Case No: C20CL033

IN THE COUNTY COURT AT CENTRAL LONDON

THOMAS MORE BUILDING
RCJ
STRAND
WC2A 2LL

Date: 18/11/2016

Before :

HIS HONOUR JUDGE HAND QC

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Between :

Foxland Management Limited	**Appellant**
- and -	
(1) Redab Finchley Limited **(2) Buckleigh Tailoring and Hire Limited (successor in title to Kyoroulla Tsouloupas, Andreas Neophytou and Margret Neophytou)** **(3) Real Estate Development Limited in Stockholm AB** **(4) Redab PLC** **(5) Redab UK Limited** **(6) Berit Maria Sundgren**	**Respondents**

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Mr Philip Rainey of leading counsel (instructed by **Stone King Solicitors**) for the **Respondents** filed a written submission

Mr John de Waal of leading counsel (instructed by **Dewar Hogan Solicitors**) for the **Appellant** indicated that the **Appellant** was neutral as to the application and wished to make no submission

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Judgment on the application by Mr Alister Redler to discharge a witness summons

I direct that copies of this version as handed down may be treated as authentic.

HHJ Hand QC

1. This appeal pursuant to section 10(17) of the **Party Wall etc. Act 1996** ("the Act") is due to be heard by way of a rehearing over four days commencing on 22nd November 2016. It concerns an award made by one of the two appointed surveyors and "the third surveyor", Mr Alistair Redler FRICS. Last week the Respondents applied for a witness summons to compel the attendance of Mr Redler, which I granted. He applied by email on Wednesday, 14 November 2016 for the witness summons to be discharged on the basis that when acting as "the third surveyor" he was acting in a quasi-judicial capacity and as such he should not be a compellable witness. Indeed he went further and argued that because he was, in effect, the tribunal or a constituent part of the tribunal, the decision of which was the subject of the appeal, his evidence could not be admitted on the appeal. He also made submissions about the practical difficulties of attendance.

2. The Appellant through Mr De Waal has indicated its neutrality on the point and has not made any submission. Mr Rainey on behalf of the Respondents made a written submission. He addressed the practical difficulties but I think these have been overcome and I propose only to deal with the question of principle as summarised above.

3. Mr Rainey QC submitted that a party wall surveyor can be a party to an appeal. He cited an earlier appeal against an earlier award in this controversy as an example; Mr Redler had been defendant to claim B20CL047. But the Court need not go to that extreme because there was nothing in the Act to prevent Mr Redler being called as a witness and, therefore, no reason in law why he cannot be called or summonsed. His evidence is relevant to the issue of bias (real or apparent); it is alleged that the makers of the third award had a "closed mind" and there is a challenge to the process, which implicitly raises issues of real or apparent bias. Given that Mr Redler has declined to make a witness statement that leaves n choice but the issue of a witness summons.

4. Is Mr Redler only a witness? Her Honour Judge Hazel Marshall QC sitting in the Central London County Court in **<u>Manu v Euroview Estates Ltd</u>** [2008] 1EGLR 165 concluded that a party wall surveyor has mixed functions, partly as an independent expert and partly as the agent of the appointing owner (see paragraph 113 of her judgment). But she was dealing with a surveyor appointed by a party and it seems to me that a third surveyor is not in the same position.

5. In **<u>Gyle-Thompson v Wall Street (Properties) Ltd</u>** [1974] 1 WLR 123, a case under the **London Building Acts (Amendment) Act 1939** (the predecessor to the Act) Brightman J apply at page 130E-H made the following comments (probably obiter dictum):

> **"My conclusions on the above two issues are sufficient to dispose of this case. There are, however, certain matters of procedure which were very fully argued before me, and I think it is desirable that I should touch briefly upon them. The procedural objection is not always meritorious. One's instinctive approach to such an objection tends to be unsympathetic. Mr Hart, for the plaintiffs, though voicing these procedural objections, made it plain that he did not place them in the forefront of this case. However, I take the view that the procedural objections in the present case do not deserve to be diffidently approached, for this reason. Section 46 et seq of the Act of 1939 give a building owner a statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests. The position of the adjoining owner whose proprietary rights are being compulsorily affected, is intended to be safeguarded by the surveyors appointed pursuant to the procedure laid down by the Act. The surveyors are in a quasi-judicial position**

> **with statutory powers and responsibilities. It therefore seems to me important that the steps laid down by the Act should be scrupulously followed throughout and shortcuts are not desirable. I am not concerned with any question of the extent to which an irregularity is capable of being waived or cured by estoppel.**"

This relates, of course, to formality rather than to the current issue but it is highly persuasive on the status of a party wall surveyor and, moreover, it seems to me correct.

6. I am bound to say that there seems to me something uncomfortable about the concept of an inferior tribunal being required to give evidence on an appeal against its determination. I am familiar with the practice in a different legal context of an appellate tribunal offering the opportunity to, or even requiring, the inferior tribunal to comment upon allegations made about its conduct of the first instance proceedings. In a sense Mr Redler has been offered that opportunity by being asked to provide a witness statement, something which I understand he has declined to do. I very much doubt, however, whether a refusal on the part of the first instance tribunal to cooperate should result in that tribunal giving evidence to the appellate court. I have never come across such a situation, although I do recollect that in a late 19th century case involving the then Lord Chancellor of England and Wales, Lord McNaughton, and there a dispute over trespass on a railway line in County Antrim, he had sworn an affidavit about his conduct as the local magistrate and his personal interest in his own family walking along the railway line to Sunday worship. I have no time to recover that matter and, in any event, the distinct presentiment that represented a most unusual case. Apart from that I having no recollection of an appellate tribunal on a rehearing taking evidence from the inferior tribunal.

7. I am therefore of the view, having reflected on the matter, that the witness summons should be discharged.