IN THE COUNTY COURT
SITTING AT CENTRAL LONDON

Claim No. C20CL109

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

Tuesday, 3rd January 2017

Before:

HIS HONOUR JUDGE EDWARD BAILEY

Between:

MS TRACEY REEVES

Claimant

- and -

(1) MR ROBERT CHARLES YOUNG
(2) MRS GILLIAN CHRISTINE YOUNG
(3) MR PHILIP ANTINO

Defendants

JUDGMENT (APPROVED)

Counsel for the Claimant: MR STUART FRAME

Counsel for the Defendant: MR RICHARD POWER

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JUDGMENT

HIS HONOUR JUDGE EDWARD BAILEY:

1. This is a part 8 claim brought by Miss Tracey Reeves, the owner of 28 Bramble Road, Benfleet, Essex, SS7 2UN, against the defendants, Mr and Mrs Young, the owners of 30 Bramble Road. As the addresses indicate the parties are neighbours although it may be noted that the properties are each detached.

2. Miss Reeves wished to demolish a single storey rear extension to her property and replace it with a larger, single storey extension, both to the rear and to the side of her property. The proposed works engaged section 6 of the Party Wall, such being the vicinity of the works of the excavation to the defendants' property at 30 Bramble Road.

3. Miss Reeves appointed as her party wall surveyor Mr John Westray from the firm Vincent-Brown & Associates Limited, having had an approach by Vincent-Brown. A notice was served under the Act. Mr and Mrs Young did not serve a notice under section 6(7) of the Act indicating their consent to the works of excavation and construction which Miss Reeves wished to carry out and accordingly a dispute arose within the meaning of the Act.

4. In circumstances not explained to the court Mr and Mrs Young also appointed a surveyor from the firm Vincent-Brown & Associates Limited to act as their party wall surveyor, namely Mr Gold. There is nothing in the Party Wall etc Act 1996 to prevent party wall surveyors appointed by building owner and adjoining owner coming from the same firm, but one can envisage that circumstances might arise in which this is not a preferred arrangement.

5. Having secured their appointments Mr Westray and Mr Gold needed, by virtue of the provisions of section 10(1)(b), to appoint a third surveyor. Section 10 of the Party Wall Act provides:

> "(1) Where a dispute arises or is deemed to have arisen between a building owner and adjoining owner in respect of any matter connected with any work to which this Act relates either:
>
> (a) ...*[not relevant]*;
>
> (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;
>
> (2) All appointments and selections made under this section shall be in writing and shall not be rescinded by either party."
>
> ….
>
> (9) If a third surveyor selected under (1)(b):
>
> (a) Refuses to act;

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

(c) Dies or becomes or deems himself incapable of acting before the dispute is settled;

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

….

(12) 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 arising out of or incidental to the dispute, including the costs of making the award..."

(13) 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."

(16) The award shall be conclusive and shall not, except as provided by this section be questioned in any court."

The only provision provided for in section 10 is the appeal to a County Court which is authorised by sub-section 17 of section 10.

6. It is the claimant's case that the two party wall surveyors did indeed comply with their obligations under section 10(1)(b). Upon their appointments they selected as third surveyor Mr Alistair Redler. On 5th August 2015 Vincent-Brown & Associates Limited wrote a letter to Miss Reeves stating, *inter alia*:

> "As required by the 1996 Act the two appointed surveyors have selected Mr Alistair Redler of Delva Patman Redler LLP, Thavies Inn House, 3-4 Holborn Circus, London, EC1N 2HA, *[with the telephone number]* to act as the third surveyor. The third surveyor would only usually be approached by the two surveyors if they are unable to reach an agreement on any significant matter. In the vast majority of cases the third surveyor is never asked to act and there are consequently no fees due to him."

7. It may be observed that the comment that the third surveyor in many cases is never asked to act is indeed the case. So frequently the case indeed that it is not unknown for party wall surveyors to appoint as a third surveyor a well-known surveyor in this field

(and Mr Redler is one such) who himself is never even informed of his appointment unless and until there is a need for a third surveyor. There is no requirement in the 1996 Act that a third surveyor selected by the party wall surveyors need consent to his selection. All that is required is that he is selected by the party appointed surveyors and that his selection shall be in writing.

8. It appears that Vincent-Brown & Associates prepared a letter in very similar terms addressed to Mr and Mrs Young. There is a file copy of such a letter in the bundle. In the ordinary course of events one would expect that, having prepared the letter, Vincent-Brown & Associates would send it both to Mr and Mrs Young and to Miss Reeves. Mr Young has prepared a witness statement for these proceedings in which he asserts that he was never advised, neither was it ever suggested to him, that Mr Redler was the agreed initial selected surveyor. If that is correct he could not have received the letter for which there is a file copy.

9. There is some basis for the claimant to look at Mr Young's assertion somewhat sceptically. It is certainly the case that at some point the third defendant, Mr Antino, whose presence as a defendant here I should have mentioned when starting my judgment, received a copy of the file copy of the letter. As Mr Antino received his documents solely from Mr and Mrs. Young that is the foundation of the claimant's belief that Mr Young is not correct in his assertion.

10. In the event it seems to me that it does not matter to the issues before me whether or not Mr Young in fact received his version of the letter dated 5th August 2015. What is plain is that Vincent-Brown & Associates made the selection, that the selection was in writing, and the Vincent-Brown prepared letters, and one would ordinarily assume posted letters, to both the building and adjoining owners stating that the two appointed surveyors had selected Mr Redler as the third surveyor.

11. In due course, on 25th February 2016, a party wall award was made authorising notifiable works which Miss Reeves wished to undertake. This award was made by both Mr Gold and Mr Westray. The recitals to the award state not that Mr Redler was the third surveyor but that Mr Philip Antino was the third surveyor, giving his contact details. Neither party appealed that award under section 10(17). Miss Reeves relied on the award, commencing her works shortly after its service.

12. During the course of the works it became apparent, at least to the claimant and a Mr Jason Evans, an employee of Vincent-Brown who it does appear was undertaking much of the work which was required of the party wall surveyors, that Miss Reeves' contractors would need access over the land belonging to Mr and Mrs Young. Mr Evans, acting it must be assumed on behalf of both the party wall surveyors, prepared a notice for the purposes of section 8 of the 1996 Act preparatory to the claimant's contractors entering the adjoining owners' land essentially, it appears, to erect scaffolding necessary for construction of the roof.

13. Mr and Mrs Young were not content to allow Miss Reeves' contractors on their land. They decided, mindful one must assume that the section 8 notice had been prepared by a member or employee of Vincent-Brown & Associates, to contact Mr Antino to request him to make an award in respect of the proposed entry onto the adjoining owners' land.

14. While acting in his presumed capacity as the third surveyor Mr Antino wrote to Mr Gold and Mr Westray requesting documents, and he was provided with a number of documents in addition to those which he had already received from Mr and Mrs Young. The documents which Vincent-Brown provided to Mr Antino were provided under cover of an email sent on 15th June 2016, 12.08, by Mr Jason Evans. Having attached various documents he states this:

> "As an additional note you will notice that the initial third surveyor selected was Alistair Redler of Delva Patman Redler, dated 15th August 2015. However, this was subsequently changed to yourself (Mr Antino) upon agreeing the award. This was chosen because you were also selected as the third surveyor for 28 and 26 Bramble Road [dispute] in the event of a referral. It made more sense to keep the same third surveyor throughout the case."

18. That is the only indication that is to be found on the papers as to the circumstances in which, and the reason why, Mr Antino's name appears in the party wall award made on 25th February 2016 by the party wall surveyors. The recital to which I have referred makes no mention of the change of third surveyor, nor the reason for the choice of the third surveyor. It simply says as follows as part of the recital:

> "As and whereas the building owner's surveyor and the adjoining owners' surveyor, hereinafter called the two surveyors, have selected Mr P Antino of Antino & Associates Limited, 145 London Road, Chelmsford, Essex, CM1 0QT to act as third surveyor in accordance with the provisions of the 1996 Act. In the event of him being unable or unwilling to act and they being unable to jointly agree upon a substitute they have agreed that another third surveyor shall be appointed by the appointing officer of the relevant local authority in accordance with section 10(8) of the 1996 Act."

19. Mr Antino himself wrote a letter to both the party wall surveyors on 15th June 2016 in which he gave a series of directions to each of the party wall surveyors. He then set out under the heading "Conduct of the referral" a note of how it was that Mr Antino proposed to proceed with the referral. The directions are set out in fairly peremptory terms requiring both the surveyors to set out in detail the basis upon which they had taken certain acts. It is perhaps not surprising that the directions Mr Antino served on 15th June were not well received by the surveyors in question.

20. The very next day, on 16th June 2016, Mr Gold emailed Mr Antino noting that he had received his letter of 15th June, taking the point that the letter was signed Antino & Associates rather than Mr Antino personally, and then stating this:

> "We are not in receipt of Mr Young's referral to you. However, it appears that Mr Young is unhappy with both clause 4.9 of the award and section 8(1) of the 1996 Act. Neither of these is subject to referral to the third surveyor as the disputed matters have already been determined. The award is now final and any referral to you concerning matters determined in the award would necessarily be contrary to section 10(16) of the 1996 Act. Accordingly we will not correspond with you further in the matter in the absence of a written opinion from counsel confirming that you have standing to act. I shall also advise the appointing

> owners to ignore any document you may send them purporting to be an award as being *ultra vires* and unenforceable."

It seemed that his concern is not with Mr Antino's appointment as third surveyor but that Mr Antino should have taken upon himself to make an award in the circumstances which I have outlined.

21. Mr Antino was not daunted by that email. He went ahead without, it must be assumed, receiving any positive response to his various directions to the two surveyors, and on 25th June 2016 he made an award. In the course of the award, which is interesting in its own right, he determined that the notice which had been served for the purpose of section 8 of the Party Wall Act was invalid, that Miss Reeves was not entitled to access the neighbours' land and ended with the following paragraph headed: "Third surveyor's fees":

> "That upon the signing of this award the building owner will pay the third surveyor's fee of £3,469.50 in connection with the preparation of this award. In the event of damage being caused by the contingencies or variations arising, *including the legal costs of pursuing any sums owed in pursuance of the Act*, the surveyor is entitled to a further fee which will be payable calculated on an hourly rate of £350 and disbursements." *[italics added]*

22. I note in passing that a copy of the award in the trial bundle does not in fact contain internal page 11 of the award, but that is no great matter. It may fairly be observed that the award adopts quite a combative style. Mr Antino in paragraph 50 objects, perhaps understandably, to Mr Gold's email of 16th June that he would not correspond in the absence of written opinion from counsel. He observes that the adjoining owners' surveyor appears to have overlooked his duty of care, his statutory obligations and his professional obligation of protecting the rights of the adjoining owners' and indeed the building owners. In paragraph 51 Mr Antino states that the further response is "equally misconceived, obstructive, aggressive and unhelpful" and at 52:

> "It is my opinion that both the building and adjoining owners' surveyors should have engaged with the referral and dealt with this matter in a more professional, courteous and appropriate manner."

Mr Antino makes adverse comments of Mr Westray in the following paragraph of the award, and ends with the observation that in his view, (paragraph 61):

> "Both the building and adjoining owners have not received the level of care that they were entitled to from the ordinarily competent party wall surveyor."

23. Before and after receipt of the award Mr Gold advised Miss Reeves that Mr Antino's award was a nullity and unenforceable and that Mr Antino had no standing to make the award he did. Miss Reeves ignored the award and neither party appealed it. As the award was ignored Mr Antino did not receive the £3,469.50 which he was hoping to obtain by way of fees. Mr Antino therefore proceeded to seek to enforce the award in Barkingside Magistrates Court. I understand that the Magistrates' Court's proceedings have been adjourned until next month pending a decision of this court. The costs of enforcing an award in the sum of £3,469.50 are not modest. The breakdown of costs already submitted by Mr Ashley Bean, solicitor, amounts to some £13,387.20, of

which £4,788.80 are fees of Mr Antino which are set out in a separate breakdown to the schedule of costs.

24. That then is the background of the matter. This is not an appeal against the award, such an appeal would be out of time. Rather it is an application seeking as relief a declaration that the entire award is invalid on the basis that Mr Antino was not the properly and duly selected third surveyor when he was making his award and further that the particular paragraph which I have recited relating to third surveyor's fees is invalid as it purports to award fees outside the scope of section 10(12) and section 13 of the 1996 Act.

25. I should deal first with the question of whether Mr Antino was properly selected as the third surveyor. The first point to consider is whether Mr Alistair Redler was duly selected under section 10(1)(b) as suggested by the letters dated 5th August 2015 to both the building owner and adjoining owners. On the face of it the letters confirm that the two surveyors have complied with their obligation under the Act and have appointed Mr Redler as third surveyor. Mr Power, for the defendants, points out that the letters concerned were not signed. The originals have been produced in court and it is certainly the case that there is no signature, or a squiggle purporting to be a signature, on either letter. In the case of the file copy the absence of a signature is not surprising. It is clear, however, that the letter to the claimant does come from Vincent-Brown Associates. The letter is on Vincent-Brown's headed notepaper, notepaper which incidentally incorporates coloured printing, and it seems to me that while it would plainly be advisable for the author's signature to have been appended, the letter is nevertheless a perfectly valid letter sent by the firm in question.

26. It is sadly the case, though perhaps in the circumstances understandable, that Vincent-Brown Associates have not given any assistance to disclosure or evidence in these proceedings. It is probably the case however that the letters of 5th August 2015 comprise the only documentary evidence of the selection of Mr Alistair Redler. As documents, however, it appears to me that they are sufficient to meet the requirements of section 10(2) of the Act. The selections have been made and they are in writing to the two owners concerned.

27. It is argued by Mr Power that whatever the status of the letters it was open to these two surveyors, as he points out, sitting in the same office to agree to deselect Mr Redler and select Mr Antino in his place. That is clearly what appears they thought they were doing when one considers the email which I have already recited, explaining the reasons for appointing Mr Antino in the place of Mr Redler, not as an alternative to an initial Mr Redler selection. Indeed the choice of words by Mr Jason Evans "the initial third surveyor selected" and "this was subsequently changed" make it clear that there was a first appointment of Mr Redler and a second appointment by replacement of Mr Antino.

28. Mr Frame, for the claimant, argues that such an approach to the selection of a third surveyor is not permissible under the 1996 Act. Section 10(1)(b) requires the two surveyors forthwith to select a third surveyor and, once that has been done, the surveyors have completed their task and have put it out of their power to make any further selection. Section 10(2) makes it plain that neither party may rescind a selection of the third surveyor. Mr Power, for the defendants, points out that there is no express provision in section 10 preventing the two party surveyors to rescind their

selection. He suggests that it would be perfectly proper for them to do just that. He points out that the mischief that section 10(2) is aimed at meeting is that of a party wall surveyor being constrained in carrying out his duties under the Act, duties which involve quasi-judicial responsibilities, by the risk of having his appointment terminated by either appointing party.

29. That, I have no doubt, is the mischief that section 10(2) is designed to meet. It seems to me equally applicable to having a third surveyor acting without being constrained by the possibility that one or both party wall surveyor might at any time rescind his appointment. I see no significance in the absence in section 10(2) of the words "party wall surveyor."

30. I agree with Mr Frame's submission that once the two surveyors have selected a third surveyor they are, in words which are no longer to be used, *functus officio*. The party-appointed surveyors have completed their statutory task and they are no longer able to make a further selection or undo the selection already made. The possibility that there may need to be a further selection in particular circumstances is met by the Act at sub-section 9. This sub-section sets out circumstances in which the two owner appointed surveyors might select a new third surveyor. Those circumstances are when the third surveyor refuses to act, neglects to act, dies or deems himself incapable of acting. There is no scope there for a new third surveyor to be selected in any other circumstance or for any other reason however excellent it may seem to the two surveyors to make a further selection. Doubtless when the two party-appointed surveyors appreciated that there was a different surveyor appointed as third surveyor in the party wall procedure on the other side of the building owner's property it seemed to them good sense to have the same third surveyor in both cases. But by then it was too late. The selection had been made and it was not permissible under the Act for the party-appointed surveyors to change their minds and make a new selection. I am accordingly satisfied that Mr Redler was duly appointed and that the surveyors had no business to be selecting Mr Antino in his place. That was an invalid selection. Mr Redler remains the third surveyor duly selected in this party wall process.

31. Mr Power, however, has a further argument to deploy. He points to the fact that Mr Antino was stated to be the third surveyor in the recital to the first award and he points out that not only was there no appeal against this award both parties acted upon the basis that it was a valid award. For her part Miss Reeves proceeded to carry out construction works authorised by the award. For their part Mr and Mrs Young did not take any steps to prevent Miss Reeves carrying out such work, work that in part at least was only permissible under the authority of an award.

32. Mr Power constructs an argument that the claimant is estopped from denying Mr Antino's selection as third surveyor by reason of the facts which I have stated. Mr Power refers me to paragraph 307 of volume 47 of Halsbury's Laws of England which sets out a statement of what is described as common law estoppel by representation:

> "...where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such

> representation and thereby altered his position… an estoppel arises against the party who made the representation, and he is not allowed to claim that the fact is otherwise than he represented it to be."

33. Mr Power argues as follows. When Mr Gold and Mr Westray made their replacement selection of Mr Antino, for it must be assumed that it was indeed them and not Mr Evans who made such replacement, they must be taken each to have made a representation of fact to the other that Mr Antino was now the third surveyor. In making those representations of fact they individually would have been acting as agents for their relevant appointing owners. The relevant owners then acted upon the representation by accepting the award without challenging it. From the perspective of Mr Power's clients, Mr and Mrs Young, they acted to their detriment by not challenging the award and allowing Miss Reeves to proceed with the works authorised by the award which, for these purposes, I must assume would otherwise constitute a trespass or a nuisance.

34. Thus, argues Mr Power, the ingredients of estoppel by representation are made out. It cannot be right, says Mr Power, in these circumstances for the building owner, Miss Reeves, who has not troubled to challenge by way of appeal the original party wall award or Mr Antino's award, now to argue Mr Antino was never third surveyor at all and accordingly his award is invalid.

35. Furthermore, Mr Power suggests that even if, putting aside the representations of fact that each surveyor must be taken to have made to each other, the recital of the first award must be such a representation.

36. As to this latter argument I have this difficulty. The recital is only that, it is not part of the award. It cannot in those circumstances, it seems to me, be said that, even assuming that Miss Reeves was aware of the recital, which it may be she should be deemed to have been, (I express some caution in that regard), but even if she was aware of the recital Miss Reeves cannot be said to have acted upon the recital when proceeding with the building works. Acting as she did in carrying out the building work she was, in my judgment, relying on the award and the recital forms no part of the award.

37. Be that as it may, in my view the concept of holding an owner to a third surveyor who has been improperly selected by virtue of an estoppel is flawed. We are not here dealing with a legal right in a building owner or adjoining owner, whether under the Act or common law, which might be lost through estoppel. The provisions of section 10 constitute a statutory scheme for the appointment of a party wall tribunal which has quasi-judicial functions under the 1996 Act. Due compliance with that statutory provision is not a matter that can be side-stepped or overlooked by estoppel. It is a procedure laid down by the Act and it is one which must be followed.

38. Mr Frame reminds me of the observations of Mr Justice Brightman in *Gyle Thompson v Wall Street Properties Limited [1974] 1 All ER 295* at 302, where the learned judge, then a puisne judge, said:

> "A procedural objection is not always meritorious. One's instinctive approach to such an objection tends to be unsympathetic... However, I take the view that the procedural objections in the present case do not deserve to be diffidently

> approached, for this reason: ss 46 et seq of the 1939 Act 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. Those 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 short cuts 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."

39. The provisions of the Act governing the appointment of party wall surveyors (including the third surveyors) are steps governed by the Act which must be scrupulously followed. Failing to comply with these statutory requirements cannot be treated as irregularities curable by way of estoppel. In the circumstances I am satisfied that Mr Antino was not validly appointed. He had no business to be making the award that he made and accordingly the award must be declared as invalid.

40. As for the further matter relating to the paragraph dealing with third surveyor's fees I should say simply this. In drafting the paragraph in question Mr Antino appears to have followed substantially, but not entirely, paragraph 10 of the draft award contained in the RICS Practice Standard, Party Wall Legislation and Procedure Guidance Note, sixth edition. I say substantially because Mr Antino has followed the wording save for the passage which I set out in paragraph 21 above in italics. That passage has been added by him.

41. The authority of a party wall surveyor to make an award of costs was considered by the Court of Appeal in the case of *Christine Reeves v Beatrice Blake [2009] EWCA Civ 6111*. Taking it shortly, in that case there was a dispute between the building owner and the adjoining owner as to whether an award which had been published covered certain works which the building owner wished to carry out. The building owner considered that she had the appropriate authority, the adjoining owner said she did not and that she could not proceed as she proposed without a further award. Ignoring the adjoining owner's objection the building owner then proceeded to commence the works. In order to prevent the works being carried out the adjoining owner sought legal advice and the papers necessary to seek injunctive relief were prepared by a solicitor and counsel. However, it was not necessary for the adjoining owner to obtain injunctive relief as the building owner saw the error of her ways in time and discontinued the unauthorised works.

42. In due course a party wall award was made enabling the building owner to carry out the works she wished to carry out. The award included a figure for the costs incurred by the adjoining owner in preparing to seek injunctive relief. The County Court judge refused to allow the appeal against that aspect of the award and the Court of Appeal agreed with him. Giving the only judgment of the court Etherton LJ, as he then was, said:

> "20. In view of the nature of the disputes referred to surveyors under the 1996 Act, and the wide wording of s10(1), (10)(b), (12)(c) and (13)(c), there can be no doubt that there may be circumstances in which appointed surveyors have the power under s10 to order payment by one adjoining owner of legal costs reasonably and properly incurred by another. HH Judge Birtles

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correctly so held in *Onigbanjo v Pearson [2005] BLR 507*, esp at para 39. Mr Stephen Bickford-Smith, counsel for the respondent, did not contend otherwise. Nor did Judge Viljoen suggest otherwise. That also appears to be the view generally held by practitioners in this field: see 'The Party Wall Act Explained' (2nd ed) published by the delightfully named Pyramus & Thisbe Club.

B

21. The power to order payment of such costs under s10 of the 1996 Act is, however, restricted to costs connected with the statutory dispute resolution mechanism. As a matter of interpretation, the 'dispute' mentioned in s10(1), (10)(b), (12)(c) and (13)(c) is a dispute arising under the provisions of the 1996 Act, whether an actual dispute within s1(8) or a deemed dispute under s4(5) or s6(7), or a dispute under some other provision, such as s7(2) (compensation for loss and damage resulting from execution of work executed pursuant to the 1996 Act), s11(2) (responsibility for the expenses of work), s11(8) (expenses of making good damage under the 1996 Act) or s13(2) (objection to building owner's account of expenses). I agree with Judge Viljoen that, by contrast, proceedings in court to enforce common law or equitable remedies, such as damages or an injunction for trespass or nuisance or the threat of them, fall wholly outside the 1996 Act. That is equally true of preparations for such proceedings.

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22. That conclusion is consistent with practice and policy. The purpose of the 1996 Act is to provide a mechanism for dispute resolution which avoids recourse to the courts. A power of the appointed surveyors under the 1996 Act to make provision for costs incurred for the purpose of actual or contemplated litigation in court would be inconsistent with that statutory objective. Such litigation, resulting from noncompliance with the dispute resolution mechanism, falls entirely outside the statutory dispute resolution framework."

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43. Returning then to the third surveyor's fees paragraph in Mr Antino's award, two points arise. First, the further fee to which a surveyor may be entitled in the event of damage being caused or other contingencies or variations arising must relate to a matter "arising out of or incidental to the dispute". The absence of those words in the RICS guidance note can be described as no more than unfortunate. It may be said that a competent party wall surveyor will be aware that the further fee must be so restricted as in accordance with the terms of the Act. It would, however, perhaps be preferable were that qualification to be made clear.

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44. The second point is this. Is the enforcement of legal costs a matter arising out of or incidental to the dispute, including the costs of making the award, or is it in contrast a proceeding in court to enforce remedies outside the scope of the Act? I would note that Mr Power made it plain that he did not suggest that this provision in Mr Antino's award in any way usurped the function of a court of law to control costs arising in proceedings before it.

G

45. It seems to me that the legal costs of pursuing a sum for costs awarded by a surveyor, or surveyors, to himself or themselves, in an award is not properly considered to be a matter arising out of or incidental to the dispute. On the contrary it is a matter which arises outside the 1996 Act. All courts of law govern their own procedures, including any incidence of costs arising out of proceedings before the court. The fact that a party wall surveyor has to go to court to enforce his award leaves him in no worse a position

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than any other litigant. He is entitled to claim such costs as are available to him in the relevant court's procedures. It is possible for a surveyor to enforce his award either in a Magistrates' Court or in a County Court and he may make his choice and obtain such costs as are available in each of those different courts. Therefore in including the passage which I have put in italics it seems to me that Mr Antino is going beyond that which he is entitled to do under the 1996 Act.

46. Insofar as his hourly rate of £350 and disbursements relate to other matters which fall within the Act, the provision of an hourly rate cannot of itself, it seems to me, be held to be improper. The danger is that having set out an hourly rate without reference to any particular work that has been conducted at that rate the surveyor may later rely on the provisions of section 10(16) of the Act: "The award shall be conclusive and shall not, except as provided by this section, be questioned in any court" and thereby seek to preclude argument that in the circumstances the hourly rate is excessive.

47. Fees involve both hourly rate and hours spent. A high hourly rate, if it is to be reasonable, will be justified only where the surveyor has and demonstrates particular expertise or exercises such efficiency that he carries out more work than a surveyor for whom a lower hourly rate is appropriate. In comparison with the charges made by surveyors in many of the awards that have been before this court £350 per hour is a very high rate. Casting one's eye down the breakdown of Mr Antino's fees one can well envisage he would have very great difficulty indeed in persuading a court that the hours spent at this hourly rate was anything approaching reasonable. But although I have highlighted the difficulty inherent in setting out an hourly rate in a party wall award I do not consider that I can properly go so far as to say (as I have been invited to do) that hourly rates should not be set by surveyors or that any particular hourly rate, subject, of course, to ludicrously high rates (and £350 ph while very high in comparison with the market as a whole cannot be stated to be ludicrously high), must necessarily be invalid within the context of a party wall award.

48. In the circumstances I will grant declaratory relief, the precise form of which I will, in the first instance, leave to counsel to agree.

MR FRAME: Your honour, I ask in the usual manner for costs to follow the event and for you to make an order for the claimant's costs against the defendants. Your honour, a statement of costs, summary assessment, was I understand filed with the court—

THE JUDGE: It was.

MR FRAME: You have had it, I am grateful. Your honour, I am asking you to assess that summarily. I do have a couple of offers that were made. There was a part 36 offer that was made to Mr Antino. That was made on 31st October and that was for £250 in full and final settlement of Mr Antino's costs as set out in the award.

THE JUDGE: Sorry, £250?

MR FRAME: Pounds, and that the parties agreed to set aside the award. However, there was earlier correspondence that was sent to Mr Bean, Mr Antino's solicitor, in which an offer was made of £2,000 to Mr Antino. I do not know if you have that, but I can hand that letter up to you. The letter is undated unfortunately. It was sent direct from

Miss Reeves. It is undated but I can confirm that it was sent by email on 13th September 2016.

THE JUDGE: There is a problem, is there not? This is to do with the Barkingside Magistrates' Court, is it? The first point is it is not a part 36 offer.

MR FRAME: No, it is not a part 36, no. But it is an offer offering to settle all matters in dispute relating to—

THE JUDGE: Including matters in the Magistrates' Court?

MR FRAME: Yes, including matters in the Magistrates' Court. You will see that the letter very, very clearly sets out all the arguments that have been run. It is very open. The arguments have been set out openly and clearly and in the circumstances that was a very, very good offer at the time, £2,000, and it was designed to get rid of everything so nobody would need to go into any court.

I have a confirmation from Mr Bean dated 16th September where he simply says: "Dear Miss Reeves, thank you for your email. The offer is rejected. Yours sincerely, Mr Ashley Bean." So I just bring those offers to your attention.

THE JUDGE: So this letter was written when?

MR FRAME: This letter was sent on 13th September 2016.

THE JUDGE: Thank you. When I turn to your statement of costs you are direct access here, is that it?

MR FRAME: Yes. My costs are effectively £7,850 plus VAT. I have been dealing with this case from the outset, advising Miss Reeves from the outset. I would add that the claimant's costs are I think in the region of £20,000 and I just bring that to your attention for the obvious reasons.

THE JUDGE: But then they had to pay for solicitors as well as counsel.

MR FRAME: They have had to pay solicitors as well as counsel, but in the circumstances I would say that instructing counsel directly nevertheless is proportionate in the circumstances.

I drafted the original part 8 claim and the witness statements and there was an initial fee there which is included in the £5,100. I have been advising Miss Reeves throughout. I have been drafting correspondence on her behalf. I think there is no secret that I drafted the letter that she sent for her, and so I have been advising and drafting matters for her. Later on I liaised directly with Mr Bean in relation to disclosure from Vincent-Brown as to their files, I liaised with Mr Bean as to the trial bundles. I have been liaising generally with him. So that is what I have been doing—

THE JUDGE: Have you ever been involved in a detailed assessment?

MR FRAME: No, I have not.

THE JUDGE: I have no idea how a costs judge would approach this. What you have done – I say this as neutrally as I can – is put nought in every single box on the statement of costs until you come to counsel's fees, which you say is the right thing to do because all the boxes relate to solicitors. But I have absolutely no basis of assessing how much work you did for the £5,100. I have no idea. If it was a solicitor you have to give your hourly rate, you have to say whether you are a grade A, B, C or D.

MR POWER: Your honour, can I assist on that question? I have been instructed with regard to the assessment of costs from time to time. I would not criticise Mr Frame for his summary. What I would invite Mr Frame to do is to produce his fee note, which probably sets out his hourly rate and his hours. I do not know whether he has got it.

THE JUDGE: Does it?

MR FRAME: My fee note does set out the hours I think. On occasions it does set out the emails—

THE JUDGE: May I see it then? I mean, would you rather I did not?

MR FRAME: No, I am quite happy for you to see it, but I do not have a copy with me. I can get it emailed over very, very quickly if that—

THE JUDGE: Why do you not have a quiet word with Mr Power to see whether he would object to the hourly rate that you have presumably adopted? Have a quiet word.

MR POWER: May I just do a calculation ...

THE JUDGE: You need to do some long division.

MR POWER: Yes. Your honour, Mr Frame has kindly indicated what his hourly rate is and it equates to approximately 18 hours in advising and preparing and the fee for doing the skeleton, I presume, is included in the hearing, which is not dissimilar to my fee. So I will not object to his fee for the hearing.

I would invite some trimming of the 18 hours. I accept that Mr Frame has been acting himself and he may well have been drafting the correspondence and there is no criticism of that. I do point to the fact that if one looks at the schedule under which Miss Reeves is claiming as a litigant in person, she has spent some 45 hours or so in emailing and stuff like that. Her rate is set by the rules at £19 an hour and I would say that 45 hours in preparing this case, which has fairly straightforward, discrete issues, is over the top. I would invite you to halve her hours and trim my learned friend's hours. Obviously Mr Frame is entitled to his costs. I do not object to that, but I do not know to what extent Mr Frame is seeking to take advantage of this part 36 offer.

THE JUDGE: It is strange, is it not? As soon as you do a summary assessment it is effectively done on an indemnity basis. So one has to bear that in mind as a summary assessor.

MR POWER: Yes.

THE JUDGE: So, you need trimming, Mr Frame.

MR FRAME: I do not believe that 18 hours is excessive at all, your honour. As I say, I drafted the witness statement, the initial witness statement and claim form in this matter. That in itself was not an inconsiderable amount of time spent on that. In fact I can confidently say to this court that in fact my time spent was far more than 18 hours on this case, but that is a matter for me whether I charge that or not. But 18 hours, your honour, is not excessive and I would say that it is extremely reasonable.

THE JUDGE: I can assure you I dislike this aspect of my job. I will award costs as claimed, £11,799.40.

MR FRAME: I am grateful, your honour.

MR POWER: Your honour, this is not an appeal, so—

THE JUDGE: Yes, of course. So you need permission if you are going to appeal and if you are going to appeal you are going to a High Court judge.

MR POWER: I think I do go to a High Court judge.

THE JUDGE: And you are going to have to get permission from him.

MR POWER: All right.

THE JUDGE: Or her.

MR POWER: Or her.

[Hearing ends]