 2(2)(a). When an award is made, this general right to underpin is replaced with a specific right to underpin under section 10(12). This subsection provides:

> "An award may determine—
>
> (a) the right to execute any work;
>
> (b) the time and manner of executing any work; and
>
> (c) any other matter …"

61. The 1996 Act refers in different places to "rights" conferred by the Act and "work executed" under the Act. There will be cases where the distinction is of no relevance. In this context, Ramsey J in *Kaye v Lawrence* [2010] EWHC 2678 (TCC), when contrasting the provisions of section 7(1), a rights conferred provision, and section 7(2), a work executed provision, expressed the view that the use of different phrases within the Act did not lead to the conclusion that they were applying to different subject matter.

62. Here however, unlike the position in *Kaye v Lawrence*, there is a real distinction to be made. If a party wall surveyor has to consider the question of unnecessary inconvenience to the adjoining owner when determining the right of a building owner to underpin, he may arrive at a different result than if he determines the building owner's right to underpin without reference to the adjoining owner's convenience and only brings in a consideration of the adjoining owner's convenience when, having determined the right, he moves to determine the time and manner of executing the work. This distinction is of the essence to the Appellant's case.

63. Mr Gray argues that a consideration of his convenience should lead to the party wall surveyor rejecting scheme C and approving scheme F or similar. Mr Gray appreciates that if the surveyor determines the building owner's right to scheme C and then moves on to determine the time and manner of executing the work in scheme C and only at that stage considers measures to ensure that the work is executed so as to cause unnecessary inconvenience, Mr Gray has lost his case for scheme F.

64. Mr Isaac rejects the suggestion that the adjoining owner's convenience is a matter to be regarded only in respect of time and manner of execution of the work and not when the specific right (as I have termed it) is determined by the party wall surveyor in the

award. Mr Isaac suggests that it is wrong to separate the right from the time and manner of execution; and notes that section 7(1) qualifies the right not the execution. The effect of the qualification must, therefore, be felt on the right. The fact that section 10(12) apparently distinguishes between the determination of the right and the determination of the time and manner of execution should not be allowed to detract from what is suggested to be the overall policy of the Act, which Mr Isaac submits is to protect the adjoining owner against inconvenience from his neighbour's works so far as is consistent with the maintenance of the building owner's rights to carry out works in accordance with the provisions of the 1996 Act.

65. For Elite Town, Mr Winser concedes that a party wall surveyor undertaking a proper exercise of his functions would ordinarily consider a proper alternative proposal provided that it contains such necessary detail and, where relevant, engineering support as would permit a development to proceed, but he is reluctant to elevate this proper exercise of function to the status of a duty. It would mean that a party wall surveyor, in the discharge of his duty, might find himself taking on the role of a designer of the scheme the building owner is to put in place. Mr Winser argues that the party wall surveyor cannot be expected to take on the role of a designer. This would be more than any, or at least most, party wall surveyors would ever expect would be required of them. It is an unrealistic expectation of a party wall surveyor that he redesigns the building owner's scheme because he is able to detect an alternative viable scheme which would or might cause less inconvenience to the adjoining owner.

66. Furthermore, Mr Winser suggests that very serious liability considerations would arise in the event that there were defects in the design as put forward by the party wall surveyor in respect of which the award was made. The building owner would have a contractual relationship with his own design team and builders, but they would then find that they had to complete a design and or build to a design not their own. What would be the respective insurance provisions of the party wall surveyor and the building owner's design team? What duties would be owed to the building owner by the party wall surveyor? Would the party wall surveyor be able to limit his exposure to the claims arising in relation to its design and, given that no surveying or engineering qualifications are in fact required for a party wall surveyor under the Act, where would that place the admittedly rare beast, the party wall surveyor, who has no professional expertise and professional indemnity insurance?

67. I share Mr Winser's concerns. They were, if anything, understated. I would expect the surveyors' profession to be aghast if the courts imposed a duty such as that suggested by Mr Isaac upon them. Mr Isaac is a recognised expert in this field. In the enthusiasm of the moment, he may perhaps have been carried away.

68. What does fall to be considered, however, is whether a party wall surveyor should refuse to make an award in respect of a scheme where it appears to him that the work it involves will result in unnecessary inconvenience to the adjoining owner or any adjoining occupier.

69. As a matter of good practice, as Mr Winser accepts, a party wall surveyor may ordinarily be expected to consider with the designer of the proposed scheme any aspect of his scheme which is likely to give rise to any particular inconvenience to the

adjoining owner. That may even involve alternative schemes or, more likely, alternative aspects to part of the proposed scheme.

70. I do not, incidentally, see the need for Mr Winser's qualification that a party wall surveyor need only consider alternatives which are fully detailed and have any necessary engineering support. In the course of consideration between the party wall surveyor and the scheme designer, amendments may be made to the scheme to reduce inconvenience to adjoining owners and occupiers and these amendments may, in rare case, result in a rather different scheme emerging. Individual cases will give rise to differing considerations.

71. This is all good practice. To elevate this good practice to the status of legal duty is dangerous and, I suspect, unwarranted. It would, in any event, be a matter for the Court of Appeal. In my view there should be no such duty. The scheme of the Act is for both owners to have party wall surveyors, who are there to protect their respective owner's interest, consistent always with the quasi-judicial role they are undertaking. The third surveyor, where appropriate, holds the ring and a disappointed party can appeal to the County Court. There is no obvious place in the statutory scheme for the imposition of specific duties on party wall surveyors in relation to what may or may not be awarded.

72. In any event, this is a very unusual case. The unnecessary inconvenience complained of is not 'work execution' inconvenience, noise, dust, hours of work and so forth, it is 'legal right' inconvenience. Mr Gray's concern is that the effect of scheme C as authorised by the third award will be that his basement piling, intended always to be wholly constructed on his own land and forming no part of the party wall, will become part of the party wall structure. In consequence, if he wishes to carry out any work to the piling on the 9 Ennismore Mews' side of his basement he will have to seek an award under the 1996 Act.

73. Mr Gray is, of course, correct that the effect of scheme C, as authorised by the third award, will incorporate his basement piling into the party wall structure. On the face of it, having to seek an award under the 1996 Act to carry out any work to part of his piling is inconvenience and, indeed, is unnecessary inconvenience if a solution could be found where it would not be necessary to obtain an award. But if one looks beyond the theoretical inconvenience to the position in practice, a rather different picture emerges.

74. First and foremost, as a matter of fact, the execution of the works authorised by the 2001 award works resulted in the cutting away of the concrete footing, as shown on the Price & Myers' drawing SK1B. This was not meant to happen: see the drawing and plans attached to the 2001 works. The piles were supposed to be safely inboard of the footings, with a capping beam projecting over the concrete footings up to but not attached to the perimeter party wall. In the event, the works did not follow the plans. Mr Gray explained the difficulty of using a tracked piling rig in the space available. I do not doubt the technical difficulty. Neither would I be unduly critical of the operator who, hitting a hard spot, found his drilling, which he could not pull out of because the drilling and infilling was part of a single operation, going off course. It was this that gave rise to the so-called deviant piles. But difficulty in operation of the required equipment is no excuse. It is inherent in the operation undertaken. If there is

a known risk, as there was, of drilling going off course, due allowance for this risk should be made before the operation is commenced.

75. The result is that any new design, scheme F or some similar design, giving Mr Gray a full basement width with his piles removed, will require works to the footing to provide the lateral support lost when the concrete footing was removed to be replaced by the piles. Nothing is lost at the level of the footings by the piling provided it stays. However it is apparent that as soon as Mr Gray wants to remove his piles he will require an award or, as I will come to later, it may be the permission of Elite Town.

76. After consideration of the matter I cannot see that, as a matter of fact, Mr Gray suffers unnecessary legal inconvenience by his piling being incorporated into the party structure. He cannot extract his piles without an award as things stand at present, and it is eminently arguable that he cannot make material deviations from the 2001 authorised works without permission. Given his own attitude with regard to special foundations, an attitude based on misapprehension, as it seems to me, of the ground conditions, as explained by Mr Clark in the witness box, Mr Gray cannot expect ready acquiescence in any steps he might take with regard to his piling where there will be difficulty and expense experienced by Elite Town as adjoining occupier. To most surveyors and owners, the obvious answer to the present problem is the use of special foundations, but Mr Gray has made it clear that that is not an option, despite Mr Clark's observations as to his own experience of the presence of gravel deposits beneath 7 Ennismore Mews.

77. For completeness I record that Mr Winser argued that on the facts no alternative proposal was ever put to the party wall surveyor in this case. Scheme F was, of course, never put. As to scheme E, the argument can only be made good if by "alternative proposal" is meant a fully detailed proposal supported by engineering calculations. For what it is worth, Mr Gray's email of 9 October 2013, it seems to me, was quite sufficient to alert the party wall surveyor to the alternative proposal which Mr Gray wanted to make, a proposal which could not be proceeded with once Elite Town made it clear that, understandably, it wanted to exercise the right it had under section 2(2)(a) to underpin.

Issue 6

78. Issue 6 is whether, in the light of such duty as does exist, Mr Crowley was obliged to permit Mr Gray to put forward alternative underpinning solutions to that proposed by Elite Town.

79. This is not a live issue in light of my observations above. It may be noted that to the extent that Mr Gray did put forward an alternative solution, it may be seen that Mr Crowley did permit him to do so. This will be seen by consideration of Mr Gray's submissions that there should be no underpinning and Mr Crowley's award where he expressly finds that it is not considered that the proposal will result in unnecessary inconvenience to the adjoining occupier. I believe there is an extra "not" in Mr Crowley's award which needs to be removed, but his sense is clear.

Issue 7

80. Issue 7 is whether Mr Crowley should have authorised an alternative design and, if so, which design, on the basis that it would be less inconvenient to Mr Gray.

81. We are still very much on the same point. It is asserted that Mr Crowley should have authorised design F, not design C, because F would not allow the building owner to co-opt piles for his benefit. The point is made that, if C is implemented, Mr Gray would need an award even to trim his own piles on his side.

82. However in considering the issue of an alternative design a rather more substantial point arises, which I will describe as the "flooding issue".

83. The engineers instructed by both sides gave evidence, Mr Clark on behalf of the appellant and Mr Darby on behalf of the respondent. They gave evidence item by item in the witness box together; another example of the usefulness of the practice known as "hot-tubbing" in TCC matters.

84. With regard to this issue the important aspect of the engineering evidence is that they are now agreed that design C and, incidentally, for what it is worth design D, are viable but for one matter: flooding of one basement with the adjoining basement remaining dry. While both engineers agree that the schemes proposed under design C are structurally sound while both basements are dry, both agree that there is a risk of failure in the eventuality that one basement floods with water while the other remains dry. The difference between them, as one might expect, is not a matter of engineering calculation but whether, as a matter of engineering practice, the design needs to accommodate such an eventuality.

85. It is difficult to imagine circumstances in which the basement of either 7 or 9 Ennismore Mews will fill with water (and by "fill", I mean substantially if not completely fill – the engineers have not done precise calculation as to the point of failure) while the adjoining basement remains dry. There is, to take my absurd example, no indoor swimming pool in either property which might give way and suddenly fill the basement beneath with water while the adjoinin basements remain dry.

86. Mr Clark gave an example from his experience which we have called the "Chester Road example". It appears that there was here a property where, as he put it, a lorry standing on a tarmac road fell through the road where there was a burst water main, which resulted in substantial flooding to the immediately adjacent property. One assumes that what happened was that a burst water main had caused the sub-base to the tarmac road to wash away so that the road surface could no longer support the weight of a substantial vehicle. One must then assume that water built up in the void beneath the tarmac surface and that the weight of the lorry coming through that tarmac caused a sudden influx of water sufficient to fill the adjoining basement.

87. As Mr Isaac points out burst water mains are not an uncommon feature of life for the Londoner. Whether their frequency seems the more because the inconvenience they cause stays in the memory is a matter on which I cannot make further comment, but the accumulation of water in Chester Road and the inundation of the adjoining basement because of the presence of the lorry is certainly an unusual circumstance. I suggested to Mr Clark that it could be described as a "lightning strike risk", and he was disposed to agree.

88. In the ordinary course, a burst water main, while it results in a significant flood of water, does not accumulate in a great quantity so as to be in a position to inundate an adjoining basement. Ennismore Mews cannot be said to be a thoroughfare where no lorries ever come. Presumably the residents of Ennismore Mews have deliveries from time to time from lorries, although ti will not be often. Perhaps for these purposes it does not matter with what frequency there is a passage of a heavy vehicles along Ennismore Mews, a quiet Mews notwithstanding its adjacent position to the Cromwell Road, there will from time to time be heavy vehicles in the Mews.

89. The experts, as I have indicated, were in disagreement. Mr Darby was quite satisfied that inundation of water, as described, was not a matter which an ordinarily competent engineer would take into account. Mr Clark espoused the opposite view. He did, however, accept in cross-examination that there was a reasonable body of engineering opinion which would not agree with him. He could not say that a reasonable engineer could not take the opposing view.

90. It seems to me that it stretches matters too far to suggest that the party wall surveyor should refuse to approve the design because of the possible risks inherent in a really substantial inundation of water to one basement and not the other. There was, in the course of argument, consideration of the relevant heights at which the respective properties were tanked; the possibility of water flowing into one basement because the tanking was lower than its neighbour, but there is in fact no evidence that the levels of tanking do differ. Neither is there evidence as to the position of the water mains along Ennismore Mews. On the evidence before me I find that the risk of flooding is not one which should prevent the authorisation of the scheme authorised by the third award.

Issue 8

91. Issue 8 is whether, if Mr Crowley was right to authorise the design in the award, he should have concluded that this design caused loss and damage to the appellant, subject to compensation under section 7(2) of the Act (to be assessed).

92. This is, in reality, a non-issue. Mr Gray can still ask for his damages. It is not at all unusual for section 7(2) damages to be the subject of a separate award either with or without issues of expenses being determined. This was not taken further in argument.

Issue 9

93. Issue 9 is whether Mr Gray's stated intention to remove the piling on his side of the party wall (a) negates any claim to payment under section 11(11), or (b) has any other and, if so, what effect on the award.

94. In the course of argument we moved on from the stated issue to the more simple question of whether Mr Gray was entitled to compensation. Mr Crowley considered the issue of section 11(11) compensation in his award and he held that Mr Gray was not entitled to compensation under section 11(11) in relation to the proposed underpinning. The reason he gives is stated in one sentence:

> "It is considered that none of the works previously carried out by the adjoining owner are being used by the building owner."

95. Mr Winser accepts that the reason is erroneous, but he contends that the decision was correct. Mr Winser makes the point that while if Mr Gray had undertaken scheme C Elite Town would have to make a section 11(11) payment, here the position is "dramatically different." The piles will be structurally depended upon by Elite Town but not by choice. There is no benefit whatsoever for Elite Town in its dependence on the piles; indeed, it is suffering detriment because, as a result of the presence of the piles, there is a loss of basement space. Had the piles not been present, Elite Town could have used scheme D. In the circumstances, it would be wholly inappropriate for there to be a section 11(11) award.

96. I have sympathy with Mr Winser's submission, but it seems to me that the wording of section 11(11) does not permit the refusing of an award in circumstances such as Mr Winser has outlined. The subsection provides:

> "Where use is subsequently made by the adjoining owner of work carried out solely at the expense of the building owner the adjoining owner shall pay a due proportion of the expenses incurred by the building owner in carrying out that work …"

97. The fact that Elite Town has no option but to do so does not mean it is not making use of Mr Gray's work. The answer to the problem facing Elite Town in facing having to make payment to make use of these works, in my view, is in the statutory words, "pay a due proportion of the expenses". A due proportion, it seems to me, can, in appropriate circumstances, be nil.

98. As to the issue as stated, whether Mr Gray's stated intention to remove the piling (a) negates any claim to payment under section 11, the stated intention, it seems to me, may not negate the claim but is a separate reason why the due proportion then payable should be nil. As to (b), what effect it has on the award, this is a matter I will have to come to under issue 13.

Issue 10

99. Issue 10 is whether Mr Crowley was provided with information in relation to the quantum of Mr Gray's costs and, if so, what information.

100. Mr Crowley decided that:

> "Decision: The costs incurred by the Adjoining Owner in connection with this matter which are to be met by the Building Owner can only be determined upon receipt of a detailed breakdown of what is being sought.
>
> Reason: The Act clearly states under Section 10 that the reasonable costs incurred in making or obtaining the award should be paid by such parties as the surveyor or surveyors determine. To enable this to occur it firstly needs to be established what are the reasonable costs and no information in connection with this has been provided."

101. The appellant's contention is that these costs have indeed been provided. They are to be found in the invoices submitted by Miss Nithya Murthy, dated between December 2013 and December 2014, together with an invoice from the Hopps Partnership, which I assume is a live issue, in the sum of £3,500, Mr Hopp being the original party wall surveyor acting for the adjoining owner, invoice dated 2 August 2012. These appear at tab 8 of the bundle. The invoices submitted by Miss Murthy are broken down by reference to date, the matter on which she was engaged, the time spent and a charge calculated at the rate of £125 an hour.

102. As I see it this is perfectly adequate information and is good, if not better, in my experience, than many party wall surveyors are provided with for these purposes.

Issue 11

103. Issue 11: In any event, what costs should be awarded in relation to Mr Gray's costs to the date of the award? In particular, what was the reasonable quantum of costs in all the circumstances?

104. This is the real issue as to costs between the parties, not the issue of provision of information. To be more specific, the matter of contention is Mr Gray's use of Miss Nithya Murthy as his party wall surveyor.

105. In this regard, Mr Hill, in his witness statement, said this:

> "49. On 21 December 2013, the last available day to do so, Russell Gray appointed Nithya Murthy to be his surveyor. Nithya Murthy is not a surveyor but a trainee architect. She appears not to have a professional practice of any description and gives her address as BVAG House, a property owned by Russell Gray. I understand from Graham North that, in general, Nithya Murthy declines to make any comments in person and always requests that everything is put in writing. It is my view that Nithya Murthy is no more than a mouthpiece for Russell Gray and her writing style very strongly suggests that Russell Gray writes much, if not all, of Nithya Murthy's correspondence."

106. Mr Gray deals with his appointment of Miss Nithya Murthy, starting at paragraph 65 of his statement. Having covered the new party wall notices, he states:

> '65. Of course I therefore needed to appoint a party wall surveyor again. However, by now I had involuntarily become well informed in party wall law and on first name terms with numerous specialist lawyers and potential advisers. I had, through my adverse experience of the basements of No. 1, No. 3 and No. 9, come to know of a good number of what appeared to be a fairly small club of well-known London party wall surveyors.

> 66. My direct experience of those who had been appointed supposedly to act for me was that they had made little or no reference to me and they were uninformed and had little interest in ensuring they were properly informed before making an award. In two cases they and their counterparts had been ready to sign off special foundations in knowing disregard of the requirement for consent. The pattern that I perceived – confirmed by the evidence of one acting in my name in the No. 5 case gave in court – was that more established members of the "club" were able to prevail upon the more junior and aspiring to acquiesce in whatever plans were put before them.
>
> 67. I had an architect working for me on No. 7, Ms Nithya Murthy, who had recently moved to the UK from India and was looking to take forward her career in the UK, having taught architecture and worked in an architectural practice in Bangalore before moving here. I knew her to be conscientious, intelligent, open and honest – qualities that I had dearly missed in my previous party wall surveyors. She had of course no direct experience of the Party Wall Act but this was easily remediable as I could direct her to specialists for any legal guidance she might need. My long experience of the practicalities of construction, particularly on historic buildings, was of course also available to her.
>
> 68. I asked Nithya if she would be prepared to serve as my party wall surveyor, explaining that the standards by which she should judge her competence to accept the appointment should not be intimidating. She accepted and was appointed by me on 27 December 2014. She and I both made enquiries as to the hourly rates charged by party wall surveyors including the rate charged by Mr North and others I had recently encountered. We agreed that a rate of £125 per hour would be appropriate. This seemed to be at the very bottom end of the market and would thus reflect Nithya's limited experience.
>
> 69. Of course she had a very challenging assignment as there was already a long history of Mr Hill's abortive earlier plans and overturned Award.
>
> 70. Mr North, I discovered, had a reputation in the world of London Party Wall surveyors of taking a very dictatorial stance in relation to his counterparts. He was no more chivalrous to Miss Murthy.'

Then, at paragraph 73:

> "Following the formalisation of the party wall process with appointment of Ms Murthy there was an exchange of correspondence between her and Mr North … This is self-explanatory and therefore I do not enlarge upon it here. All

> correspondence was written by Ms Murthy in consultation with me and, where appropriate, following discussion with legal advisers and/or engineers to whom I was able to direct her or relay their advice."

107. There are two statutory provisions of relevance. The definition of "surveyor" in the interpretation section, section 20 of the 1996 Act is:

> "means any person not being a party to the matter appointed or selected under section 10 to determine disputes in accordance with the procedures set out in this Act."

There is nothing in section 10 which requires a surveyor to have any, or any particular, qualification let alone surveying qualification.

108. Secondly, section 10(13) provides:

> "The reasonable costs incurred in—
>
> (a) making or obtaining an award under this section;
>
> (b) reasonable inspections of work to which the award relates; and
>
> (c) any other matter arising out of the dispute,
>
> shall be paid by such of the parties as the surveyor or surveyors making the award determine."

In other words, it is not essential for a claim for expenses under the Act that the expenses are those of a surveyor.

109. I accept Mr Winser's submission that "not being a party" in the definition of "surveyor" requires there to be an independent appointment to the extent that, as Mr Isaac accepted, it involves a degree of independence from the party. It excludes any person who is a mere cypher or *alter ego* of a party. Such a person cannot properly be a party wall surveyor within the 1996 Act definition. That is, in effect, Mr Winser's submission in respect of Miss Nithya Murphy, that she is a mere cypher or *alter ego* of Mr Gray. He points out that she is a young professional lady with a qualification from India, apparently an academic rather than a professional qualification; this is her first time in the role of a party wall surveyor; she has no experience of the 1996 Act; she refused to deal with Mr North or Mr Crowley orally, everything had to be in writing; she works in one of Mr Gray's offices; it was reasonable to infer, not least from Mr Gray's statement, that much of her correspondence was written by Mr Gray; and there is no witness statement served in these proceedings in which she states that she was in fact acting independently. Mr Winser also relies on the failure to give disclosure of documents passing between her and Mr Gray. In fact, the only disclosed documents of this nature were two emails, each clearly part of a chain of communication, not standalone letters and themselves indicative, though not more, of close instructions being given to Nithya Murthy by Mr Gray.

110. In response, Mr Isaac accepted, as Mr Gray openly stated, that there was a fair deal of input by Mr Gray into Nithya Murthy's correspondence. The criticisms of disclosure are rejected. Almost all the communication between Mr Gray and Nithya Murthy, I was assured, was conducted orally. Furthermore, Mr Isaac points out, concerned as they undoubtedly were as to the position, both Mr Hill and Mr North, the building owner's party wall surveyor, treated Nithya Murthy as Mr Gray's party wall surveyor. There was no challenge to her position either formally, for example by seeking a declaration that hers was not a valid appointment, or informally by refusing to deal with her. In the absence of a challenge, Mr Isaac suggests that Elite Town cannot now assert that Nithya Muthy was not a party wall surveyor. In any event, he points out that Elite Town takes no issue with any item of work, so they should pay.

111. I have read through Nithya Murthy's letters in the bundle. I was taken to a number of them in argument. I have read the others. I note the various points made by Elite Town. I am satisfied that, on a strong balance of probabilities, Nithya Murthy was Mr Gray's *alter ego*. I do not consider that every word she wrote was as a mere cypher, but much of what she sent was plainly drafted by Mr Gray and what was not actually penned by him was written at his suggestion. The essential important letters bear the hallmarks of Mr Gray's authorship. It is, in this context, a little unfortunate that she did not give evidence, but perhaps it was well advised that she was not called to do so. Nithya Murthy probably found herself in a difficult position, newly arrived in this country.

112. At all events, in the circumstances, Nithya Murthy was not a surveyor for the purposes of the 1996 Act. That does not mean that Mr Gray is not entitled to anything. The work that Miss Nithya Murthy did, or much of it, was necessary. It was administrative rather than professional, by which I mean she did not involve herself, so far as I can tell, with engineering or building method detail.

113. In these circumstances, £125 an hour, inexpensive as that may be next to the fees of Mr North, Mr Redler or Mr Crowley, is unreasonable. This is real "doing the best I can" territory, that mantra without which a County Court Judge frequently cannot operate satisfactorily, is one which, it seems to me, is made the more respectable by the recent changes to CPR 1.1 (the definition of the "overriding objective"). Nithya Murthy was not just a secretary, she lent some authority to her texts. I will allow one-third of the sums claimed.

Issue 12

114. Issue 12: In the light of findings in relation to the above issues on the appeal, whether and to what extent the appeal should be set aside or varied.

115. As is apparent, I have concluded that the award should not be set aside or varied save in the minor matter of the payment of the £1,320, the payment of one-third of the costs claimed by Miss Murthy and, if it has not already been awarded or paid, the entirety of the Hopps Partnership invoice in the sum of £299.

Issue 13

116. There are then two issues arising from the Part 18 request and response. Issue 13 is whether, and to what extent, the appellant is prevented by the award, dated 5

November 2001 or common law, from removing or cutting holes in the existing contiguous piles.

117. The relevant facts, in summary, are these. Recently, by which I mean after the publication of the third award on 3rd October 2014, Mr Gray cut holes in the contiguous piles adjacent to Elite Towns' property. As described by Mr Isaac, Mr Gray cut out of part of two of his deviated piles at a point where they were entirely within the footprint of 7 Ennismore Mews and there was, therefore, no trespass. As a result, it is possible to look through into the basement of 9 Ennismore Mews, and we have photographs demonstrating that fact. No damage has resulted to 9 Ennismore Mews. I do not have the dimensions for the holes, but the photographs suggest that they are sizeable.

118. Elite Town sees this as a spoiling manoeuvre, an attempt to make the execution of the works permitted under the third award (scheme C) impracticable or at the least much more expensive.

119. For his part, Mr Gray says that his actions were designed to be informative. The cutting out demonstrated that it was incorrect to suggest, as Mr Crowley appears to have done, that scheme C would not involve making use of Mr Gray's piling to provide lateral support.

120. The November 2001 award, which authorised Mr Gray to construct his basement, permitted the formation of a new basement by means of piling approximately 6.5m deep with reinforced concrete lapping beam, with the first and second floor levels supported on an RHS, a rectangular hollow section of steel columns taken down to and resting upon the piling ring beam. The permitted works are identified by reference to drawings, building regulation approval for piling works and the method statement to be provided by the piling contractor.

121. Mr Isaac argues that the work involved in cutting the holes was not notifiable work because the piles are not, or certainly not yet, a party structure. No damage was caused to No. 9 Ennismore Mews and, accordingly, Mr Gray was not prevented from acting as he did. As for removal of the piles, the same argument is made: they are not part of a party wall structure and no works in relation to them are notifiable.

122. For his part, Mr Winser does not suggest that the cutting of the holes was unlawful at common law and accepts that the hole cutting did not involve notifiable work. His concern, naturally, is with the threat to remove the existing contiguous piles. His submission is that as it was notifiable works to insert the piles, it must be notifiable to remove them. Seen within the terms of the Act, there must necessarily be an excavation in order to remove a pile, and such excavation must necessarily be around the pile, that is within 3m of 9 Ennismore Mews. Mr Winser also points out that Mr Gray has served party wall notices in respect of this work. A notice under section 2, served presumably to safeguard against a finding that the piles are presently a party structure and relying on 2(a) and (k), the notice served on 10 December 2014, was in respect of proposed works of removal of the RC continuous piles and to underpin the party wall to the width of the brick footing or such greater width as specified by a structural engineer with mass concrete foundation. On the same date, a section 6 notice was served in respect of the removal of the piles, this being within 3m of 9 Ennismore Mews and works of underpinning, as with the section 2 notice.

Accordingly, Mr Winser argues that removal of the piles, which is far more important, plainly, than the cutting of holes in them, would involve notifiable works.

123. In so far as removal of the piles is concerned, I accept, fortified by Mr Isaac's submissions, that they are notifiable works so far as the whole is concerned. I can see that it did not involve work and is not prevented from doing so by the 1996 or the common law.

124. However, the issue does require me to consider the award dated 5 November 2001. Paragraph 3 of the award provides that:

> "No material deviation from the agreed works shall be made without prior consultation with an agreement by the Adjoining Owner's Surveyor."

125. This, as it happens, is less stringent than the equivalent provision of the 1996 Act, which at section 7(5) provides:

> "Any works executed in pursuance of this Act shall—
>
> (a) comply with the provisions of statutory requirements; and
>
> (b) be executed in accordance with such plans, sections and particulars as may be agreed between the owners or in the event of dispute determined in accordance with section 10;
>
> and no deviation shall be made from those plans, sections and particulars except such as may be agreed between the owners (or surveyors acting on their behalf) or in the event of dispute determined in accordance with section 10."

126. The question arises, therefore, whether as a matter of principle the provision in an award or in the statute that there must be no deviation, or no material deviation, from the agreed works prohibits a building owner from executing the entirety of the work in accordance with the plans, specifications and so on, and then, at a time after he has completed his execution of the works, alter the works so that, if he had originally executed the works in the manner they finally end up after his alteration they would have constituted a deviation, or material deviation, from the agreed works.

127. Mr Isaac argues that the proper approach is this. Once the works authorised by the award have been completed, the award is, as he puts it, "spent". Thereafter, if the building owner wishes to carry out any alterations to the works, the adjoining owner is left with his common law remedies and, of course, he will have a remedy in circumstances where the building owner should have but did not serve a party wall notice and did not obtain a party wall award to amend his works.

128. I can see that there is some force in Mr Isaac's submission. I am bound to say, however, that I am deeply troubled with a result that allows a building owner to complete his execution of the works in accordance with the plans and then, at any

time afterwards, deliberately and perhaps cynically act so as to effect a material deviation from the agreed works. In the present case it will only matter if the holes that have been cut by Mr Gray constitute a material deviation from the works. I would also observe that there is probably no difference between "deviation" and "material deviation". "Material" is normally defined as being "other than immaterial" and, if that is the true position here, in the interpretation of the award, as I believe it to be, there is no distinction to be made between the wording of the award and the statute. It is not necessary for me to make any express findings on the matter, but, as I say, I am troubled with the approach suggested by Mr Isaac, and instinctively believe that it must be wrong. Awards are not 'spent' on the conclusion of the work they authorise. They continue to apply and impact upon the rights between the two owners. Apart from any other consideration an award which permits the commission of an act which would otherwise constitute a trespass by the building owner must continue in effect to prevent the continuance of that act becoming a trespass. I will take the matter no further.

129. I should also consider whether cutting holes is a material deviation. The fact that holes have been cut without any apparent loss of structural integrity suggests that they are not a material deviation, though I am bound to say I am troubled by that as well. Certainly, one way or another, it seems to me that the important point arising out of this issue, namely the removal of the piles, is prohibited because the works would necessitate works of excavation which are notifiable under the 1996 Act whether or not they were works which Mr Gray would be prevented from carrying out without the consent of the adjoining owner.

130. I do offer this final thought. It seems to me that where a building owner in the position of Mr Gray executes works involving contiguous piling which are expressly designed to provide support for the basement construction at 7 Ennismore Mews, then for as long as the basement construction remains in place and requires that support, it would be a deviation from the agreed works for the purposes of the award and section 7(5) for those piles to be removed.

Issue 14

131. Issue 14 is whether and to what extent the appellant's service of the notice under section 6(5) of the Act impacts upon the award.

132. The straightforward answer is not at all. Awards are permissive. The works proposed by Mr Gray in respect of which he has served his section 6(5) notice would, were an award to be made as sought, result in conflicting awards. There is nothing in the Act to prevent conflicting awards.

133. As to whether a building owner with an award can start work and then prevent his adjoining owner as building owner from commencing work on his conflicting award is, Mr Isaac submits, a question of fact in each case. The neutral observer hopes for common sense; he may not always find it.

134. In the present case it seems to me that as Elite Town have started their work relevant to the third award, albeit under the first award and, therefore, only impliedly authorised, but necessarily impliedly authorised by the third award, it might be in a good position to obtain an injunction to restrain Mr Gray from commencing any work

he may be authorised to execute under an award obtained further to his section 6 or section 2 notices. However, Mr Gray has no awards in his favour at present and, as Mr Winser has asked me to say nothing in this regard, an invitation I have not entirely accepted, I say nothing more.

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