Claim No. B20CL043

IN THE COUNTY COURT AT CENTRAL LONDON

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

Tuesday, 15th September 2015

BEFORE:

HIS HONOUR JUDGE BAILEY

BETWEEN:

(1) HESHMAT HASSAN BIBIZADEH
(2) JANET CATHERINE BIBIZADEH

Appellants

v

ANA DODOSH

Respondent

JUDGMENT
(As Approved)

Miss H. Holmes *(instructed by Child & Child, 4 Grosvenor Place, London, SW1X 7HJ)* appeared on behalf of the Appellants.
Mr. R. Power *(instructed by MLC Solicitors, DX 52557 WANSTEAD)* appeared on behalf of the Respondent.

Transcribed from the Official Recording by
John Larking Verbatim Reporters
Suite 91 Temple Chambers, Temple Avenue, London EC4Y OHP
Tel: 0207 404 7464 Fax: 0207 404 7443

Words: 10289
Folios: 143

Tuesday, 15th September 2015

JUDGE BAILEY:

1. The Appellants in this matter (Mr. and Mrs. Bibizadeh) live at 50 Levett Gardens, Ilford, IG3 9BU. The Respondent (Miss Ana Dodosh) is their next door neighbour at 48 Levett Gardens, Ilford.

2. During 2014, the Appellants wished to construct an extension to their property. They were advised, correctly or otherwise, to serve two party wall notices on the Respondent, and this they did on 28th July 2014. Thereafter it appears that the Appellants had doubts as to whether or not it was necessary to serve party wall notices, and indeed there came a point where it appears that they endeavoured to withdraw them. However, as is apparent from the fact that this is a party wall award appeal, surveyors did proceed to make a party wall award. Against that award, the Appellants now appeal. By the time the award had been made, works had been commenced. In order to prevent works being carried out in what was considered to be a breach of The Party Wall Act 1996, an injunction was obtained in the Romford County Court. That was subsequently replaced by undertakings. That claim, commenced under Part 7 of the Civil Procedure Rules, remains to be determined.

3. The Party Wall Act 1996 imposes obligations on building owner who wish to erect or carry any manner of work on a party wall or fence or who wish to excavate in the vicinity of a neighbour's building. An appropriate notice must be served and, following the appointment of party wall surveyors, an Award must be obtained before works are carried out. The Act provides a means of dispute resolution which avoids recourse to the court. It also authorises a building owner who utilises its provisions to do what the common law will not allow him to do; trespass on the land of his neighbour in circumstances where he wishes either to build a new wall or carry out works to an existing wall, where that wall is "a party wall" or a "party fence wall" as defined in the Act. A party wall is defined in Section 20 of the 1996 Act as meaning:

   > "(a) a wall which forms part of a building and stands on lands of different owners to a greater extent than the projection of any artificially formed support on which the wall rests; and
   >
   > (b) so much of a wall not being a wall referred to in paragraph (a) above as separates buildings belonging to different owners."

4. I should, for completeness, point out that the Act also refers to "party fence walls" which are defined as:

   > "a wall (not being part of a building) which stands on lands of different owners and is used or constructed to be used for separating such adjoining lands, but does not include a wall constructed on the land of one owner the artificially formed support of which projects into the land of another owner."

Section 6 of The Party Wall Act covers a situation where

> "a building owner proposes to excavate, or excavate for and erect a building or structure, within defined distances measured horizontally from any part of a building or structure of an adjoining owner".

5. In cases involving excavation the Act provides a procedure which might better be described as "dispute avoidance" rather than "dispute resolution". It is designed to ensure that the foundations of the adjoining owner's property are not weakened or damaged by an excavation carried out by the building owner either within 3 metres of the adjoining owner's structure or

> "within a distance of 6 metres measured horizontally from any part of a building or structure of an adjoining owner, and any part of the proposed excavation, building or structure will within those 6 metres meet a plane drawn downwards in the direction of the excavation … at an angle of 45 degrees."

6. The operation of the provision in s.6(2)(b) of the Act is not a matter with which we need be concerned in these proceedings.

7. Party Wall Act procedures - whether under Section 1, Section 2, or Section 6 - are initiated by the service of a notice by the prospective building owner. (Under Section 2, this is termed a "party structure notice." Under Sections 1 and 6, it is simply a "notice".) Where a notice is served under Section 1 by a building owner intending to build on the line of the junction, an adjoining owner may consent to the building of a party wall. If, however, the adjoining owner does not consent within 14 days of the service of the building owner's notice, then the building owner may not construct a party wall on the line of the junction which trespasses on the adjoining owner's land, a construction which might be described as "building astride the junction". In such circumstances the building owner may only build wholly on his own land; he may proceed up to but not over the line of the junction.

8. A building owner intending to build at the line of the injunction wholly on his own land - whether or not he has served a notice to build astride the junction - must serve a further notice describing the work he intends to carry out at least one month before he starts work. Having served his notice, he may then place his footings and foundations below the level of the adjoining owner's land. That is an example of The Act providing for the authorisation of what would otherwise be a trespass.

9. A building owner who wishes to excavate within the specified distances provided by s.6 the 1996 Act must serve a notice indicating his proposals on the adjoining owner under Section 6(5). If the adjoining owner does not serve a notice indicating his consent to the proposals within 14 days, a dispute is deemed to have risen.

10. Once a dispute has arisen between a building owner and an adjoining owner, the dispute resolution procedures of s.10 of the 1996 Act are engaged. It is unnecessary for me to summarise the provisions of Section 10. I will have to consider individual subsections in the course of this judgment.

11. It may be noted that there is no provision in the 1996 Act for withdrawing a notice (whether it is a notice served under s.1 or s.2 or s.6) once it has been served. Neither is there any provision in s.10 for a dispute once it has arisen or has deemed to have arisen to be brought to an end by some form of discontinuance. Indeed it may be seen that s.10(2) provides "All appointments and selections..." [that is by parties of surveyors] "...made under this section shall be in writing and shall not be rescinded by either party." Clearly it is a provision designed to prevent a party from bringing the dispute resolution process to an end by rescinding an appointment.

12. Difficulties may arise where the prospective building owner decides that he no longer wishes to proceed with any of his proposals which engage the Act or, as here, decides that it was inappropriate to serve a notice and the Act was not engaged. Should he make his position clear to the adjoining owner, there can no longer be a dispute for the purposes of the Act, and further use of the dispute resolution procedure would be pointless. But until it is clear to both parties that the Act is no longer or was never engaged, it is unlikely that a dispute resolution procedure which has started will easily be abandoned. Neither should it be, for the procedure is not solely for the benefit of the building owner. The adjoining owner has an interest in an award being made which protects his interests, including the possibility for compensation from the building owner in the event that works have been carried out. Once the dispute resolution process has started, it will require the consent of both parties to bring it to an end. And there is always behind the process the question of cost. Useful as the Act's procedures are, it cannot be ignored that they add to the cost of development. The usual course, for understandable reasons, is that the building owner has to pay not only the cost of his own dispute resolution procedures, involving as they do the engagement of surveyors, but also the cost of the adjoining owner.

13. In the present case, the building owners, as I have indicated, served notices under ss 1 and 6 of the Act. Later they thought better of it, and sought to withdraw the notices. The way in which they sought to do so will have to be considered.

14. In circumstances where the validity of the appointments were challenged, surveyors were appointed to act for both building owners and the adjoining owner, a third surveyor was selected, and on 23rd December 2014 an award was published. That is the award now appealed by the building owners.

15. There are a number of matters of concern in regard to this award. I was persuaded to hold a preliminary hearing to consider the Appellants' arguments that there was no jurisdiction in the surveyors to make the award at all. These are the arguments raised in paragraphs 5 to 11 inclusive of the Appellants' skeleton argument, which is at pages 124 onwards in the appeal bundle. This is my judgment on that preliminary hearing. The history is important, if a little torturous, and I need to consider it in some detail.

16. On 28th July 2014, the building owners (Mr. and Mrs. Bibizadeh) wrote to Miss Dodosh enclosing party wall notices and response documents, together with a copy of plans and sections for the single story rear/side extension with garage conversion which they proposed to carry out. The letter discusses the position of a fence between the parties where plainly it is anticipated there may be some difficulty, but that is not a matter for concern at present. What is relevant is that the letter enclosed two notices both dated 28th July 2014. The first, said to be under s.6(1) of The Party Wall Act, stated "We intend to build within 3 metres of your building and to a lower level than the bottom of your foundations by carrying out the building works detailed below". The second, also said to be under s.6(1) of The Party Wall Act - stated "We intend to build at the line of junction between our properties". It was plainly an error to state that this second notice was under s.6(1) of The Act. It was under s.1(5) of The Act, but nothing turns on that.

17. On having received the letter and the notices, the adjoining owner appointed a Mr. Darren Flight MRICS, a surveyor with the firm ATP Architects and Building Surveyors of Coventry Road, Ilford, Essex to act as her party wall surveyor. Mr. Flight wrote to Mr. and Mrs. Bibizadeh on 1st August 2014, stating that he had received instructions to act as an adjoining owner, and pointing out that if they agreed, he could also act as the agreed surveyor. At the same time Mr. Flight served notices on the Bibizadehs, making it plain that the adjoining owner was not content for works to proceed under either notice before a party wall award was agreed.

18. It seems that Mr. Flight took his duties seriously, and visited the site at the rear of 50 and 48 Levett Gardens, Ilford during the first week of August. In doing so he incurred the ire of Mr. and Mrs. Bibizadeh. On 10th August 2014 they sent him an email, copied to Miss Dodosh as adjoining owner, expressing extreme disappointment that he had adopted a "jump the gun" attitude, and had failed to follow the RICS's professional protocol. They complained that it is the adjoining owner who should have completed the acknowledgement of notice form and returned it to them so that:

> "…we as the initiators of the process could have approached ATP prior to making our final decision with a regard to selecting the surveyor to whom we first spoke and in whose advice we trusted. Secondly, in your role as party wall surveyor, you should not have referenced the position of the boundary in your

> correspondence regarding The Party Wall Act, as it is not covered by this legislation…"

19. This latter was an interesting comment in the light of the fact that there plainly is some sensitivity about the fence which may or may not have been on the boundary in the initial letter of 28th July 2014. They complain that Mr. Flight has not disclosed the name of the person he spoke to at the London Borough of Redbridge planning department, and disputes have arisen as to dimensions quoted in his letter. Fourthly, they complain that the site visit without their knowledge or consent was one where he had not bothered to measure the existing structure of the garage and check these against the dimensions of the plans, with the result that he had misinformed the adjoining owner as to where they should build.

20. The letter then continues that they have spoken to the appropriate planning department and enforcement officers and confirmed that their plans were appropriate, and conclude:

> "We do hope you appreciate the stress and damage you have caused to this delicate situation by carelessly misinforming Ana Dodosh, despite previous verbal and written attempts to reach a fair conclusion for both parties regarding the position of the fences which were erected out of consent. Now as a direct result of your actions, we suggest the only solution is for both parties to share the cost of instructing boundary demarcation experts to clarify the exact position of the boundary throughout the entire length of the garden in an attempt to settle the dispute once and for all. The delays in the build are at an enormous ongoing cost to us, and so we also intend to seek legal advice regarding possible compensation from all parties implicated in this matter."

21. Mr. Flight responded on 12th August 2014, expressing concern and sorrow that the building owners felt that he had acted inappropriately and seeking to explain that as far as he was concerned he had acted properly, and he added:

> "Presumably you will now appoint your own building owner surveyor to complete the party wall award, including the schedule of condition at 48 Levett Gardens in my attendance. I look forward to receiving your surveyor's details to complete the party wall award."

However, although he wrote in such terms to Mr. and Mrs. Bibizadeh, Mr Flight was plainly concerned as to his position.

22. On 15th August 2014, he wrote to Miss Dodosh. In the letter he explained that the RICS, his professional body, required its members to avoid potential areas of conflict of interest. He thought Rule 3 was explicit on the point. He was particularly concerned that the building owners had challenged his professional integrity. He thought that this might create a risk of perceived or actual conflict of interest, and added:

> "I therefore believe that my ongoing appointment as your surveyor would not be beneficial to you in resolving these party wall procedures. Accordingly, and upon reflection and with great regret, I am exercising my rights under Section 10(5) of The Act and hereby rescind my appointment. I am truly sorry for the inconvenience, but Mr. and Mrs. Bibizadehs' comments have left me with no alternative."

23. Miss Dodosh then appointed Mr. Antino of APA Property Surveyors. At this point it is clear that no progress was made during the last two weeks of August and the first three weeks of September. However, I should say that in the letter of 3rd September 2014 to which I have also made reference the adjoining owner, commenting on variations to plans, stated that whilst she had no problems with the building owners building as per the approved plans, she will object to any building to the boundary line.

24. On 20th September 2014, the building owners sent a lengthy email to the adjoining owner. It dealt in its early part with the width of their respective plots and the position of the boundary, covering the arguments and potential arguments that existed as to the boundary line. And then this paragraph:

    > "With regard to APT, Darren Flight wrote to us on 1st August 2014 requesting our written confirmation that we would agree to pay his fees as adjoining owner surveyor or agreed surveyor before starting work on the matter. You have a copy of our response dated 10th August in which we informed him that we did not agree to pay his fees and set out the reasons why, in particular the fact he was willing to become involved in the position of the boundary whilst acting in his role as party wall surveyor, breaking all procedural rules, making his position untenable, and resulting in us withdrawing The Party Wall etc. Act 1996 with immediate effect. Following extensive research into this matter, we can now confirm that as we are going to build entirely on our land away from the boundary and our foundations will not be dug deeper than yours, our build does not come under the auspices of The Party Wall etc. Act 1996."

    The paragraph continues with comments which are not immediately relevant.

25. That email appears to suggest that Mr. and Mrs. Bibizadeh have already withdrawn their Party Wall Act notices. Their case before me is that it is this email that in fact constitutes a withdrawal of their Party Wall Act notices.

26. As I have already indicated, there is no provision in The Act for Party Wall Act notices to be withdrawn. And the fact that at least one Party wall surveyor has been appointed by the adjoining owner does leave over his status as a party wall surveyor and his fees. Having served a

notice under the Act the building owner has to face the fact that fees will be incurred and are a matter which will commonly be dealt with in an award. A building owner cannot avoid a prospective liability to fees by purporting to withdraw the notice which initiated the whole procedure.

27. It is against that background, namely an assertion that the notices were withdrawn and that the auspices, as it is so interestingly put, of the Party Wall Act do not apply, that on 6th October 2014 the building owners started work. On the following day the adjoining owner discovered that this work had caused damage to her garden and structures on or connected with her garden. She instructed Mr. Antino of APA Property Services Ltd. to act on her behalf as a surveyor, not at this stage as a party wall surveyor, but to assist her in connection with the damage which she maintains was caused to her property by the works which had been commenced by the building owners.

28. On 8th October 2014, Mr. Antino emailed the building owners, advising them that they should stop their excavations until what he describes as "the boundary dispute" is resolved, and warning them that if they will not provide the appropriate assurances, the adjoining owner will take legal advice "which will inevitably result in seeking injunctive relief".

29. The Respondent did indeed instruct solicitors (MLC Solicitors) who wrote in appropriate terms to the Appellants. Their response was a statement that they had stopped work without prejudice to their rights pending, it would appear, resolution of the boundary dispute which had arisen between the parties, as anticipated by the building owners. For their part, the building owners instructed a surveyor (Mr. Maunder-Taylor) who, it is now known, advised the building owners that they should serve a new party wall notice without further delay. That they did not do. On 19th October 2014 (as it happens, a Sunday), the building owners, notwithstanding their email which I have already quoted to the effect that they had stopped work, resumed work. The work involved at least partially filling excavated trenches with concrete.

30. The following day (20th October 2014), the adjoining owner appointed Mr. Antino as her party wall surveyor, and issued a claim in the Romford County Court for damages and an injunction. An *ex parte* (without notice) injunction was obtained from the District Judge, prohibiting the building owners from carrying out any further work.

31. On 23rd October 2014, Mr. Antino sent the building owners a letter in the following terms:

> "Further to our recent correspondence, we enclose a copy of our letter of appointment under Section 10(1)(b) of The Party Wall Act. Since you withdrew the notices dated 28th July 2014, Mr. Darren Flight's appointment fell away irrespective of the fact we consider the notices were valid. You have a statutory obligation to serve notice in relation to the works you have carried out. You have complied with that obligation. It is our appointing owners' position they are entitled to appoint me as set out in the

> attached document, irrespective of the fact you have wrongly interpreted The Act. It is imperative that you appoint a surveyor to provide you with appropriate advice in regards to your statutory obligations. Your understanding and interpretation of The Act is wrong. If you fail to appoint a surveyor, we will be entitled under Section 10(4) to make an appointment on your behalf at any time after the expiry of the 10 day period as set out in the statutory legislation. This letter is therefore a request under Section 10(4) which we consider flows from the notice of 28th July 2014, and our appointing owners' dissent. We hope that commonsense will prevail, and that you will engage with the legislation."

32. There is proof of posting of that letter in the form of a Post Office receipt. That indicates that the letter was wrongly addressed in that it gives the postcode "IG3 9BU", whereas it should be "IG3 9BT". It is addressed to Mr. and Mrs. Bibizadeh at 39 (sic) Levett Gardens. It might be thought that the Post Office might still manage to deliver the letter correctly. However the building owners say it was never received, and I proceed upon that basis.

33. On 29th October, MLC Solicitors - in the person of Mr. Ashley Bean - emailed solicitors then acting for the building owners at 16:50, recording that the building owners had refused to grant Mr. Antino access to the property that morning, noting that this would undoubtedly increase costs, and stating:

> "Although you are suggesting that there be a without prejudice onsite meeting, all our client wants your client to do is comply with the provisions of The Party Wall Act."

34. At 17:52, the building owners' solicitors, Mr. Gary Chambers of Gisby Harrison, responded to Mr. Bean asking how Mr. Antino might suggest that the excavated trench, now filled with concrete, compromised the integrity of the foundations, asking MLC to take a constructive approach rather than seek to score points, and commenting on the forthcoming court hearing on 7th November.

35. In response, at 18:14 Mr. Bean wrote in the following terms:

> "We are not seeking to score points. The statutory legislation is there for a purpose. You are avoiding the single most important issue, which is your client's noncompliance and continued noncompliance with the requirements of The Party Wall Act. Without prejudice to any arguments regarding whether or not your client withdraw the notice, your own expert accepts that The Party Wall Act continues to apply.
>
> In the event that the original notice - which your client denies withdrawing, notwithstanding this email to Mr. Antino as repeated in the first expert report of Mr. Maunder-Taylor - is still effective, then he needs to appoint a surveyor under Section 10(1)(b) of The Act, and should not have carried out any works

to which The Party Wall Act applies until such point as he has appointed one, and the surveyors have met, and works are agreed after a schedule of commission is prepared. If the notice is not effective, he needs to serve a new Party Wall Act notice.

It appears that your client is determined not to comply with The Act - even though he has been advised to by his own expert surveyor - presumably in some form of attempt to try and avoid paying the costs of Mrs. Dodosh's appointed a surveyor.

Your client - and it is not for us to advise - either needs to appoint a surveyor to serve a Party Wall Act notice, and we invite you to do so now on your client. For the avoidance of doubt, it is not accepted on any basis that the only live issues relate to the foundations of the patio and dwarf wall. And we have no idea as to where that has come from, save it was suggested by your Mr. Chambers to our Mr. Bean which was - for the avoidance of doubt - not accepted at the time, and it is wrong to suggest the same.

Please confirm by 4 p.m. tomorrow - time being strictly of the essence - that your client will comply with the terms of The Party Wall Act, failing which we will advise our client to issue an application returnable on 7th November compelling your client to do so."

36. The following day Mr. Bean sent a further e-mail in similar terms, noting that the refusal of the building owners either to serve a Party Wall Act notice or to appoint a surveyor under The Party Wall Act resulted in the building owners continuing to be in breach of The Act, and reserving his position to issue an application in the terms which he had already indicated. On 4th November 2014, MLC served just such an application.

37. On 5th November 2014 Mr. Bean again wrote covering issues arising in relation to the hearing which was to take place two days later on 7th November and asking for confirmation that the building owners would be prepared either to serve a new notice under The Party Wall Act or appoint a surveyor under s.10 of the Act.

38. This first email was at 10:33, and there was a further email covering very much the same ground at 13:34. Then at 14:55, Mr. Chambers of Gisby Harrison responds to Mr. Bean in a short email including the following:

"My clients are not prepared to give the undertakings you seek, nor serve a new notice, nor appoint a party wall surveyor."

39. On 7th November 2014 (which was the return date of the interim application), the building owners, notwithstanding indications to the contrary, gave undertakings not to carry out further works which might

be regulated by The Party Wall Act or would be within 3 metres of the adjoining owner's property.

40. At this point the adjoining owner appointed her party wall surveyor for the resolution of a dispute requiring the publication of a party wall award, but the building owners had not appointed a party wall surveyor and indeed had made it clear expressly by their solicitors that they would not do so. The adjoining owner therefore decided to make use of the provisions of s. 10(4) of the Act.

41. On 10th November 2014, MLC Solicitors wrote to a Mr. Stevens FRICS of Slewins Lane, Hornchurch, advising him of the situation, asking him to accept an appointment under s 10(4).

42. Mr. Stevens responded the same day:

> "I am writing to confirm my acceptance of this appointment under Section 10(4) of The Party Wall Act, subject to your providing with copies of the following: original notices, notices to send Section 10(4) notice, refusal to appoint letter if provided. On receipt of this information I will write to the building owners advising them my appointment under Section 10(4), and obviously I will notify Mr. Antino."

43. On 11th November 2014, MLC forwarded documents in response to Mr. Stevens' letter. The receipt of this he confirmed by his letter of 13th November 2014. He stated that he has copies of the party's structure notice and the acknowledgement notice served back on 28th July and 1st August and then stating upon receipt of acknowledgement/dissent, the building owner had to appoint a surveyor within 14 days under Section 6(7), and accordingly Section 10 of The Act now applies.

> "Your email of 29th October 2014 to Mr. Gary Chambers of Messrs. Gisby Harrison is sufficient to satisfy the requirements under Section 10(4) of The Act. I therefore confirm I am now validly appointed in this matter. As the 10 day period expired on 9th November 2014, I am today writing to both the building owners and to Mr. Antino."

44. Accordingly it appears, because of the reference to the 10 day period, that although he did not refer specifically to s.10(4)(b) as opposed to s.10(4)(a) of The Act, he was relying on s.10(4)(b).

45. It was in those terms that he wrote to the building owners on 13th November setting out the background as he had to MLC, and stating:

> "As an email of 29th October 2014 from MLC Solicitors to Gary Chambers of Messrs. Gisby Harrison is sufficient to satisfy the requirements under Section 10(4) of The Act, I therefore confirm that I am now validly appointed by MLC Solicitors as your surveyor in this matter. As the 10 day period expired on 9th November 2014, I would like to meet with you to discuss this

> matter, and you should be obliged to let me have your contact details."

46. He then confirmed his fees, and stated that he was writing to Mr. Philip Antino as the appointed surveyor of the adjoining owners.

47. There was no response by or on behalf of the building owners to the letter from Mr. Stevens. On 20th November 2014, the building owners filed a defence in the Part 7 proceedings, in the course of which at paragraph 13.3 and at 19.6 they assert, with a statement of truth, that no works that they were undertaking engaged The Party Wall Act 1996 which they describe as "otiose". On the same day (20th November 2014), Mr. Antino and Mr. Stevens selected Mr. James McAllister to be the third surveyor.

48. On 3rd December 2014, Gisby Harrison wrote a lengthy letter to MLC. In it the point is taken that Mr. Flight had been appointed, and there was no provision for the rescission of an appointment of a party wall surveyor under s.10(2) of the Act. The letter continued that the purported appointment of Mr. Stevens "flies in the face of the court claim". Points are made to the effect that the appointment under s.10(4) of The Act was ineffective, there being no formal request made pursuant to s.10(4)(b). Indeed there is no mention of s.10(4) at all. It is suggested that Mr. Antino cannot act for party wall surveyor as he is acting as the adjoining owner's expert in County Court proceedings, and asserted that the building owners have never refused outright to appoint a party wall surveyor. Their position is that The Party Wall Act was no longer applicable. It is asserted that the appointment of James McAllister as the third surveyor was invalid because Mr. Antino had no locus as party wall surveyor, and complained that Mr. and Mrs. Bibizadeh are not happy with Mr. Antino acting, nor Mr. Stevens, because they had a business relationship together as directors of Land Commercial Surveyors Ltd. between May 2007 and November 2009. It is further asserted that an award cannot deal with works already carried out, and challenged a notice for access to carry out work.

49. The same day, an email was sent by Gisby Harrison to Mr. Stevens stating that the letter of 23rd October 2014 was not received by the building owners, and explaining that the postcode was wrongly given.

50. It appears that on or shortly after 3rd December 2014, contact was made with Mr. Alistair Redler on FRICS. On 11th December 2014, he was appointed in the event of a dispute or disputes arising as a party wall surveyor, that of course being unknown at the time to the adjoining owner.

51. The following day on 12th December 2014, Gisby Harrison sent a letter to MLC Solicitors commenting upon the proceedings in the Romford County Court and on the appointment of surveyors (which Gisby

Harrison continued to challenge), and then concluding with a section headed “Offer”:

> “Notwithstanding our client’s contention, the party wall award cannot deal with works already completed and is unnecessary. In view of your client’s continued insistence on a party wall award, our clients propose the following. In an attempt to progress matters and to remove areas of dispute, our clients will appoint Alistair Redler as their party wall surveyor. Your client may appoint Mr. Redler also, so he is an agreed surveyor. If your client does not wish to appoint Mr. Redler, she shall appoint her own surveyor. For the avoidance of doubt, this offer is made on the basis that the surveyors presently appointed or purportedly appointed by the parties for the purposes of The Act - namely Mr. Antino, Mr. Stevens and Mr. McAllister - shall be released and shall not be further engaged in any respect regarding the operation of The Act. We will be grateful if you would respond to this offer by 4 p.m. on Wednesday, 17th December.
>
> As aforesaid, no letter was received from Mr. Antino dated 23rd October, and the email dated 29th October is not valid service of a notice for the purposes of Section 10(4) of The Act. In the event that this offer is not accepted, our clients make the following election: insofar as any notice for the purpose of Section 10(4) of The Act has now been served, less than 10 days have passed since the service of such notice, and our clients nominate an appointment of Mr. Alistair Redler as their party wall surveyor without prejudice to their pleaded case and the earlier correspondence between ourselves.”

52. So, on the face of it, the letter is offering in terms to make a future appointment of Alistair Redler who may be appointed as agreed surveyor; and that if the offer is not accepted, Mr. Alistair Redler will be appointed as the building owners’ party wall surveyor.

53. There are in the bundle two transcripts of telephone calls made by Mr. Redler to Mr. Stevens on 16th and 17th December. I will not rehearse what was said, but it is evident that Mr. Redler considers that the matter is not settled, and it appears he does not consider himself to be a duly appointed party wall surveyor.

54. Seven days later on 23rd December 2014, Mr. Antino and Mr. Stevens published the award, the subject of this appeal.

55. The provisions of The Party Wall Act relating to resolution of disputes are to be found in Section 10:

> “(1) Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either—
>
> (a) both parties shall concur in the appointment of one surveyor (in this section referred to as an ‘agreed surveyor’); or

> (b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as 'the three surveyors').
>
> (4) If either party to the dispute—
> (a) refuses to appoint a surveyor under subsection (1)(b), or
> (b) neglects to appoint a surveyor under subsection (1)(b) for a period of ten days beginning with the day on which the other party serves a request on him,
> the other party may make the appointment on his behalf.
>
> (10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter—
> (a) which is connected with any work to which this Act relates, and
> (b) which is in dispute between the building owner and the adjoining owner."

56. It may be noted that while s.10(2) requires all appointments and selections to be in writing, the Act prescribes no particular form of written appointment, neither is there any provision in the Act as to the giving of notice to the other party or the form in which such notice might take.

57. It is the Appellants' case that neither Mr. Stevens nor Mr. Antino were duly appointed as surveyors, it is only those two who have made the award, and it follows that as they were not duly appointed party wall surveyors, they had no jurisdiction to make any award at all. Plainly, if the Appellants succeed in establishing that either one of these surveyors was not properly appointed, then the award cannot stand as it would not have complied with s.10(10).

58. I will deal first with the question of Mr. Steven's appointment. As I have noted, he was purportedly appointed on 10th November 2014, subject to the provision of documents which were provided the following day, and he was formally appointed on 13th November 2014. His letter to the building owners of that date refers to s.10(4); and while it does not specify paragraph (b), it is evident that it is that paragraph on which Mr. Stevens was relying and the adjoining owner was relying in appointing him.

59. The appointment is challenged on the basis that subsection 4(b) requires there to have been neglect on the part of the builder owners to appoint a surveyor "for a period of ten days beginning with the day on which the other party serves a request on him". It is asserted that no request was served on the building owner.

60. At the time, it is apparent that the adjoining owner and Mr. Stevens were relying on the email of 29th October 2014, which I have already quoted

in its entirety. It is evident that there are no terms of request in the letter. What Mr. Bean of MLC is doing is making it clear that the building owners need to appoint a surveyor, but he does so - and I have some sympathy with him - against a background of the building owners asserting that they had withdrawn a notice, and stating that in effect they had to make up their mind: either the original notice was a good one, in which case the building owners need to appoint a surveyor; or it is not effective, in which case they need to serve a new Party Wall Act notice.

61. The building owners' uncertain position as regards the service of the original notice, the need for notice, their withdrawal or purported withdrawal of the notice, and then apparent denial that they had withdrawn the notice, certainly gives rise to a difficult situation for the adjoining owner. Nevertheless, s.10(4)(b) requires a request, and I cannot see that the email of 29th October constitutes a request.

62. It is the case that there was no response to the email of 29th October, either serving a new notice or appointing a surveyor. Furthermore, on having received Mr. Stevens' letter on 13th November stating that he had been appointed under s.10(4), there was no response to the letter, and there was no challenge to his appointment until the letter of 3rd December. Between 13th November and 3rd December, it is apparent that the building owners were content to allow Mr. Stevens to proceed on the basis that he had been validly appointed. Why there was no response or challenge is no concern of the court.

63. As for the letter of 23rd October 2014 from Mr. Antino, that letter, on the face of it, is in sufficient terms to amount to a request. But as I have noted, it is denied that that letter was received. The adjoining owner raises rather high an eyebrow as to that assertion, but that remains the assertion. And it is the case that at the time the letter of 23rd October 2014 was not relied on as constituting a request for the purposes of s.10(4)(b).

64. A further point potentially arises whether in fact Mr. Antino (the party wall surveyor already appointed by the adjoining owner) had authority to act as agent for the adjoining owner for the purposes of s.10(4). The difficulty arises because party wall surveyors are not, as a matter of general course, appointed as agents for the appointing party. They do, after all, have a quasi-judicial function.

65. For the adjoining owner, Mr. Power submits that the position of the party wall surveyor and whether he can properly act as agent for an appointing party does depend on the individual task that he is doing at the relevant time. That submission cannot be dismissed out of hand, although I certainly have my doubts. At all events, this is not the case to consider this point because, as I say, the letter was not received and was not at the time relied on.

66. However, although there may not have been a good appointment under s.10(4)(b) of The Act, the adjoining owner argues that she was entitled to make an appointment under s.10(4)(a) of The Act, which of course provides that the other party may make the appointment on behalf of a party to the dispute who "refuses to appoint a surveyor under subsection (1)(b)". It is argued that there was a clear refusal to appoint a surveyor.

67. There is more than one refusal which the adjoining owner may rely on. Staying with the email of 29th October 2014, the failure to appoint after receipt of that email, argues the adjoining owner, is a clear case of a refusal. Earlier than that, on 20th September 2014, the email, which I have read part of, asserts that The Party Wall Act did not apply and they had withdrawn the party wall notice. That too, argues the adjoining owner, amounts to a refusal to act.

68. But perhaps more pertinently is the exchange between the parties on 5th November which I have already quoted, in particular the email of 5th November 2014 at 14:55 from Mr. Gary Chambers of Gisby Harrison:

> "My clients are not prepared to give the undertakings you seek, nor serve a new notice, nor appoint a party wall surveyor."

It seems to me that that is a clear refusal to appoint a surveyor, and the adjoining owner need look no further for a refusal.

69. However, Miss Holmes for the building owner argues that the adjoining owner may not rely on their refusal to make an appointment under s.10(4)(a) because the adjoining owner did not do so expressly at the time. She relies on a decision of His Honour Judge Crawford Lindsay QC, sitting in this court, in *Frances Holland School v Wassef* [2001] 2 E.G.L.R. 88.

70. This was a decision under The London Buildings Act (Amendment) Act 1939, the forerunner to the 1996 Act. The head note is in the following terms:

> "The appellant building owner constructed a new building, access to which required the demolition of a building that adjoined the Respondents' premises. The Respondents were statutory tenants, for the purposes of The Rent Act 1977, of the building they occupied. Between 1996 and 2000, several awards and addendum awards were made, within the meaning of The London Building Acts (Amendment) Act 1939, relating to works affecting the Respondents' property. A number of issues arose between the parties, one of which was whether the respondents should be temporarily rehoused during the works to their property. On 2nd February 2000 the Respondents' appointed surveyor, believing that the Appellant's appointed surveyor was not going to agree the outstanding issues, made an *ex parte* award dealing with those matters. The Appellant appealed against the award, contending that: (1) the Respondents' surveyor was not entitled to have made the *ex parte* award, which was bad on its face; and (2) the Respondents could not be

> ‘owners’ for the purposes of The 1939 Act (as defined in Section 5 of The London Building Act 1930), and, accordingly, they were not entitled to the protection of its provisions. The Respondents maintained that the Appellant was estopped from raising the first of these issues.
>
> Held: The appeal was allowed. (1) A surveyor who wishes to avail himself of the provisions of Section 55(e) of the 1939 Act, and make an *ex parte* award, must comply strictly with the formalities of The Act. That means that the surveyor can rely upon either a refusal or a notice that complies with the provisions of The Act, or, where appropriate, upon both grounds. The relevant grounds must be expressed accurately in the *ex parte* award. There was no reference in the award to a neglect to act by the Appellant building owner’s surveyor after a written request. The *ex parte* award referred to a ground that the Respondent’s surveyor did not rely upon, not to a ground that he did rely on. It was bad on its face and invalid. On the evidence, the Appellant’s surveyor had not refused to act or neglected to act effectively for 10 days prior to the award.”

71. The learned judge dealt with the definition of “owner” in the 1939 Act. This is a case where on the evidence the Appellant’s surveyor had not refused to act or neglected to act for ten days prior to the award.

72. At page 90 of the report, the learned judge sets out Section 55 of The London Buildings Acts (Amendment) Act 1939:

> “Where a difference arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Part of this Act relates, the following provisions shall have effect:—
>
> …
>
> (e) if a surveyor appointed under subparagraph (ii) of paragraph (a) of this section by a party to the difference or if a surveyor appointed under paragraph (d) of this section refuses or for ten days after a written request by either party neglects to act, the surveyor of the other party may proceed *ex parte* and anything so done by him shall be as effectual as if he had been an agreed surveyor.”

73. The effect of those provisions, although not in identical terms, are to be found in s.10(6) of the Act, which provides:

> “If a surveyor—
>
> (a) appointed under paragraph (b) of subsection (1) by a party to the dispute; or
>
> (b) appointed under subsection (4) or (5),
>
> refuses to act effectively, the surveyor of the other party may proceed to act *ex parte* and anything so done by him shall be as effectual as if he had been an agreed surveyor.”

Not in the same terms, but having a very similar effect.

74. At page 91 of the report, the learned judge says:

> "The surveyor who proceeds *ex parte* can make an award that could then lead to court proceedings. I conclude that any surveyor who wishes to avail himself of the provisions of Section 55 must comply strictly with the formalities of The Act. This means that the surveyor can rely either upon a refusal, or upon a notice that complies with the provisions of The Act, or, where appropriate, upon both grounds."

And then this sentence:

> "The relevant grounds must be expressed accurately in the *ex parte* award. In this case, there was no reference to a neglect to act by Mr. Johnson after the written request in the *ex parte* award. The only reference was to a refusal to act."

75. As I have indicated, I am not concerned here with s.10(4) with the identical provision, and indeed there is no identical provision, but there are plainly similarities between s.55(e) of The 1939 Act and s.10(4) of The Party Wall Act.

76. Miss Holmes submits that the *Frances Holland School* case establishes a principle that where a failure on another's part is relied on, in this case for the appointment of a surveyor, or in the *Frances Holland School* case the making of an award, the grounds relied on must be expressed accurately in the award or the appointment as the case may be.

77. Insofar as there is any principle which is applicable to the present case, in my judgment it is restricted to the observations of the learned Judge that a party or surveyor wishing to avail themselves of the provisions of the Act must comply strictly with the formalities of the Act. I cannot agree with the submission of Miss Holmes that there is a principle that the relevant grounds relied on must be expressed accurately in the *ex parte* award in the case of award or the notice of appointment as in this case.

78. I have the greatest respect for Judge Crawford Lindsay QC, a colleague of mine for several years when this court was in Park Crescent. But it seems to me that any suggestion that for the purposes of the 1996 Act that relevant grounds must be expressed accurately would be an unwarranted gloss on the Act. Plainly the formalities of the Act have to be complied with, and complied with strictly. But there is nothing in the Act to suggest that grounds relied on must be expressly stated. It would have been a very straightforward matter for Parliament to have made such a provision, and it did not.

79. It seems to me that in the circumstances of this case there was a clear refusal on the part of the building owners to appoint a surveyor. It

was in the circumstances open to the adjoining owner to make an appointment. The fact that the adjoining owner thought that it was open to her to make an appointment under s.10(4)(b) does not alter the fact that she was entitled to make an appointment under s.10(4)(a). There was no challenge by the building owner to the appointment at the time shortly after it was made. In the circumstances, I conclude that the appointment of Mr. Stevens was a valid appointment.

80. I now turn to consider the appointment of Mr. Antino. The objection here is that Mr. Flight was plainly appointed as the adjoining owner's party wall surveyor, and such appointment may not be rescinded by the adjoining owner under s.10 subsection(2). It is argued on behalf of the building owner that it was not open to the adjoining owner to appoint Mr. Antino because such an appointment would have had to rely on s.10(5) which did not apply.

81. Section 10 subsection (5) provides:

> "If, before the dispute is settled, a surveyor appointed under paragraph (b) of subsection (1) by a party to the dispute dies, or becomes or deems himself incapable of acting, the party who appointed him may appoint another surveyor in his place with the same power and authority."

82. I have noted the terms of the letter written by Mr. Flight referring to conflicts of interest and the requirements of the RICS (his professional body), his concern that the building owners had challenged his integrity such that in his view there was an actual or potential conflict of interest, and that his ongoing appointment would not be beneficial in resolving the party wall procedures. He then states "I am exercising my rights under Section 10(5), and hereby rescind my appointment."

83. It is difficult to accept that final comment at face value. Mr. Flight had no right to rescind his appointment. But where he deemed himself incapable of acting, it was open to the adjoining owner to appoint another surveyor in his place.

84. It is agreed at the bar, and certainly it is my view, that the expression "becomes or deems himself incapable of acting" is to be interpreted more widely than referring to an incapability by reason of physical or mental disability. But there is no guidance in The Act as to what constitutes "incapability" for the purposes of s.10(5).

85. Miss Holmes submits that for a surveyor to deem himself incapable of acting does require a proper basis, and I entirely agree. She submits that it was not a proper basis that the building owners had written a letter making it plain that they had no confidence in him and that they were not going to pay his fees, and further that he had or may have caused them financial loss and they were going to seek legal advice regarding possible compensation from him and others.

86. It sits ill in the mouth of the building owners to complain that their letter of 10th August led to Mr. Flight deeming himself to be incapable of acting, and then asserting that he was in fact still capable of acting.

87. In circumstances where, as here, a party wall surveyor receives a letter in terms such as those in the letter of 10th August 2014, one might hope that he had sufficient confidence to continue to act, notwithstanding the attitude of the building owners. The adjoining owner's letter, telling the building owners that they would have to put up with it, was in a more appropriate spirit. Nevertheless, it is plain that Mr. Flight felt so uncomfortable that he considered himself incapable of acting within the terms of the guidance published by his professional institution, the Royal Institution of Chartered Surveyors. And the consequences would need to be considered for the adjoining owner, having appointed a surveyor and then finding that due to the abrasive attitude adopted by the building owners, maybe justified, maybe not, he feels unable to act and declares himself incapable of acting. What is she to do? Seek an injunction to require him to act? It does place her in an extremely difficult position.

88. It is a difficult area. But it seems to me that in the circumstances it cannot be said that Mr. Flight acted so improperly that he could not reasonably deem himself to be incapable of acting. Certainly the adjoining owner had little alternative, it seems to me, but to accept the position and appoint an alternative party wall surveyor, which she did in appointing Mr. Antino. I conclude that Mr. Antino was properly appointed.

89. I now turn to the third of the three challenges made to the validity of the party wall award. That is set out in paragraphs 5 and 6 of the skeleton argument, paragraph 5 being:

> "Notwithstanding the above, the award purports to deal with the very issues raised by the respondent and claimed before Romford County Court, and purports to compel the Appellants to carry out works, that the award purports to address the Respondents' common law claim is plain from…"

[And then three subparagraphs of paragraph 1 of the award are referred to, in each of which the party wall surveyors make comments to the effect that the building owners have acted in breach of The Act, have caused damage, have failed to comply with the procedures under Section 10, and have committed a trespass.]

> Paragraph 6:
> "Plainly surveyors appointed under The Act have no jurisdiction to resolve common law claims, whether nuisance, trespass or otherwise. The reason for this is clear: works conducted unlawfully and without the authority of an award do not engage The Act."

There is then a citation from the judgment of Lord Justice Evans in *Louis & Louis v Sadiq* [1997] 1 E.G.L.R. 136.

90. I would suggest that the reliance on the citation is misguided. Evans LJ said:

> "If he commits an actionable nuisance without giving notice and without obtaining consent, he...[that is the building owner] "...cannot rely upon a statutory defence under procedures with which *ex hypothesi* he has failed to comply. If he does then give notice he will in due course acquire statutory authority for whatever works are approved or agreed. But in my judgment this does not relieve him from liability for the continuing nuisance which he has unlawfully committed."

91. What the learned Lord Justice is there saying is that if a building owner commits a tort, whether it is trespass or nuisance, he has committed the tort. The fact that he might under The Act obtain an award which authorises him to commit the tort does not prevent him having committed a tort at the time that he committed it. To turn it on its head and argue that in the light of this citation it is simply not possible for party wall surveyors to make an award on matters which are before the courts in a Part 7 claim simply does not follow.

92. It is to be noted that Evans LJ makes the point that in due course there will be statutory authority if an award is made. So a building owner who ploughs ahead without the benefit of an award commits a trespass. It is plain that he has committed a trespass and he continues to commit that trespass until such time as he either rebates it or - in Party Wall Act terms - he obtains an award authorising him to do the acts which would otherwise be a trespass. At that stage, the trespass which has been committed and which has continued ceases to exist. Plainly the adjoining owner in those circumstances can obtain damages, but only in respect of the period up until the making of an award which authorises The Act.

93. It is evident that a 1996 Act award and common law claims relating to the same subject matter may overlap. That is no basis for saying that once a Part 7 claim has been commenced the party wall surveyors are in any way precluded from covering the same ground, provided of course it is appropriate for them to do so for the purposes of their award. It is to be noted, I repeat, that a party wall award can do something that no court can ever do, that is give authorisation for acts which would otherwise constitute a trespass or a nuisance.

94. I do not accept that the award purports to address the Respondent's common law claim. What it purports to do is address facts and matters which arise in the common law claim. Plainly the party wall surveyors have no authority to deal with the claim; and to the extent that their award makes findings or relies on facts and matters which in court proceedings are shown not to be matters on which reliance may properly be had, it seems to me that the answer is to vary the award so as to remove such matters and any further findings that are consequential

upon such matters. But for present purposes it is sufficient for me to say that this is not a proper basis on which to rule that the surveyors had no jurisdiction to make the award. It may be that there are matters arising in the award which may properly be reviewed, varied, or set aside. That would be for another time when this full appeal is heard. But it is important to bear in mind that s.10 (12) provides that an award may determine not only the right to execute work, the time and manner of executing work, but "(c) any other matter arising out of or incidental to the dispute including the costs of making the award." That is a wide statutory authority to party wall surveyors to determine matters arising out of or incidental to the dispute.

95. There is also the authority given by The Act to the party wall surveyors to make an award compensating any adjoining owner "for any loss or damage which may result to them by reason of any work executed in pursuance of this Act". That, it seems to me, properly construed, provides that a party wall award may include compensation for an adjoining owner for works carried out, including works which were carried out before the making of an award but which are retrospectively authorised by the award.

96. As already noted the fact that a trespass has been committed by building works does not preclude the making of an award which retrospectively authorises that Act. The fact that liability for past trespasses is not removed by The Act does not preclude compensation being awarded for acts executed under works which are authorised by an award, even after the works in question, or some of them, have been completed.

97. I am now straying from the issues before me. There may be matters in this award which will not stand further scrutiny. But it cannot be said that these surveyors had no jurisdiction to make an award at all. That is the present challenge, a challenge which in my judgment must fail.